

A COMPARATIVE ANALYSIS OF CIVILIAN INTELLIGENCE ACCOUNTABILITY IN THE UNITED STATES OF AMERICA AND THE UNITED KINGDOM

Imtiaz Ahmed Fazel Ellahi

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Supervisor: Prof M Hough

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CHAPTER 1: INTRODUCTION

1. IDENTIFICATION OF THE RESEARCH THEME

Security and Intelligence Services are essential components of the security architecture of democratic societies. Yet while it is recognized that the intelligence industry's effective functioning is dependent upon an imperative for secrecy and special powers of intrusion for procuring information, these dependencies are ordinarily incompatible with a system of democratic governance; the rule of law, and respect for human rights - all of which are indispensable, and fundamental features of a democratic state.

If not subject to safeguards, these powers may be abused to threaten rights to privacy and freedom of expression, or manipulate intelligence outcomes, and have the possible effect of subverting the very purpose for which Intelligence Services have been established. This gave rise to the fact that Intelligence Services not only protect, but can also threaten a democracy.

Against this background, the need for connecting the divergent worlds of democracy and security was recognized in both the United States of America (US) and the United Kingdom (UK), where civilian Intelligence Service accountability has been the subject of much debate and controversy. This debate was further exacerbated by intelligence scandals; intelligence failures, and legal challenges which represented, to varying degrees, recurring causes of intelligence reform in both countries. Securing the accountability of Intelligence Services through an appropriate statutory framework, and mechanisms for the oversight and control of their activities was therefore increasingly seen as a crucial element of democratic governance in those countries, and a prerequisite for the credibility of the Intelligence and Security Services.

It has also been argued that Intelligence Service accountability is arbitrated by national security considerations, and a ring of secrecy, buttressed by a national security consensus. While evolving at significantly different paces, in both the US and the UK, there however remains a growing consensus on the need for democratic accountability of the civilian Intelligence Services.

2. STUDY OBJECTIVES

This study will examine the evolution of the environment and mechanisms for civilian intelligence accountability in the US and UK, as the selected case studies, and compare the similarities and differences between the respective dispensations in this regard. In doing so, the study will also assess whether these mechanisms have emerged as adequate surrogates for a sceptical public in narrowing the credibility gap of state Intelligence Services, and for assuring them that the Services are a force for good with a crucial role in their democracies, and that they operate within the framework of law.

In addition to the main objectives described above, the study will also specifically:

- Describe and analyse the nature, timing and extent of the impact of recent global and national security developments on civilian Intelligence Service accountability, with specific reference to the US and the UK.
- Analyse the different approaches by which the civilian intelligence communities of the US and the UK are held accountable within the context of their respective systems of governance and,
- Assess whether or not the system for holding the civilian Intelligence Services to account, including the mechanisms for their oversight and

control, is ultimately arbitrated by broader national security considerations in the democratic dispensations of the US and UK.

3. LITERATURE SURVEY

Literature on intelligence accountability in the US has developed substantially since the 1970's, and in the UK to a lesser extent since the 1980's, and includes the published work of oversight mechanisms in both countries; various published contributions on the subject; investigations as a result of intelligence abuses and failures, and legislation on intelligence oversight and control in both countries. These are included in published legislation, and a plethora of congressional/parliamentary hearings; editorials; special and annual reports; articles; books; lectures, and the virtual media.

While investigations associated with intelligence abuses and failures have had a significant influence on the development of intelligence oversight and control mechanisms in the US, and to a lesser extent in the UK, the available literature has tended to focus on structural reforms attendant upon those failures. As a result, the literature has neglected the role of oversight in preventing the occurrence of abuses and failures, and also neglected the reforms to oversight and control regimes as a consequence thereof. Literature on recent official investigations into the intelligence failures associated with the attacks of September 11, 2001 in the US, and the Second Gulf War of 2003, such as the report of the Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001 by the US Select Committee on Intelligence and House Permanent Select Committee on Intelligence, and the UK's Review of Intelligence on Weapons of Mass Destruction prepared by a Committee of Privy Counsellors amplify this omission, shed light only on the structural weaknesses that led to intelligence failures, and focus heavily on the intelligence process without adequately expanding on oversight considerations (United States: 2002a; United Kingdom: 2004).

Publications on best practice for intelligence accountability such as Who's Watching the Spies?: Establishing Intelligence Service Accountability (Born, Johnson and Leigh: 2005) provides little historical detail of the development of oversight mechanisms in the US, focuses mainly on congressional oversight, and provides only a brief overview of the present oversight and control dispensation in the UK. Other documents and publications such as the Report on the Democratic Oversight of the Security Services (European Commission: 2007), and Intelligence: From Secrets to Policy (Lowenthal: 2006) are largely theoretical, and provide only limited practical application. These publications reflect the broader trend where oversight and control is presented in historical or descriptive terms with little analysis of the challenges underlying the oversight and control of intelligence. Furthermore, no available literature provides a critical comparison of Intelligence Service accountability in the US and the UK - both democracies albeit with very different traditions.

It is apparent from the literature survey that most of the available literature, in assessing oversight and control measures, also seem to avoid the crucial inquiry as to the true utility of intelligence oversight in a democracy; whether or not it is ultimately arbitrated by broader national security considerations in the democratic dispensations of the US and UK, and whether arrangements for intelligence accountability rather favour functional considerations as opposed to the acclaimed human rights traditions of those countries.

This study will therefore provide a nuanced evaluation of the implications of the intelligence abuses and failures in the US and UK on arrangements to hold to account their respective intelligence communities, and to indicate the reforms to oversight and control as a result thereof.

4. FORMULATION AND DEMARCATION OF THE RESEARCH PROBLEM

This study will focus primarily on determining how the environment and mechanisms for civilian intelligence accountability in the US and UK evolved, and establish the similarities and differences between the respective dispensations in this regard. Following from the main research problem, a number of sub-problems are addressed, namely:

- To what extent have recent global, continental and national security developments had an impact on civilian Intelligence Service accountability in the US and UK? The reason for this assessment is to explain how arrangements for civilian intelligence accountability have been directly influenced by those events or by changes to the operational environment, and architecture of the civilian intelligence community as a result thereof.
- What are the different approaches to civilian Intelligence Service accountability in the US and the UK within the context of their respective systems of governance? Identifying the similarities and differences between the two systems of civilian Intelligence Service accountability will provide an appreciation that no two systems are the same, and that intelligence accountability is secured in a democracy in a manner that is best suited to the idiosyncrasies of a country's own system of governance.
- Is civilian Intelligence Service accountability, including its oversight and control, ultimately arbitrated by broader national security considerations in the democratic dispensations of the US and UK, and is there ultimately a national security consensus that supersedes oversight and control considerations? This is an important consideration as it may demonstrate that civilian intelligence accountability provides only

limited assurance that the intelligence services operate within the framework of the law, and that intelligence gathering is ultimately a coercive instrument of the state with only limited checks and balances.

While the aforementioned questions form the basis of the research problem, the study will be based on the following assumptions:

- Historical as well as recent global, continental and national security developments have had a significant impact on civilian Intelligence Service accountability in the US and UK.
- The different democratic traditions of the US and UK are also reflected in the different approaches by which the intelligence communities of their respective countries are overseen.
- The secretive nature of the intelligence industry and the national security consensus of the Cold War and more recently, the US/UK war on terrorism, have threatened democratic values in both countries.

This study covers the period from the onset of the Cold War up to the end of 2009, with specific emphasis on the post-2001 period following the terrorism attacks in the US, and the start of the Second Gulf War in 2003.

5. METHODOLOGY

The study adopts a qualitative methodological approach for investigating the problem statement. This includes a comparison of the different facets of intelligence accountability, and of the strengths and weaknesses thereof on the basis of an analysis of the regulatory framework, and oversight and control models for intelligence in the selected case studies, namely the US and the UK. The literature has been collated and analysed in order to identify

developments that have had an impact on arrangements for civilian Intelligence Service accountability in the respective countries. A critical analysis has also been made of significant events and developments in the oversight and control over civilian intelligence to identify the existence of trends and patterns that support or refute the assertion that a national security consensus in the US and UK supersedes the prerogatives of intelligence oversight and control.

The theoretical framework briefly illustrates the critical role of Intelligence Service accountability in a democracy, and consists of a discussion of the main concepts used in the study to describe intelligence; civilian intelligence, and intelligence oversight and control, as instruments of intelligence accountability. The study also describes the main forms of oversight and control encountered in a democratic system including Executive, parliamentary, judicial and investigatory or independent oversight (the oversight aspect of intelligence accountability), and the role of enabling legislation and the regulation of intelligence activities, including the use of intrusive measures, for the conduct of intelligence (the organising principles or control aspects of intelligence accountability). In doing so, the study differentiates between compliance-based oversight (rule of law or governing framework of checks and balances) and performance-based oversight designed to evaluate the operational effectiveness of intelligence activities.

The end of the bi-polar confrontation between East and West, and its superseding by a new era of globalisation and open society followed by the emergence of intelligence accountability, has been most evident in the democratic societies of the US and the UK. Furthermore, the intelligence failures in the US regarding the September, 11, 2001 attacks, and in the UK regarding the July, 7, 2005 attacks, as well as the intelligence failures in both countries relating to pre-war predictions of Iraqi weapons of mass destruction during 2003, crystallised the debate around Intelligence Service accountability

in both countries. These developments make the US and the UK relevant case studies for any present study of intelligence accountability. The choice of the US and the UK as case studies is also to make a comparison of the similarities and differences in the nature and extent of intelligence oversight and control within the governance systems of these historical allies, and to assess the continuing relevance of the assurance value of intelligence oversight and control mechanisms in those countries.

Research for this dissertation relied on a range of unclassified sources including legislation; official reports; books; articles; journals; speeches; internet searches; seminars and conferences.

Both primary and secondary sources have been used in the study. As the legal framework governing national security of the selected countries are both well developed, the legislation governing the Intelligence Services, including primary legislation and presidential directives will serve as a primary source of research information in the case studies. These include the US National Security Act of 1947; the Intelligence Reform and Terrorism Prevention Act of 2004, and the Security Service Act of 1989 (United States: 1947, 2004a; United Kingdom: 1989). Other primary sources included the published reports of a number of oversight investigations in response to intelligence failures and scandals such as the Reports of The Senate Select Committee Study of Governmental Operations with Respect to US Intelligence Activities (1975/6), known as the "Church Committee" (United States: 1976a). More recent investigations into the intelligence failures associated with the attacks of September 11, 2001 in the US and the second Gulf War, are documented in the report of the Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001 in the US, and the UK's Review of Intelligence on Weapons of Mass Destruction (United States: 2002a; United Kingdom: 2004).

Secondary sources include books, journals and articles that provide a nuanced view of the challenges and dynamics of intelligence accountability. Publications on intelligence and intelligence accountability such as Silent Warfare: Understanding the World of Intelligence (Shulsky *et al*: 2002); The Judiciary, Civil Liberties and Human Rights (Foster, S: 2006), and Intelligence and National Security: Evaluating intelligence oversight committees: The UK Intelligence and Security Committee and the 'war on terror' (Gill: 2007a) have also been used mainly for the case studies and historical framework. Secondary sources used in the theoretical framework of the study included a number of published books that served as an invaluable source of best practice for intelligence accountability, and included Who's Watching the Spies?: Establishing Intelligence Service Accountability (Born, Johnson and Leigh:2005), and Source Book on Security Sector Reform (Fluri *et al*: 2004).

6. THE STRUCTURE OF THE RESEARCH

The chapters were structured as follows in the research.

- Chapter 1: Introduction
- Chapter 2: Conceptualisation of Intelligence Service accountability
- Chapter 3: Historical overview of intelligence accountability in the UK and US up to the end of World War II
- Chapter 4: Case Study: Intelligence accountability in the UK in the post-Cold War period
- Chapter 5: Case Study: Intelligence accountability in the US in the post-Cold War period
- Chapter 6: Evaluation

Chapter one serves as an introduction containing the research objectives, problem statement, and assumptions.

Chapter two discusses the main concepts used in the study, and describes the system for civilian Intelligence Service accountability in a democracy. It also describes the main instruments of intelligence accountability encountered in a democratic system.

Chapter three examines the development of civilian Intelligence Service accountability in the US and the UK to the onset of the end of the Cold War.

Chapter four examines the development of civilian Intelligence Service accountability in the UK, and the influence of both the European Convention on Human Rights on its evolution in the post-Cold War period, and the emergence of asymmetric threats to security as espoused by the September 11 and July 7 attacks on the US and UK respectively.

Chapter five examines the development of civilian Intelligence Service accountability in the US, and the influence of the diminishing bi-polar world order on its evolution in the post-Cold War period, and the emergence of asymmetric threats to its security as espoused by the September 11 attacks.

Chapter six contains the conclusions of the study, and provides a comparison of civilian Intelligence Service accountability systems and approaches as discussed in the two selected case studies. The assumptions formulated in the Introduction are also evaluated.

CHAPTER 2: CONCEPTUALISATION OF INTELLIGENCE ACCOUNTABILITY

1. INTRODUCTION

The purpose of this chapter is to develop a conceptual framework for civilian Intelligence Service accountability in a democracy, and ensure a common understanding of terms used in this study. The chapter will therefore define concepts such as intelligence, civilian intelligence and intelligence in a democracy, before describing the architecture and organising principles of Intelligence Service accountability and its main instruments and functions.

This chapter will illustrate that Intelligence Service accountability is a collective interdependent system of checks and balances in a democracy, each functioning with its own nuances and idiosyncrasies in support of a common goal. This chapter will also illustrate that the incompatibility of aspects of intelligence practice with democratic principles makes Intelligence Service accountability essential to reconciling the paradox of intelligence in a democracy, and that the exacerbating consequences of the intelligence requirement of secrecy further underscore this need. The presumption however is that intelligence is not alien to democracy but is in fact an indispensable resource for the advancement of national security.

2. DEFINING INTELLIGENCE

The term intelligence is used as a generic term, making a precise and universally accepted definition elusive (Burger, 2008:11). Definitions of intelligence therefore range over a wide spectrum and theorists have tended to emphasise different aspects of the term depending on its use. In some definitions, intelligence seems little different from information, except that it is perceived as secret. Lowenthal (2006: 9) supports the general consensus that intelligence is something broader than information and defines intelligence as

“the process by which specific types of information important to national security is requested, collected, analysed and provided to policy makers; the products of that process; the safeguarding of such process and information by counter-intelligence activities; and the carrying out of operations as requested by lawful authorities”. In this definition, intelligence is therefore seen as information; a process; product; the safeguarding of processes and information; as well as operations or covert action.

Shulsky *et al* (2002:1) define intelligence as “information relevant to a government’s formulation and implementation of policy to further its national security interests and to deal with threats from actual and potential adversaries”. Given that intelligence comprises a wide range of activities however, they maintain that it is not feasible to find a common thread, except that “intelligence is a struggle between adversaries that deals primarily with information, having to do with obtaining and denying information”. Shulsky *et al* (2002:2) further propose that the term intelligence refers to raw data acquired by means of espionage or otherwise and analysis and assessments based on it, culminating in intelligence products. As an activity it involves the collection and analysis of intelligence information, techniques for analysing it and denying it to others. Organisationally, intelligence also refers to the entity that carries out these activities and undertakes secret programmes in advancement of foreign policy objectives. While increasing quantities of information are available in the public domain, the pursuit of secret information is the essential characteristic of intelligence gathering. Secrecy however, “though the mainstay, is not a necessary precondition” for intelligence gathering (Born, 2003: 277; Lowenthal, 2006: 6-7). Lowenthal (2006: 9) also makes a crucial distinction in pointing out that “information is anything that can be known while intelligence refers to information that meets the stated or understood needs of policy makers”.

Born (2003: 277) provides a succinct definition of intelligence as “the collection, processing and dissemination of information in order to ensure the security of society and the freedom of its citizens” resulting mainly from operations conducted in a secret and clandestine manner.

It is evident that definitions of intelligence are varied and range over a wide spectrum. As the focus of this study is on the broad accountability and governance of the civilian Intelligence Services as a whole, the term intelligence is interpreted in its broadest sense. In this regard intelligence refers to policy relevant information which is gathered or collected against targets through open and secret sources upon prioritisation and requirements planning. It refers to the analysis, processing, coordination and interpretation of gathered information to generate intelligence products for dissemination and use in the conduct of security policy. Intelligence also includes both activities to protect that information and related processes and operations to conduct foreign policy - as opposed to gathering information. Finally, intelligence also refers to the organisation/s that conduct/s all of these activities. These primary business activities of the Intelligence Services will be broadly referred to as intelligence activities. According to Lowenthal (2006:2) intelligence agencies exist for four major reasons: “to avoid strategic surprise, to provide long-term expertise, to support the policy process, and to maintain secrecy of information, needs, and methods”.

Given that the analysis of Intelligence Service accountability will largely refer to civilian Intelligence Services, the purpose of the next section is to define civilian intelligence within the context of the broader community of Intelligence Services.

3. CATEGORIES OF INTELLIGENCE SERVICES

As state intelligence evolved in the twentieth century, it became more structured and organised as different categories of intelligence services began to emerge to undertake the diverse intelligence needs of the state.

3.1. Organisation and structure of intelligence

Organised intelligence as an industry became prevalent in the late nineteenth and early twentieth centuries and evolved where most governments now have permanent institutions devoted to the intelligence needs of the state (Watts, 2004:12; Burger, 2008:16). This organisation of a national intelligence capacity evolved with these needs and manifested both as intelligence support functions within government departments such as the military and police services, and as stand-alone independent Intelligence Services.

Intelligence structure and practices in any jurisdiction are peculiar to a particular nation however, even among those with strong historical ties and intelligence sharing arrangements. Considerations that may influence the structure include role and function; understanding overlaps between intelligence and other security community elements such as law enforcement; the form of central analysis and processing; the need for central control, accountability and coordination and public oversight of the intelligence community (Hannah *et al*, 2005: iv,5). In seeking to constrain the activities of Intelligence Services, especially given that the legal restraints and operational idiosyncrasies of intelligence in and outside a country's borders mostly differ, democratic countries have also emphasised the need to maintain a jurisdictional demarcation between internal and external security, and law enforcement. Apart from the occasional devolution of traditional security functions to non-intelligence departments, generally four categories of national intelligence focus areas are distinguishable. These are security or domestic

intelligence and foreign intelligence, collectively referred to as civilian intelligence; military intelligence, and crime intelligence (DCAF Intelligence Working Group, 2003:13,30; Shulsky *et al*, 2002:4).

3.2. Civilian Intelligence Services

Civilian Intelligence Services are concerned with the security of the state and promotion of the national interest, and support the civilian leadership in government's formulation and implementation of security policy. Generally two distinct patterns are prevalent for organising civilian intelligence. These include a single agency or separate agencies for domestic and foreign intelligence. Separate agencies are characterised by geographical competencies that are either completely separate or which partially overlap. The distinction between internal and external services is not absolute however, not only as regards geographical competency but also in the areas of mandate demarcation (DCAF Intelligence Working Group, 2003:13, 29).

Civilian domestic or internal Intelligence Services are concerned with security intelligence which is intelligence relevant to internal security. This includes threats to the state, internal stability and the constitutional order arising from developments within or outside of the geographical territory of the state (South Africa:1994; United Kingdom:1989). Domestic Services usually conduct operations within the geographical borders of the state, although this limitation is not always clear. It is the domestic Services - with their special powers of intrusion, which are of concern from a propriety perspective. The Security Service in the UK (MI5) and the former National Intelligence Agency (NIA) in South Africa are examples of civilian domestic Services.

Civilian foreign intelligence is relevant to external security and is the domain of external or foreign Intelligence Services. These Services focus on threats as well as opportunities to the national interest or well-being that have developed

outside of the borders of the state. Their focus is on gathering intelligence on the activities, intentions and capabilities of foreign powers, their agents, non-state groups and other appropriate sectors (South Africa: 1994). In a controversial step, in certain states, external Services have the responsibility for conducting covert action or active measures (Lowenthal, 2006:157). External agencies by definition would be unable to carry out their responsibilities were they to obey all the laws of the country in which they conducted operations. The Central Intelligence Agency (CIA) in the US, and the former South African Secret Service (SASS) in South Africa are examples of civilian foreign Intelligence Services.

3.3. Defence or military intelligence

Defence or military intelligence, which is information relevant to the territorial integrity of the state, is seen as a third branch of intelligence alongside civilian internal and external Intelligence Services (DCAF Intelligence Working Group, 2003:30). Military intelligence is intelligence regarding the war potential and military establishment of foreign countries including their capabilities, intentions, strategies and tactics (South Africa: 1994). Defence or military intelligence arms include the Defence Intelligence Agency (DIA) within the Department of Defence (DOD) and Defence Secretariat in the US, and the Defence Intelligence Staff (DIS) within the Ministry of Defence (MOD) in the UK.

3.4. Crime intelligence

Crime intelligence is intelligence that identifies crime patterns; provides forewarning used in the prevention of crime, and identifies targets to conduct criminal investigations. It is also intelligence used to prepare evidence for the purpose of law enforcement and for the prosecution of offenders (South Africa: 1994). Crime intelligence agencies are located as either a component of law enforcement agencies, such as in South Africa, or as independent Services such

as the UK's Serious Organised Crime Agency (SOCA). Crime intelligence gathering utilises techniques similar to those used for intelligence gathering, and develops the bigger intelligence picture of organised crime as opposed to the more discriminate law enforcement approach of responding to the commission of a given criminal act (Shulsky *et al*, 2002:4-5). In its intended means and ends, crime intelligence is somewhere between intelligence gathering and law enforcement. Ultimately the purpose of crime intelligence however, is to support law enforcement.

3.5. Specialist Services

Advanced technology platforms have emerged as a valuable means to collect a variety of raw intelligence from within the electromagnetic spectrum to serve the collection needs of foreign and military Intelligence Services. In contrast to traditional human intelligence (HUMINT) collection, the concentration of technology gave rise to a new field of technical collection (TECHINT), and established the need for specialised Services outside the general categories of Intelligence Services. These Services pursue highly indiscriminate or bulk intelligence collection strategies that include among others, the collection of imagery intelligence (IMINT); communications intelligence (COMINT), and signals intelligence (SIGINT). The National Security Agency (NSA) and National Geo-spatial intelligence Agency (NGA) of the US, and the former Russian Federal Agency for Government Communications and Information (FAGCI) are examples of specialist Intelligence Services (DCAF Intelligence Working Group, 2003:30).

3.6. Community of Intelligence Services

In jurisdictions where the intelligence needs of government led to the creation of multiple Intelligence Services, a dispersed national intelligence enterprise emerged and is collectively referred to as the intelligence community. The

term intelligence community refers to agencies and offices whose work is related and sometimes combined although they serve different clients under different lines of authority and control. The community also includes various intelligence coordination and integration mechanisms, intelligence managers and consumers of intelligence (Lowenthal, 2006:11, 35).

4. INTELLIGENCE IN A DEMOCRACY

Certain aspects of intelligence practice are ordinarily incompatible with the principles of democracy. Intelligence as an instrument of national security therefore gives rise to a democratic deficit and poses a ‘security dilemma’ for the democratic state.

4.1. Definition of democracy: public representation; rule of law, and human rights

The term democracy broadly refers to “representation of the people, by the people and for the people and is marked by free elections; the rule of law; separation of power, and respect for basic human rights” (Born and Leigh, 2005:138). Democracy implies that citizens’ have the right to participate in the management of government affairs; requires representative institutions at all levels of governance; and is anchored in an elected legislature with the appropriate powers to express the will of the public by means of legislation and oversight of Executive action (Hopkinson, 2001: 1-8; Held, 1999: 108). This representation is essential for obtaining public consent for the organisation and activities of the state and government, including the Intelligence Services.

The rule of law refers to legislation, including human rights legislation, legitimately adopted by a democratically elected legislature. This must be enforced and systematically applied without discrimination by an independent Judiciary with coercive powers, and is an essential condition for accountability

in a democracy. The rule of law implies that those affected by it perceive the set of rules as “fair, just and legitimate and are willing to follow them” (Born and Leigh, 2005:141).

Human rights refer to “any basic right or freedom to which all human beings are entitled” and in whose exercise a government may not unduly interfere including the right to life and civil liberties, freedom of thought and expression and equality before the law such as are contained in International Human Rights Treaties (Born and Leigh, 2005:138). In a security context, these rights are vital elements of a democracy. Intelligence Services must accordingly protect and advance them (Born, 2004: 276).

4.2. Incompatibility of Intelligence Service immunity with democratic principles

Intelligence Services operating outside of a democratic framework are ordinarily unable to maintain public consent for intelligence action. The intelligence requirement for secrecy; use of intrusive collection powers; and absence of a legitimate legal framework among others, are at odds with the democratic concepts of transparent government; right to privacy and freedom of expression, and the rule of law. These unchecked phenomena are associated with a national security consensus that given their remit to protect the security of the state, Intelligence Services are some kind of exception to democratic principles. Under these circumstances, the characteristic of informality and secrecy reinforces the tendency to operate within limits set chiefly by effectiveness, unhindered by regulation and mandate (Watts, 2004:12). Against this background, Intelligence Services have enjoyed a greater immunity from democratic accountability than other components of the state (DCAF Intelligence Working Group, 2003:2). Under these circumstances however, certain aspects of intelligence are incompatible with a democratic order and

given the implications of the intelligence need for secrecy, including its diverse potential for abuse, it poses certain risks to democracy.

4.3. The security dilemma: imperatives of security versus democratic principles

Undemocratic intelligence practice gives rise to a ‘security dilemma’ - a contradiction between divergent interests and its mitigation revolves around the mediation of a systemic trade-off, of finding a balance individually and as a whole between the divergent interests of collective or state security and democratic principles. The clichéd question ‘to spy or not to spy?’ is relevant here: “which security exceptions or limitations are acceptable in a democracy and which are not, and under what circumstances” (DCAF Intelligence Working Group, 2003:32). According to Lowenthal (2006:273) this dilemma is acceptable in a democracy provided that the intelligence community operates within a system of democratic accountability.

The next section will define the concept of accountability in general and in a context specific to intelligence practice and describe broad models, the organising principles and the main instruments or pillars generally used to achieve civilian Intelligence Service accountability.

5. DEMOCRATIC ACCOUNTABILITY FOR INTELLIGENCE SERVICES

Accountability is a broad term denoting concepts such as responsibility, answerability, blameworthiness, liability and account-giving (Cameron, 2005:37). It follows therefore that accountability is the acknowledgement and assumption of responsibility in relation to governance and implementation within the scope of a particular role. In the context of Intelligence Services, accountability has the political purpose of constraining the powers of intelligence and the administrative purpose of effectiveness and efficiency

(Born and Leigh, 2005:137). Given that accountability refers to obligations of responsibility and account-giving within the context of clear expectations, performance standards; rules of engagement; and basic organising principles for intelligence practice are essential referent objects for measuring it.

5.1. Reconciling the security dilemma

Mitigating the implications of the security dilemma requires harmonisation of intelligence practice with democratic principles of governance. The security context and the idiosyncrasies of intelligence practice however make certain traditional democratic principles inappropriate for the intelligence industry.

Within this context, the ‘democratic accountability of Intelligence Services’ is a broad adaptation of these principles and describes the whole of the systematic approach to the democratic governance of Intelligence Services. This implies that intelligence practice in a democracy is bound within the context of the rule of law, checks and balances and transparent lines of responsibility notwithstanding the need for secrecy of intelligence activities (Born and Leigh, 2005:138). Within this context, the system of accountability seeks to balance the contradictory imperatives of secrecy and accountability. It provides assurance on the propriety and efficacy of Intelligence Services, thereby conferring upon them a measure of credibility and public consent for their activities, and reconciles the security dilemma or paradox between security imperatives and democratic principles. This proposition is shared by Born and Leigh (2005:138) who describe accountability for intelligence as the instrument for determining the propriety and efficacy for Intelligence Services within the parameters and confines of the values of a democratic state. Intelligence Service accountability is therefore a surrogate for the conventional democratic process that is usually associated with other governmental activities.

5.2. Definition of functions in support of intelligence accountability

A diverse set of terms are associated with the concept of accountability and which describe the functions carried out to achieve it. These include among others, control; oversight and supervision; monitoring and review. Each of these functions is exercised under different circumstances by a multiplicity of institutions and actors.

Control means “to rule, instruct or even to manage”, as opposed to the less strict concept of “to check” (Born, 2004:283). Control refers to the management and direction of the Intelligence Services and may be exercised at various levels. Statutory control refers to the legislature passing laws relating to the mandate and operations of the Service. Executive or political control is exercised by a Minister responsible for a Service providing direction to the Service. Internally, administrative control is exercised by the head of the Service in the form of procedures and guidelines (Gill, 2004: 299).

In definitional terms oversight refers to the action of overseeing and implies supervision and watchful care (Lowenthal, 2006: 192). Supervision in turn means to observe and direct the execution of an activity and denotes involvement or participation therein (Havanagh *et al*, 2002: 1178). It therefore signifies a more extensive role and greater activism than mere ‘watching-over’. In other definitions a broader interpretation is made of oversight as a watchdog function over ongoing activities (Caparini, 2007:8).

Review is the formal assessment of something with the intention of instituting “change or reconsideration of something by a higher authority”. Review is a substantive retrospective or ex-post facto survey, to ‘view or inspect again’ (Caparini, 2007:5; Havanagh *et al*, 2002:1001). Monitor means to observe and check over a period of time or maintain regular surveillance over something and implies a report on the result thereof (Havanagh *et al*, 2002: 750).

In functional terms democratic governance or democratic accountability for Intelligence Services refers to a “systematic approach; oversight and review refer to a broad approach; and control signifies a powerful approach” underpinned by greater authority with respect to the democratic accountability of intelligence (Born, 2004:283).

5.3. Interchangeable use of terms

The phrase ‘democratic control’ is widely used to refer to the whole system of ‘democratic accountability’ of Intelligence Services. According to Gill (2004:299) the term oversight is often used interchangeably with the term review and in some languages have the same meaning. The interchangeability of these functional terms disguises important distinctions between them (Gill, 2004:299). Under these circumstances, certain terms used to describe a function imply other functions. In some instances terms used to label certain instruments of accountability are not in line with actual functions performed. Parliamentary oversight is mostly characterised by ex post- facto review work and ‘watchdog’ activities, rather than supervision (as the definition of oversight mostly seems to suggest), as do most instruments labelled as oversight. Caparini (2007:8) points out that notwithstanding this interchangeable use of terms, there is ample motivation for their separation and careful use, especially as they often denote different things.

5.4. Structure and models for intelligence accountability

Gill (2004: 301) proposes that in a ‘security context’ states operate at four main levels where public accountability is concerned: the secretive level occupied by intelligence (the object of accountability); the Executive; the broad array of state institutions including an elected Legislature; the Judiciary; and the bureaucracy; and finally the non-state level representing the citizenry and social movements. He submits that different institutions and forms of

control, oversight and review exist at each level where form of accountability becomes more specific the closer the level is to the object of accountability.

Caparini (2007:10) proposes the ‘tri-partite’ approach advanced by Schedler to describe the accountability of Security and Intelligence Services. This three-part framework underscores the multiplicity of mechanisms concerning public institutions and the various levels at which they operate and encompasses three types of accountability: horizontal, vertical and the third dimension. Horizontal accountability is used to describe the restraint of state institutions by other state institutions, public agencies and the three branches of government (the Executive, Legislature and Judiciary) and describes a relationship among co-equal independent agencies. In contrast, vertical accountability concerns relations among those unequal in their power relations, such as the hierarchical top down relationship of superiors holding subordinates to account within a state institution and to the bottom up efforts of citizens, the media and civil society in holding state institutions to account. The third dimension refers to the restraining effect of international actors and laws on the security sector of the state.

Against these broad structural considerations, no one single definitive model or best practice for Intelligence Service accountability emerges. As a multitude of practices and systems prevail across all democracies, the model for intelligence accountability is equally idiosyncratic to the democratic culture of a particular country and is therefore a product of its system of government, politics, history and culture. Notwithstanding the absence of definite norms and standards however, certain fundamental arrangements for Intelligence Service accountability are necessary for intelligence practice in a democracy, as are certain basic principles, relationships and structural arrangements. In this regard, general agreement exists that “democratic and parliamentary oversight of the security sector is a sine quo non condition for democracy” (Born, 2004: 282).

5.5. Organising principles for intelligence accountability

The organising principles for Intelligence Service accountability provide the foundation and parameters for the conduct of intelligence. These principles also establish the framework and referent objects for a multiplicity of instruments and actors for securing Intelligence Service accountability.

5.5.1. A legal framework for intelligence activities as a referent object for accountability

There is broad consensus that the initial step to intelligence accountability is a sound legislative framework that regulates the objects, functions and powers of intelligence and establishes a framework for its execution. Vertical accountability must be secured in law which sets out the basis for the control, supervision and oversight of intelligence (Born and Leigh, 2007:3). Creating explicit parameters for intelligence; appropriate definitions of national security in law; demarcating intelligence to such security concerns, and defining areas of operation, are prerequisites for the effective and legitimate functioning of intelligence and holding Intelligence Services to account.

Without a legal framework, intelligence accountability would be devoid of a referent object and Intelligence Services would be without a framework in which to operate and to properly account or be held accountable for their actions. It is widely accepted that in a constitutional democracy, Intelligence Services have no special powers, save for those conferred upon them in law. Given that the purview of Intelligence Services is subject to varying interpretations even where there is a legal definition of security, among the crucial elements of intelligence accountability is the need for clear systems for tasking and prioritisation. Where intelligence focus is directed towards domestic priorities, even greater care is required (Born, 2004:278-9).

The overall framework to regulate intelligence is based on the constitutional framework or basic law, laws passed by Legislatures as discussed in the preceding paragraph and Executive directives or regulations made under the provisions of the law as well as internal control procedures laid down by the management of the services, discussed respectively as part of Executive oversight and internal control.

5.5.2. Demarcation of intelligence functions

The security dilemma in democratic states revolves largely around the question of the circumstances under which a government may legitimately target its own citizens. As a result domestic intelligence activities are subjected to a greater degree of operational and legal restraints as opposed to external Intelligence Services which operate more freely from domestic legal and other constraints (DCAF Intelligence Working Group, 2003: 73). Although resource constraints, coordination and command-control considerations have also given rise to combined single or fused Services, since they operate under different missions and rules, democracies generally separate civilian domestic from civilian foreign Services (Born and Leigh, 2007:4).

Given the different objectives of law enforcement and civilian Intelligence Services, their separation is of even more importance. Even though crime intelligence is one of its disciplines, law enforcement is ultimately directed at gathering evidence for criminal prosecution that is admissible in a court of law. As such it is preceded by “transparency; justification and due process”, as opposed to the more indiscriminate approach of intelligence gathering (DCAF Intelligence Working Group, 2003: 73).

Although it requires greater resources and coordination, the system of democratic accountability of Intelligence Services is enhanced, accumulation of power negated and intelligence community redundancy and check on power

effected, where the services are organised such that each operates around one mission as opposed to a multiple mission comprehensive service (Born, 2004:279). Under these circumstances civilian intelligence is separated from defence intelligence and divided into domestic and foreign intelligence, while law enforcement is segregated altogether from military and civilian Intelligence Services.

5.5.3. Professional conduct

A crucial organising principle for Intelligence Service accountability is the infusion of the appropriate political culture and values within its overall framework. In this regard, Caparini (2007:17) proposes the value-based framework advanced by Lustgarten. This framework asserts that law is only a secondary mechanism and that the fundamental indicators of security governance are “basic political values such as respect for dissenting ideas, human rights and privacy; legitimacy and acceptance of oversight; a concept of national security that is limited to core political values and societal interests, and strict requirements for both justifying the holding back of information from Parliament and the public and restricting the rights and freedoms of citizens”. This requirement is closely associated with the adherence of Service members to a professional work ethos and code of conduct. This includes “loyalty to the state; a culture of adherence to the rule of law; respect for oversight and human rights and responsible use of intelligence information and special powers according to the principles of proportionality”. Accordingly, the internalisation of these political values and ideas within the political culture provides the only meaningful yardstick of the democratic framework within which intelligence accountability must unfold. The pursuit of Intelligence Service accountability and its search for the efficacy and propriety therefore includes “shifting both legal contexts for intelligence work and the culture of the agencies” (Gill, 2004: 299).

5.6. Instruments of intelligence accountability

Democratic accountability of intelligence is secured through a multiplicity of institutions, actors and functions and generally comprises of five distinct yet independent horizontal and vertical instruments or pillars, namely, Executive control; parliamentary oversight; judicial review; independent oversight on behalf of the general public, and internal control by the Intelligence Services (Born and Leigh, 2005:138). To these instruments of accountability for Intelligence Services can be added the more modest oversight of civil society and the media.

5.6.1. Executive oversight: supervision and control

Responsibility for Executive oversight and political control resides with the primary client of intelligence who is usually the head of state or government or a member of the Executive designated for this purpose (Born, 2004: 281). The Executive exercises political control in authorising intelligence budgets and priorities and conducts oversight by means of ongoing formal and informal review of activities, political guidance and direction to the Intelligence Services. As a consumer of intelligence, the Executive is appropriately placed to review the quality of intelligence products and the legality of activities. While this requires a sufficient degree of control and the right to demand information, it is essential to appreciate that intelligence is separate from and yet is an inseparable part of the government, whose policies it must serve. As such the Services must be insulated from political abuse without being isolated from Executive governance (Born and Leigh, 2005: 13).

In rare instances, the Executive is known to exercise political control over sensitive operations such as covert action (Lowenthal, 2006:193). In certain jurisdictions requests for the use of special powers of collection are subject to Executive review and approval (DCAF Intelligence Working Group, 2003: 55). In

other jurisdictions, the Executive also exercises a quasi statutory control through regulation of intelligence activities that are susceptible to change and require frequent regulatory modification (South Africa: 1994). Executive oversight and control is often facilitated and supported by independent and other review mechanisms such as security councils, advisory boards and Inspectors-General (Lowenthal, 2006: 192; Farson, 2005:105).

5.6.2. Legislative oversight: review and control

Legislative oversight is about holding the Executive in check and is widely accepted as the centre of intelligence accountability. Shulsky *et al* (2002: 145) regard it as a “compromise between the requirement for secrecy and the desire to bring public opinion to bear on Intelligence Services”. It is therefore a surrogate for public debate and the democratic process of government by the people and is seen as the primary tool for balancing security and liberty, especially in the public conscience.

Legislative oversight refers to oversight by Legislatures who make laws governing intelligence activities and approve funding for Intelligence Agencies thereby exercising a form of statutory control and conduct review-type assessments, investigations and inquiries into the effective performance and legal conduct of intelligence activities. The norm is for Legislatures to establish a dedicated committee in support of systematic and focused legislative oversight of intelligence although a number of hybrid variations are also known to operate in other countries (Born and Leigh, 2005: 10,11). In some jurisdictions these committees review and oversee both policy and operations such as in the US, under which circumstances it has greater powers including the power to subpoena witnesses. Other committees have an oversight mandate limited to policy and finance only, such as the UK or human rights and the rule of law such as in Norway, under which circumstances, the lack of access to operational detail respectively impedes their ability to effectively

convey any assurance of compliance with the rule of law and Service effectiveness (Born and Leigh, 2005:11). In the absence of a natural advocate for this restricted issue, legislative oversight, in building a political consensus around intelligence in the body politic, is also challenged to avoid complicity, being ‘captured’ by the system or serving parochial political interests (Caparini, 2007:19).

5.6.3. Judicial review

Judicial review is confined to legal matters and is rather modest in comparison to the other pillars of Intelligence Service accountability. As perceived protectors of human rights, their “independence and detached view” lends credibility to the broader system of accountability (Born and Leigh, 2005: 14). Given that legal standards define the circumstances that warrant the use of intrusive collection methods, designated members of the Judiciary are appointed to review and approve intelligence requests in this regard, thereby exercising a form of judicial supervision and control (South Africa: 2002). In other jurisdictions the Judiciary reviews the merits of requests approved by a Minister or member of Cabinet, thereby exercising a form of judicial review of the appropriateness of authorisations granted, after the event (Oleynik, 2003: 220). Under these circumstances the Judiciary or Executive are essentially sanctioning what is usually non-compliance with the law, under circumstances and strict conditions defined in law. Intelligence Services and their members are subject to the judicial process and in a democracy can sue and be sued for their actions. Judicial review also tends to clarify and pronounce on the constitutionality of the many complex factors related to intelligence practice that may appear before the courts in a form of “anticipatory control” (DCAF Intelligence Working Group, 2003: 33, 53, 55).

Although the Judiciary is undoubtedly deferential to the Executive branch in intelligence matters, judicial control can act as a strong arbiter of government

secrecy (DCAF Intelligence Working Group, 2003: 53). In some jurisdictions such as the UK, the activities of intelligence are also subjected to review by an independent judicial tribunal as a result of a complaint by members of the public to draw attention to a violation of human rights by the Intelligence Services (Oleynik, 2003: 234). Most jurisdictions who have established public recourse mechanisms have opted for other forms thereof however, most of which have spans of review beyond complaints, as discussed below.

5.6.4. Independent oversight

Independent oversight refers to special purpose entities independent of the Intelligence Services that provide impartial verification and assurance of intelligence activities and in certain countries provide redress for complaints.

5.6.4.1. Public recourse mechanisms

Given that the courts are seen as an inappropriate platform of redress for individuals who believe that their rights may have been affected by the special powers of the Intelligence Services, administrative complaints systems have been established in some jurisdictions as an alternative avenue (Born and Leigh, 2005:105). Some of these alternatives are part of the broader system of democratic accountability for Intelligence Services and reside within the functions of intelligence Inspectors-General such as in South Africa and Australia; independent Tribunals in the UK; and legislative and independent committees of the Legislatures in the US and Canada (O' Brien, 2005: 215; Born and Leigh, 2005:105; Farson, 2005: 105). Other mechanisms outside of the immediate system of democratic accountability include independent ombudsmen, human rights commissioners and data protection officers who are part of the overall system of governance, though competent to receive and investigative such complaints (Born and Leigh, 2007:17). As these mechanisms operate outside of the ring of secrecy however, they encounter difficulties in

procuring the necessary information from, and cooperation of the Intelligence Services, and in practice often defer to those mechanisms inside the ring.

It is crucial to appreciate that irrespective of the form of recourse, the emphasis is generally on independent investigation on behalf of a complainant and on addressing administrative failure within the Services rather than facilitating legal recourse for the complainant, who is typically excluded from the process (Born and Leigh, 2007:17). The limited nature of the process and its lack of due process or natural justice therefore places complainants at a distinct disadvantage, and has been known to detract from the utility of and public confidence in these mechanisms.

5.6.4.2. Independent review

Independent mechanisms for intelligence oversight refer to those appointments or entities established to complement the oversight system and are generally characterised by special appointment and reporting mechanisms with their independence secured in law (Born and Leigh, 2005:139). Independent review agencies as they are also referred to, are also characterised by statutory powers of access to information and expert capacity to support their functions, although restrictions are placed on the disclosure of their findings. They include Inspectors-General, Judicial Commissioners discussed in the preceding paragraph, and financial Auditors to review the financial and operational activities of the Intelligence Services for propriety and effectiveness (Born and Leigh, 2007:18).

Inspectors-General review the operational activities of the Services as a basis for providing assurance on their effectiveness and propriety, generally provide redress for complaints and operate inside the ring of secrecy. They usually report to and provide assurance to the Executive and in some dispensations, to Parliament (and as a result, partially bridging the inner ring of secrecy) or

both, thereby also facilitating Executive and parliamentary control and oversight respectively (Farson, 2005: 105; O' Brien, 2005: 215; Born and Leigh 2005:139; Born and Leigh, 2007:19).

Independent audit offices have a general remit to audit the finances and establish the propriety of government expenditure including those of the Intelligence Services (O' Brien, 2005: 215). The need to protect sources, methods and ongoing operations may however result in restrictions on both the nature and extent of access to information granted to Auditors and on reporting audit outcomes in some jurisdictions, and distinguishes the audit of Intelligence Services from regular audits of government programmes (Born and Leigh, 2007:20). Given these limitations, the audit assurance is either limited, or in certain jurisdictions Inspectors-General are given an extended mandate that includes the financial audit usually carried out by independent audit offices (United States: 1978a).

5.6.5. Internal control by the Intelligence Services

Internal control broadly refers to the internal administrative and operational management and direction of the Intelligence Services. It is a documented system of rules, standards, instructions, procedural guidelines and checks and balances or specific controls designed to ensure that the Intelligence Services achieve their operational objectives in a lawful and effective manner. Born and Leigh (2005:139) define internal control as a “complex system of safeguard mechanisms” to ensure compliance with the standards of democratic rule.

Internal control is designed to guide and standardise intelligence practice, especially high risk activities, to prevent and detect error and malpractice and includes among others, specific control procedures for authorisation and planning; ongoing operational conduct; supervision and review; responsibility; audit or documentary trails; and dealing with exceptions and duties to report

unlawful conduct (United States: 1999). Internal control may also include a professional code of conduct for intelligence practice, reporting mechanisms for unlawful conduct, and internal compliance units to monitor and enforce compliance with internal controls, and to promote a culture of compliance (Born and Leigh, 2005:49). Internal control gives expression to the legal framework and policies governing intelligence, and is the referent object for establishing compliance with Service policies and guidelines.

5.6.6. Oversight by civil society and the media

The term civil society refers to those autonomous organisations that reside between state institutions on the one hand and individuals and communities on the other, and represents a broad range of organisations and social interests (Born, 2003: vi, 36). They include academic institutions; think-tanks; human rights observers; and policy based organisations and provide an alternative view and independent analysis of security issues; monitor observance with human rights principles; foster debate; and inform and educate the broader public on ongoing security issues. (Born, 2003: vi, 37). An independent media is an essential component of a democracy and assists in overseeing the three branches of the state; influences the political agenda; and promotes an informed citizenry as regards security policy, intelligence functions, security challenges and other pertinent issues of the day (Born, 2003: vi,:40).

Even though the participation of civil society and the media in the affairs of the state in a general sense is seen as an expression or prerequisite for democracy, in practice they are forced to operate under restriction in the intelligence domain and are impeded in their efforts by the intelligence condition for secrecy, resulting in a constant tension and adversarial relationship with 'power'.

6. CONCLUSION

This chapter illustrates that Intelligence Service accountability is a necessary condition for the practice of intelligence in a democracy, where the security dilemma is arbitrated by an interdependent compensatory system of checks and balances. In seeking to balance this paradox, this system provides assurance on the propriety and efficacy of Intelligence Services, thereby conferring a measure of credibility and public consent for their activities.

Democratic accountability of intelligence includes a multiplicity of instruments and actors and while there is no precise model for it, some specific essentials and basic organising principles are a prerequisite without which intelligence accountability could not pass democratic muster.

It is apparent that Intelligence Service accountability revolves mainly around democratic governance of the domestic security sphere. Given the increasing prominence of trans-national threats however, the traditional spheres of domestic, external, defence and crime intelligence are increasingly becoming blurred. These phenomena and the underlying threats that give rise to them further magnify the security dilemma and swing the pendulum even further away from individual freedoms towards the imperatives of collective security.

This chapter focused on the architecture and some of the main instruments that constitute a democratic system of Intelligence Service accountability, and establishes the context for the discussion in the next chapter of the evolution of Intelligence Service accountability in the US and UK from the Second World War to the end of the Cold War.

CHAPTER 3: THE EVOLUTION OF CIVILIAN INTELLIGENCE SERVICE ACCOUNTABILITY IN THE UNITED KINGDOM AND UNITED STATES UP TO THE END OF THE COLD WAR

1. INTRODUCTION

The purpose of this chapter is to provide a historical overview of the development of civilian Intelligence Service accountability in the UK and US during the Cold War period. The chapter will first provide a brief background to developments in civilian intelligence during the early modern history of both countries to the end of World War II, as well as an overview of civilian intelligence accountability in the post-war period, to the onset of the Cold War. The evolution of the system of intelligence accountability in the UK and US respectively, during the Cold War period to the beginning of 1989 will then be discussed. A brief comparison of the similarities and differences in arrangements for intelligence accountability in the UK and US towards the end of the Cold War is provided in the conclusion. This will provide the background for an examination of the further evolution of Intelligence Service accountability in the UK and US respectively, in the following two chapters.

2. EARLY MODERN HISTORY OF INTELLIGENCE PRACTICE IN THE UK AND US

The development of intelligence in the UK and US and the patterns thereof, closely parallel the history and idiosyncrasies of the respective states. The creation of an intelligence capacity was first motivated by threats to the system of government in the respective countries and later by the existence of war and international conflict, which also shaped its evolution, both structurally and substantively.

2.1. Development of intelligence in the UK

The origins of intelligence practice in the UK date from the reign of Elizabeth I during the sixteenth century amid threats to the continued existence of the Crown, and soon increased in scope from domestic threats to include those from the continent. Secretary of State from 1573, Sir Francis Walsingham, developed expertise in secret interception and developed a network of agents abroad to uncover these threats (Gill *et al*, 2006:9; United Kingdom: 2007a and b). The formation of intelligence branches during the late 19th century however, constituted a significant shift towards the institutionalisation of intelligence in the UK (Burger, 2008: 26).

Since these early developments, modern intelligence in the UK first evolved during the spy scares which preceded World War I, prompting Prime Minister Herbert Asquith to establish the Secret Service Bureau in October 1909 to counter German espionage. The Bureau was the first formal intelligence structure in the UK and comprised of a Home and a Foreign Section (Oleynik, 2006: 42; United Kingdom: 2007b). Upon the conclusion of the war in 1916, the Bureau was absorbed into the Directorate of Military Intelligence and its sections formally divided into MI5 and MI6 respectively (Burger, 2008: 27; Oleynik, 2006: 43). MI5's assumption of responsibility for threats to national security in 1931 marked the formation of the 'Security Service'. This followed the separation of MI6 into the 'Secret Intelligence Service' (SIS) responsible for foreign intelligence in 1922, and established the domestic and foreign civilian Intelligence Services of the UK. Since these early developments, the rise of Hitler coincided with a depleted Security Service prior to World War II. Confronted with threats to national survival, the civilian Intelligence Services were pressured into reorganising around the war effort in a relatively short space of time (Oleynik, 2006: 28, 43).

2.2. Development of intelligence in the US

Timely intelligence to avert threats to the new Republic was a highly sought after commodity in the US Congress and inaugural President George Washington expended as much as 12 percent of the national budget to conduct foreign intelligence and covert action in this regard (Van Wagenen, 2007:97-98). Since these very early developments however, a benign security environment and a lack of strong foreign policy interests saw a virtual absence, apart from military intelligence, of an intelligence capacity in the US for the succeeding 170 years after independence (Lowenthal, 2006:12).

This policy first began to change towards the end of the 19th century and gathered momentum in 1940 as the US achieved world power status and developed more global interests. As a result, a permanent and centralised civilian intelligence infrastructure for the collection, analysis and correlation of national security information appeared only as recently as 1940 in the form of the Coordinator of Information which was later superseded by the Office for Strategic Services - the US central intelligence enterprise of World War II. A late entrant into the realm of national security, intelligence was initially considered a novelty although the participation of the US in World War II led to a massive increase in resources devoted to it (Lowenthal, 2006:12, 13; Shulsky, 2002:161).

The Federal Bureau of Investigation (FBI) was established in 1908 as a Federal law enforcement agency under the supervision of the Attorney-General within the Department of Justice. Apart from crime intelligence gathering inherent in its law enforcement functions, the FBI also engaged in intelligence gathering that resembled domestic civilian intelligence since its inception and with executive approval, had also begun to engage in foreign intelligence. This trend continued throughout World War II and included counterespionage, sabotage, subversion, and other related intelligence matters affecting internal security as

well as substantial operations in Latin America (Turner, 2005: 20,21; United States: 2005a).

The following section will provide a brief overview of civilian intelligence structures and accountability in the UK and US in the aftermath of World War II.

3. DEVELOPMENTS IN CIVILIAN INTELLIGENCE ACCOUNTABILITY IN THE UK AND US: POST-WORLD WAR II TO THE BEGINNING OF THE COLD WAR

Civilian intelligence reform in the UK and US during the post-World War II period was primarily informed by events and lessons learnt from this war and the impending Cold War.

3.1. Post-World War II intelligence accountability in the UK

With its empire in decline, the UK emerged exhausted from the war and the civilian Intelligence Services, MI5 and MI6 owed their continued existence only to their relevance during World War II and the impending Cold War (Lustgarten and Leigh, 1994: 374). In this regard, the external threat posed by the Soviet Union and the controversial internal ‘subversive’ threat emerged as important intelligence priorities. MI5 had grown substantially during the war and in its aftermath began to operate with virtual autonomy, as did MI6, which was conceived as a “deniable and expendable covert extension of departments of State”. Reforms undertaken during the post-war period maintained these arrangements and resultant void in supervision of the Services (Oleynik, 2006: 43; Davies, 2004:18, 222). The nature of reforms undertaken focused mainly on the security needs of the UK rather than on the democratic accountability of the Services, who as such continued to operate under royal prerogative. The scope of intelligence activities was therefore limited only by perceived necessity and political judgment. In the absence of a legal basis, functions and

priorities were mainly guided by Executive direction, formal or otherwise, and internal guidelines. Formal direction also emanated from the Cabinet Office and the Joint Intelligence Committee (JIC), established in 1936 to coordinate, integrate and manage intelligence in the UK (Herman, 1996:27). As the UK approached the Cold War period, civilian intelligence comprised of MI5 and MI6 and the Prime Minister assumed overall responsibility for intelligence. According to Lustgarten and Leigh (1994: 65) executive discretion was exercised during this period in a state of “near-total official silence and the deliberate opaqueness of the statutory provisions governing it”.

3.2. Post-World War II intelligence accountability in the US

Intelligence reform initiatives in the post-World War II period were substantially informed by the Pearl Harbour intelligence failure and a desire to avoid strategic surprise. Having assumed a global role during and in the aftermath of World War II, the adoption of the National Security Act of 1947 (NSA) reshaped and established the charter of the US national security establishment. Among other things, it created the National Security Council (NSC) as the most senior Executive entity for the consideration of foreign policy and national security matters and a civilian Intelligence Service, the Central Intelligence Agency (CIA) - which superseded the disbanded OSS - under the supervision of the NSC, purportedly as a central coordination mechanism alongside existing collection agencies (United States: 1947; Warner *et al*, 2005: 5).

The scope of the NSA was limited by design and empowered the NSC to confer additional functions on the CIA. The CIA Act of 1949 provided for certain powers and duties of the Agency head and exempted the CIA from conventional fiscal accounting restraints (United States: 1949; Watts, 2004:12). These legislative reforms constituted the first steps towards regulating intelligence, established the mandate of the CIA and drew a line between foreign and what

resembled domestic intelligence in assigning these to the CIA and the FBI respectively and accordingly denied the CIA the powers of police, subpoena and law enforcement as well as internal security functions (United States: 1947). Of significance though, the newly adopted legislation did not define the terms ‘intelligence’ and ‘national security’, nor did it adequately address considerations of intelligence accountability outside of the Executive (United States: 1947; United States: 1949). As the US approached the Cold War period, civilian intelligence comprised of the CIA, and the FBI conducted intelligence that resembled domestic civilian intelligence alongside its law enforcement functions. The regulatory framework for civilian intelligence included internal guidelines within the Services under the broad direction of the NSA; the CIA Act; the NSC, and Attorney-General and Executive directives. Powers and responsibilities were conferred to the Services within this framework, often with few restraining mechanisms (United States: 1947; 1975b; 1976a).

Against this background, the following section will examine the evolution of Intelligence Service accountability in the UK and US during the Cold War period.

4. THE EVOLUTION OF INTELLIGENCE SERVICE ACCOUNTABILITY IN THE UK DURING THE COLD WAR

Intelligence effectiveness in the face of communism and the Soviet nuclear threat dominated the intelligence agenda in the UK during the Cold War. This, as well as the culture of public administration in the UK ensured that for most of this period, intelligence accountability was superseded by a national security consensus characterised by an abdication of security affairs to the Executive. In this regard, the nature and extent of constitutional authority to conduct intelligence and the provision of safeguards against intelligence excesses in the UK closely reflected its system of government.

4.1. Constitutional framework for intelligence in the UK

In the absence of a constitution conferring responsibility for security, intelligence in the UK is exercised in the name of the Crown, which in practice is exercised by Ministers of government. As such responsibility for intelligence rests with the prerogative, which is the residual powers of the Crown, and is recognized in the common law. These powers are broad in nature, have adapted continuously since the medieval period and enable the conduct of intelligence with almost no restriction. The courts have been traditionally deferential to security claims in the name of the Crown, both those derived from the prerogative, and those later founded on statutory powers (Leigh, 2005: 80). Against this background, supervision and control of intelligence is the exclusive preserve of the Executive with the Prime Minister in overall charge, and the Legislature exercised almost no influence over intelligence (Born and Leigh, 2007: 1). In the absence of a written constitution, the UK also lacks formal protection in law for those human rights which may be infringed by intelligence practices including the right against unreasonable search and seizure and to freedom of expression. In this regard, it has had to rely on the confined space and interpretations of the common law to protect human rights (as residual rather than statutory rights) whilst confronted with statutory restrictions to these rights (Lustgarten and Leigh, 1994:39).

4.2. The early Cold War period

Given its operational autonomy, Prime Minister Winston Churchill in 1952 delegated his executive responsibility for MI5 to the Home Secretary. The incumbent, Maxwell Fyfe in turn formalised the role of MI5 and its Director-General in a written directive, widely known as the Maxwell Fyfe Directive (Oleynik, 2006: 43). The classified directive formalized the broad objects under which MI5 was required to operate and proscribed it from serving sectional interests, or anything other than serious considerations affecting the nation's

safety. It introduced the phrase ‘Defense of the Realm’ as the object of security and encapsulated some specific threats but was otherwise barely defined. Among these, the interpretation of the threat of ‘subversion’ raised serious concerns about the right of freedom of expression (Leigh, 2005: 80; Lustgarten and Leigh, 1994: 375,377).

The accountability of MI6 also came into focus after a succession of operational failures. Embarrassing defections to the Soviet Union were followed by the exposure of Soviet deception operations and the Berlin tunnel in 1956, which had serious political consequences. These failures were attributed to a wide range of factors, including a void in SIS accountability. Amid these and other concerns over SIS autonomy since the end of the war, throughout the 1950s the Foreign Office increasingly sought to develop oversight of MI6 operations abroad (Davies, 2004:222,301).

Debates on security affairs were not permitted in Parliament during the early Cold War period. In a rare exception however, the use of telephone interception was officially acknowledged for the first time in a response to a parliamentary question in 1952. As a consequence of widespread concerns about the practice, the Birkett Committee was appointed to inquire into the supervision of telephone interceptions (Lustgarten and Leigh, 1994:441). During this period, UK intelligence was the sole preserve of the Executive however, and was conducted in a near opaque environment without any apparent legislative provisions governing it. Furthermore, the tradition of “deliberate Executive obfuscation and mystification of intelligence” manipulated the level of parliamentary knowledge and interest in intelligence (Robertson, 1998:145).

4.3. The mid-Cold War period

The Denning Inquiry initiated by the Executive into the Profumo affair in 1963 revealed publicly for the first time the role and functions of the Security

Service; explained the nature of Ministerial control and the Maxwell Fyfe Directive; and confirmed the pre-eminence of the Executive in security affairs (Oleynik, 2006: 44). The Denning Report reaffirmed that MI5 was not established in law, nor was it recognised under the common law or the Official Secrets Act. In a gesture designed to generate public legitimacy for the Services, Denning provided a constitutional basis for the functions of MI5 and affirmed that it had no Executive powers (Phythian, 2008:2).

Robertson observed that it was only when the Intelligence Services came to public attention that parliamentary debate on intelligence ensued. As such debates were inevitably associated with scandal and abuse of power as opposed to crucial inquiry on the intelligence process (Robertson, 1998:144). Starting this trend, Prime Minister Margaret Thatcher broke new ground in the 1970's and engaged Parliament on allegations surrounding the Cold War links of former UK intelligence officers Blunt, Hollis, and Oldfield to Soviet intelligence. This was in stark contrast to the refusal of Prime Minister Anthony Eden in the 1950's to entertain any debate on intelligence (Lustgarten and Leigh, 1994: 441). Notwithstanding this minor thaw in relations however, during this period, the Services continued to operate as an extra-legal function on the basis of Executive decrees without parliamentary consent (Lander, 2001: 32; Born and Leigh, 2007: 1). In this regard, the century-old Irish nationalist threat was at its height and the civilian Services, the police and military all assumed a role in Irish counterterrorism with the consequence that their respective roles, missions, and functions were often "conflicted, overlapped, and blurred" (Chalk, *et al*, 2004: 7-8). A disturbing belief in some official circles had also been prevalent that the public ought to accustom itself to state intrusion when in 1979, Judge Megarry candidly averred that "people who use telephones are not entitled to assume that the confidence of what they say will be protected" (Lustgarten and Leigh, 1994: 40).

4.4. The period leading to the end of the Cold War

Although an opaque environment continued to characterise UK intelligence as the Cold War drew to a close, amid the changing threat environment; intelligence failures; allegations of unlawful activities, and concerns about non-compliance with European conventions, Intelligence Service accountability began to slowly emerge in the debate on security affairs.

4.4.1. The Executive

The increasing restraints placed on the Services as a result of intelligence failures and the decline in Cold War tensions became apparent during the early 1980's. In this regard the seizure by terrorists of the Libyan and Iranian embassies in the UK, and the detection of Soviet espionage implicating UK intelligence officer Michael Bettaney, resulted in new internal operational procedures in the Security Service. The diminishing threat of subversion and espionage also spawned significant changes in MI5 as protests against the inadequate restraint of MI6 by government intensified (Oleynik, 2006: 44; Davies, 2004:346). The mid-1980's was an acrimonious period marked by the damaging public disclosures of former and serving members of the Services such as Cathy Massiter. These and other revelations exposed the widespread surveillance of civil society; counter-subversive operations against lawful political activities, and covert action that violated democratic norms in counterterrorist operations. In response, the Prime Minister announced the appointment of a Staff Counsellor in 1987, ostensibly as a sounding board for concerned members, but widely perceived as a safety measure to prevent damaging public disclosure by the disaffected (Chalk *et al*, 2004: 14, 49; Lustgarten and Leigh, 1994:433).

During the Cold War period, intelligence scandals and controversies were investigated through a multiplicity of forms of Executive inquiry. These ranged

from *ad hoc* committees to the semi-permanent Security Commission, the only body conducting any measure of oversight in the UK (King, 2001: 26). In this regard, the Franks Inquiry into the Falklands intelligence failure during 1983 was labelled a ‘classic establishment job’ after it continued a trend of failing to draw the conclusions implicit in its findings and absolved intelligence of failing to detect the Argentine invasion of the Falklands Islands (Mailonline: 2011). The effect of official inquiries in the UK on the development of oversight has therefore been limited. The absence of regular and transparent inquiries into intelligence practice and the cover-ups of intelligence scandals, created a vacuum in the realm of Service accountability; destroyed public confidence in intelligence; and weakened the credibility of the Services, in particular MI5 (Phythian, 2008:1,2).

4.4.2. The Legislature and associated independent mechanisms

According to Gordon (1983: 343), parliamentary interest in secret services has traditionally been seen as out of order, although by 1987 questions regarding the Intelligence Services which did not seek sensitive information were being tolerated. On a more substantial level, the functioning of parliamentary committees, since their reform in 1979 and the first hearings into government secret services, had been restricted by a denial of capacity as a strategy through which the Executive kept Parliament at bay (Lustgarten and Leigh, 1994: 441,445). Later on, parliamentary committees introduced episode-based investigations in their attempt to introduce a new form of oversight. In this regard, the Defense Select Committee investigation in the late 1980’s into the secretive disposal of UK arms manufacturer Westland confronted a determined Executive amid the withholding of testimony and information (Lustgarten and Leigh, 1994:452-3). Parliamentary control over the Executive in the important realm of financial affairs had been limited to approving the budget, and parliamentary questions on intelligence expenditures were traditionally rebuffed (Lustgarten and Leigh, 1994:448). In this regard, the independent

Auditor-General statutory watchdog system over government expenditure working in coordination with the Public Accounts Committee of the House of Commons was circumscribed in the security realm during this period.

Oversight of the financial affairs of the Services was therefore limited to the scrutiny of security Ministers and the Cabinet Secretary (Lander, 2001: 31). As the Cold War drew to a close, intelligence accountability to Parliament was anemic, due mainly to the scarcity of intelligence information and prevailing administrative cultures. Phythian (2008:1) points out however that from the late 1980's Parliament did begin to have an effect on the debate on the need for intelligence oversight.

4.4.3. The Judiciary

The British Courts have historically had little interest in protecting the human rights of intelligence targets and Executive discretion has been left virtually untouched where intelligence information has been used to support Executive action for detentions, exclusion orders and deportation on the grounds of national security. In the Government Communications Headquarters (GCHQ) case, which concerned the labor rights of its members, the general deference of the Judiciary to the Executive was exemplified as Lord Fraser asserted that “the decision of whether the requirements of national security outweigh the duty of fairness in any particular case is for the government and not for the courts; the government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security”. The GCHQ case therefore established that the exercise of the royal prerogative on matters of national security was not subject to judicial review. As a result, the gratuitous judgments of the Courts in favor of the government have also been apparent in restraining publication of classified information in the media (Lustgarten and Leigh, 1994:194, 287 and 330). Beyond this general deference to the Executive on security, in the absence of intelligence

legislation, the Judiciary also played no recognizable role in intelligence affairs during the period leading up to the end of the Cold War.

4.5. Reforms spawned by European conventions

Amid a new wave of public concern over telephone interceptions, non-statutory monitors of interception practices were appointed from the ranks of the Judiciary in the early 1980's in terms of administrative guidelines. However, given the ruling of the European Court of Human Rights in the case of *Malone vs UK* that these guidelines did not clearly indicate the scope and exercise of the relevant discretion conferred upon the authorities; lacked the force of law, and contravened Article 8 of the Convention protecting correspondence and privacy, the interceptions regime in the UK was forced to assume a statutory basis. The resulting Interception of Communications Act of 1985 established both the grounds and review mechanisms for lawful telephone interception and mail opening under warrant of a Minister. A statutory Commissioner to review issued warrants and a Tribunal to hear complaints of improperly authorized interceptions, were also established in terms of the Act. The Act did not define 'national security' and only regulated the right to privacy from interceptions addressed in the *Malone* case and as such left a huge void in the regulation of intelligence as a whole in the UK (Cameron, 2005:40; and United Kingdom: 1985).

4.6. The void in Intelligence Service accountability in the UK

Apart from telephone interception and mail opening, the regulatory framework in the UK remained silent on the use of a whole range of intrusive methods for gathering intelligence information (Lustgarten and Leigh, 1994:73-75; United Kingdom: 1985). Operating on the basis of Executive decrees, the objects, powers and functions of intelligence in the UK did not have, nor did it require, parliamentary approval. In keeping with this, the only officially published details of the work of the Services' as the Cold War drew to a close, was the

Maxwell-Fyfe Directive of 1952 (Born and Leigh, 2007:1). Parliament's record in enacting enabling legislation has therefore been deficient with few statutes that protect human rights. The UK, in failing to incorporate the European Convention on Human Rights into domestic law, has also marginalized its usefulness in UK courts. As a consequence, rights such as freedom of expression and protection from unreasonable search and seizure, which include the right to privacy, have been regarded, with the exception of the interception of communications, as residual rights (Mendel *et al*, 2000:9; Lustgarten and Leigh, 1994:44, 344).

Towards the end of the Cold War, freedom of expression was still being hampered by legislation and official practice, eventually producing a self-censorship in the media. The Official Secrets Act of 1909 was widely seen as an enabler for suppressing reporting of irregularities by the Intelligence Services; did not strike a balance between media freedom and security considerations, and lacked mechanisms for the protection of whistleblowers of intelligence abuses (Mendel *et al*, 2000: 6). Upon the publication in 1987 of *Spy Catcher*, the memoirs of former MI6 officer Peter Wright, the government successfully acted to ban its publication in the UK. The finding of the ECtHR against the continuation of the *Spy Catcher* injunctions by the UK courts on grounds of national security constituted the only exception to this trend (Lustgarten and Leigh, 1994: 345).

4.7. Intelligence reforms

Concerns that in the absence of enabling legislation, MI5 would not be able to gather secret intelligence without violating human rights and would consequently be in breach of the ECHR, focused attention on placing the domestic Security Service on a legislative basis (Hannah *et al*, 2005: 14). The resulting Security Services Bill of 1988 focused parliamentary debate on the desirability of intelligence oversight at a time when the Thatcher government

was of the firm view that oversight of intelligence was both impractical and impossible. *Spy Catcher* contained damaging allegations of UK covert action abroad and aroused suspicions of the political misuse of intelligence in the UK. Although this caused damage to public perceptions of intelligence, the Bill did not accommodate demands for improved accountability, although it did provide momentum for future reform and ushered in intelligence legislation in 1989 (Phythian 2008:1).

As the Cold War was drawing to a close, the intelligence community in the UK comprised of the civilian services, MI5 and MI6; the signals intelligence branch the Government Communications Headquarters (GCHQ) which was established in 1946 as the post-war successor to the Government Code and Cipher School of 1919; and the Defence Intelligence Staff (DIS), an amalgamation during 1964 of military intelligence structures. Alongside these Services, the Serious Organised Crime Agency (SOCA), a crime intelligence agency, completed the membership of the broader intelligence community. The JIC coordination mechanism constituted the focus of strategic intelligence and was the link bringing together the arms of the intelligence community, military and diplomatic service (Burger, 2008:18, 33-35; Oleykik, 2006:30). The objects, powers and functions of intelligence in the UK were not defined in legislation and aside from the Executive, excluded the other branches of the state from its oversight. This reflected the arrangement in the UK that intelligence was conducted in the name of the Crown by Ministers and for which the Prime Minister assumed overall responsibility.

The following section will examine the evolution of Intelligence Service accountability in the US during the Cold War period.

5. THE EVOLUTION OF INTELLIGENCE SERVICE ACCOUNTABILITY IN THE US DURING THE COLD WAR

The effectiveness of US intelligence in the face of the confrontation with the Soviet Union was the dominant aspect of Intelligence Service accountability in the US during the Cold War. This manifested in a national security consensus characterised by an abdication of security affairs to the Executive for most of this period. Given its rights-based constitutional framework and devolution of power however, the emergence of unlawful intelligence activities provided the impetus for the other branches of the state to gradually assume a role in the system of intelligence accountability in the US.

5.1. Constitutional framework for intelligence in the US

The functions and powers of Intelligence Services in the US may be effected only in statute; are supplemented by appropriate presidential delegation and are restricted in terms of the Constitution of the United States of America (Constitution) and other statutes (United States: 1975b). Presidential delegation for the conduct of intelligence is informed by both specific congressional authority conferred upon the President as well as his/her role in terms of the Constitution as Chief Executive Officer, Commander-in-Chief of the Armed Forces and officer responsible for the conduct of foreign relations (Lotz, 2002:5). Given the interpretation of the role of the President, during the early modern period of intelligence, its supervision and control was the exclusive preserve of the Executive. However, since the early years of the US Republic, Congress nonetheless sought to obtain some form of accountability for the secret intelligence activities of the President (Van Wagenen, 2007:98). The defiant stance of the Executive seemed to ward off congressional oversight and during the early 20th century the courts also added their weight to the debate on Executive privilege on the side of government (Manget, 1996:6).

The Bill of Rights in the Constitution protects individual liberties from unnecessary encroachment by government and is complemented by statute and the common law (United States: 1975a). The First Amendment to the Constitution protects freedom of expression and peaceful political association while the Fourth Amendment protects against unreasonable searches and seizures (United States: 1787). The US Supreme Court has also since outlined basic doctrines in accordance with these constitutional principles which encapsulate the civil liberties standards to which US persons are entitled under the provisions of the Constitution. These provide that:

1. Any intrusive investigation of a US person by the government must have a sufficient basis to warrant the invasion caused by the investigative technique utilised;
2. government monitoring of a US persons political activities require an even greater justification;
3. the scope of intrusion must not exceed the degree believed necessary and that
4. these conditions must be met, to the satisfaction of an uninvolved body such as a Court (United States: 1975a).

The development of intelligence accountability in the US during the Cold War is distinguished by certain broad phases.

5.2. The era of trust (1947-1974)

During the period known as the 'era of trust', the Cold War security environment and centrality of the Soviet threat in the nuclear age emphasised intelligence as crucial to preventing a surprise attack. Given these threat perceptions, the US continued to adopt a *laissez faire* approach to the accountability of intelligence as an exception from the rest of government, characterised by secrecy, broad discretion and unlawful action (Johnson, 2003:11, 12).

5.2.1. The Executive and associated mechanisms

The Cold War security consensus ensured deference to the Executive in intelligence affairs, and CIA activities, approved by the White House, were discretionary and allowed for broad latitude (Snider, 2007b:5; Johnson, 2003: 12). NSC intelligence directives and memoranda were the primary devices for conferring guidance and direction to the intelligence community (United States: 1975b). According to Johnson (2003:12) Executive accountability to the relevant House of Representatives and Senate subcommittees was “sketchy, perfunctory and often unwanted”. The CIA Inspector-General post was established in 1952 and its incumbent was appointed under the administrative authority of the director of the CIA. Nominally, the functions of the Inspector-General included the auditing, inspection and investigation of all CIA programmes and operations for effectiveness and legality. Circumventing proposals at the time for congressional intelligence committees, the Eisenhower administration instead established the President’s Board of Consultants on Foreign Intelligence Activities within the Presidency in 1956 to oversee intelligence effectiveness (Snider, 2007a:1; 2007b: 3).

In the domestic arena, the intelligence programs of the FBI and the military that resembled domestic civilian intelligence, established under presidential authority before World War II without proper definition or control, were given renewed attention in the post-World War II period (United States: 1976a; United States: 2005a). Associated intrusive measures were authorised in Executive Directives; the specific approval or blanket delegation of authority of the Attorney-General, or no external authorisation at all (United States: 1976a). Although the standards and procedures for warrantless electronic surveillance were improved during the period from 1964 to 1972, authorisations were based on broad theories of inherent Executive power and the undefined ‘national security’ standard (United States: 1976a). As the era of trust was drawing to a close, efforts to confine electronic surveillance to international

activities directly related to the military security of the United States began to emerge. This set a chain of events in motion that would alter the landscape of domestic electronic surveillance in the US (United States: 1976a).

5.2.2. The Legislature

The US Congress assumed oversight responsibility for the CIA since its establishment in 1947. This responsibility was informal however and resided in the Armed Services Committees and Defence Appropriations subcommittees of both the House and the Senate. Under these circumstances, Service heads interacted directly with Committee heads and formal hearings and testimonies were rarely encountered (Van Wagenen, 2007:99). By 1973, House Subcommittee Chairman Nedzi expressed concern that 26 years after the adoption of the National Security Act in 1947, “the scope of real oversight as opposed to nominal oversight remains unclear” and that the House Subcommittee on Intelligence was “still in the process of defining itself and exploring what we can do and what we must do” (Nedzi, 1996:17). During the 1950's Congress also enacted laws in the fields of internal security, subversion, emergency detention and control of communist activities that facilitated intelligence encroachment into the domestic affairs of US persons (United States: 1976a). Supporting Executive action in response to a 1967 Supreme Court decision that required judicial warrants for the use of electronic surveillance in criminal cases, Congress, in enacting the Omnibus Crime Control Act of 1968 for this purpose, also affirmed the “constitutional power of the President” and ‘suggested’ categories for warrantless electronic surveillance as a national security exception (United States: 1976a).

5.2.3. The Judiciary

Manget (1996:3) observed that during the era of trust the limited participation of the Judiciary in intelligence affairs owed much to the foreign nature of

intelligence practice, and the reluctance of the Judiciary to enter this fray. According to Manget this was the result of the ‘political question doctrine’ which allocated the resolution of national security disputes to the political branches of government. In a departure from this general trend, the Supreme Court in 1967 passed judgement that judicial warrants were necessary for the use of electronic surveillance in criminal cases. In 1972 it held that the President did not have the constitutional power to authorize warrantless electronic surveillance to protect the security of the nation from domestic threats, although it remained silent on surveillance in connection with a foreign power (United States: 1976a).

The Supreme Court ruling in 1971 against the restraint sought by the Administration preventing the publication of the leaked Pentagon Papers, was an affirmation of the public interest defense brought by the media in the absence of credible evidence of harm to national security their publication would cause. While affirming First Amendment rights as vital to media freedom, the ruling did not void the Espionage Act of 1927, nor did it support unlimited media freedom, and the Administration was able to prevail where it had been able to credibly show harm to security in subsequent cases (Lustgarten and Leigh, 1994: 373). Therefore while the government regularly opposed the publication of leaked classified information on security grounds, it was forced to compete against the premium placed by the courts on the constitutional right to freedom of expression.

5.3. The era of uneasy partnership (1975-1985)

Public attitudes in the US during the early 1970’s were severely affected by an unpopular war in Vietnam and the unfolding Watergate scandal. During this period it had also become apparent that US intelligence as a whole was drawn into the turmoil and unrest that occurred throughout the US in the 1960’s, a period characterised by dissent, demonstrations, racial, political and student

violence and widespread anarchy (Van Wagenen, 2007:99; Lotz, 2002:1). These developments, and congressional efforts to rein in the Nixon administration and establish the extent to which the US intelligence apparatus had participated in irregular and unlawful activities during the previous decade, brought the era of benign intelligence oversight to an abrupt halt and ushered in an era of ‘uneasy partnership’ within and among the respective branches of government (Van Wagenen, 2007:99).

Allegations of intelligence abuses arose as a consequence of the early development of media scrutiny of intelligence in the US and surfaced with press revelations, first of Christopher Pile in January 1970 of US Army domestic spying, and culminated in December 1974 in a New York Times expose by Seymour Hersh detailing CIA irregular operations dubbed the “family jewels” (Van Wagenen, 2007:99; Lotz, 2002: 1).

5.3.1. Executive and congressional responses

The media revelations jolted the Ford Administration into appointing the Rockefeller Commission, the first initiative of what was to evolve into an “ever-widening path of inquiry” that created an unprecedented exposure of intelligence practices in the public domain (Lotz, 2002:1). During the early part of 1975 additional disclosures had surfaced of CIA domestic espionage. The counterintelligence programme of the FBI, which was directed at anti-war protesters and the civil rights movement from 1956-1971 and resembled domestic civilian intelligence gathering, was also exposed (Johnson, 2003:14). These further revelations persuaded Congress to limit its reliance on the Rockefeller Commission and as a result the Church and Pike Committees were created in the Senate and the House of Representatives respectively, to conduct independent investigations into the allegations (Van Wagenen, 2007:100).

The earlier Ervin Committee on US Army abuses and the Church and Pike Committees, confirmed intelligence malpractices that included the unlawful opening of private mail of US citizens by the CIA; the existence of more than a million unauthorised files on US citizens in the custody of the CIA and FBI; interception and eavesdropping of private telephone conversations by the National Security Agency; more than one hundred thousand unauthorised investigations by Army Intelligence; unauthorised drug experiments by the CIA; infiltration of media, religious and academic bodies; foreign covert action including manipulation of foreign elections and assassination attempts on foreign leaders, and the unauthorised release of tax records by the Revenue Services (Lotz, 2002:5; Johnson, 2003:13).

5.3.2. Impact on intelligence service accountability

These findings and consequent public pressure to reform the intelligence community, spawned the concerted engagement of all branches of government in this regard and confirmed the role of the media as a catalyst for change. From 1975, the imperative for security in the US was confronted by another equally important democratic value, and henceforth security would have to compete with individual liberty, as a quest to balance these contradictory values superseded the old consensus (Hardy, 1996:6; Johnson, 2003:13-14).

5.3.2.1. Executive initiatives

The early adoption of the Rockefeller recommendations resulted in comprehensive internal regulations within the CIA in 1975. Informed by a range of investigations, the President in 1976 issued Executive Order 11905 United States Foreign Intelligence Activities which provided for restrictions on US intelligence activities (United States: 1976b; Lotz, 2002:6). These included, with some exceptions, a prohibition on domestic CIA electronic surveillance; a prohibition on the indiscriminate collection of information on US citizens; and a

directive to comply with the law in mail interceptions and intelligence assistance to law enforcement agencies (Hardy, 1996:9). The Order directed the Attorney-General to regulate electronic surveillance, and limited civilian intelligence activity in the US to gathering foreign intelligence. Foreign intelligence also included intelligence on a limited category of other threats that required a US person to collaborate with a foreign agent. This arrangement reflected the policy that the protection of the civil liberties of Americans was seen as a demarcating line. Executive Order 11905 also provided for the decentralisation of accountability along with charters and delegation of responsibility (United States: 1976b; Hardy, 1996:10-11). Despite increasing concerns that covert action was inimical and detrimental to US foreign policy, the conventional view that the US President needed the capability and that the CIA was the appropriately equipped agency to conduct it, held sway. As a result, the Order's only limitation on covert action was a ban on political assassination (Hardy, 1996: 11).

Executive Order 11905 established the President's Intelligence Oversight Board, a safety valve to monitor and report unlawful intelligence conduct and the National Foreign Intelligence Board (substituting the US Intelligence Board) to develop intelligence policy and manage collection systems and budgets (United States: 1976b; Lotz, 2002:6). These new boards stood alongside the already existing intelligence performance oriented President's Foreign Intelligence Advisory Board, the successor of the Eisenhower established Foreign Intelligence Board (Hardy, 1996:12). The Order represented the first unclassified directive on US intelligence functions and objectives, and superseded classified NSC directives. It also obliged intelligence community Inspectors-General and agency heads to detect and report irregularities to the Intelligence Oversight Board and differed from the Church Committee recommendations only in that its restrictions were not enacted in legislation (Lotz, 2002:6; Hardy, 1996: 10).

While the FBI's remit included foreign intelligence gathering in the US, it was excluded from restrictions on intelligence activities in terms of Executive Order 11905, and its combined intelligence and law enforcement activities were instead regulated by internal regulations drafted by Attorney-General Edward Levi in 1976 (Hardy, 1996:15). These included guidelines on foreign and counterintelligence, as well as domestic security guidelines which applied the criminal standard to the conduct of intelligence that targeted US persons. As a result, domestic security intelligence collection in the FBI was limited to circumstances where a crime had been committed or was about to be committed. Under these circumstances the conduct of intelligence that resembled domestic civilian intelligence was limited by law and the lawful actions of potential targets could therefore not be a focus of intelligence, and intelligence that resembled domestic civilian intelligence declined considerably as a result (Shulsky, 2002: 149).

5.3.2.2. Independent mechanisms

In the aftermath of the intelligence scandals of the 1970's and the exposure of intelligence oversight failures, the Church Committee found that while the Inspectors-General of the CIA and FBI were charged with investigating improper and unlawful conduct, their focus was on operational effectiveness and the investigation of legality was not of primary concern (United States: 1976c). These revelations emphasised the fact that since inception, the Inspector-General function had been conducted with serious structural defects and limited oversight strategies, and broader proposals for reform of the Inspector-General function were not enacted into law (United States: 1976d; Snider, 2007a:2).

5.3.2.3. Legislative initiatives

In a reversal of the US ‘philosophy of intelligence exceptionalism’, at the end of 1974, Congress passed the first major piece of legislation to regulate CIA activities, namely the Hughes Ryan Act, which strengthens Executive and Legislative control over covert action. The Act required Presidential approval of CIA covert action in terms of ‘findings’ which included an assessment against specific criteria justifying an operation. Reflecting the spread of the intelligence oversight responsibility in Congress, each finding was submitted to six and later eight congressional committees after the formation of the congressional Intelligence Committees (Johnson, 2003:13; Van Wagenen, 2007:100). The era of uneasy partnership was therefore characterised by tense negotiations, conflict and turf battles as reform initiatives unfolded and culminated in Intelligence Committees in both Houses of Congress (Johnson, 2003:15; Lotz, 2002:5). The Senate Select Committee on Intelligence was accordingly established in May 1976, followed by the House Permanent Select Committee on Intelligence in July 1977. These committees together with the Armed Services, Foreign Relations and Foreign Affairs Committees, assumed responsibility for the authorisation of intelligence programmes and oversight of intelligence activities (Johnson, 2003:15; Van Wagenen, 2007:100).

5.4. The Post-scandal period of the era of uneasy partnership

Notwithstanding the underlying conflict and the impediments on reform initiatives, the ‘era of uneasy partnership’ was a watershed and transformed the nature of Intelligence Service accountability in the US.

5.4.1. The Executive

The Carter administration continued the intelligence reform process during the late 1970’s and sought to establish a definitive framework for US intelligence.

Executive Order 12036 on United States Intelligence Activities superseded Executive Order 11905 and emphasised the protection of the liberties of US persons. A fundamental provision of Order 12036 created the obligation on the heads of the Intelligence Services to develop internal directives approved by the Attorney-General for all restrictions (including collection on US persons) on foreign and counterintelligence gathering contained in the Order (United States: 1978b; Lotz, 2002:6). In enabling legislative oversight, the Order compelled Service heads to keep the Intelligence Committees fully and currently informed of their activities. The Reagan administration issued Executive Order 12333 on United States Intelligence Activities which provided greater latitude to the Services and superseded Executive Order 12036 in December 1981. It remained in force until the end of the Cold War period (Lotz, 2002:6-7). Executive Order 12333 conferred authority upon the NSC, the Director of the CIA and the Attorney-General to issue directives to implement the Order, and maintained the strict procedural requirements of the Carter Order for intelligence activities (United States: 1981; Lotz, 2002:10). The Order proscribes intelligence collection on the domestic activities of US persons in the process of collection of foreign intelligence and counterintelligence in the US, and requires Attorney-General approval for the use of all collection techniques that would have needed a warrant had they been deployed for the more strictly regulated law enforcement purpose (United States: 1981).

5.4.2. The Legislature

During this era, the precedent of serious and ongoing review of intelligence programmes and budgets within the intelligence oversight and appropriations committees was established, and intelligence had entered the realm of democratic oversight prevalent in the rest of government (Johnson, 2003:15). This trend was enforced when in 1978 the enactment of the first intelligence authorisation act conferred to the committees the crucial control of the purse of the intelligence community. As the US confronted the Soviet invasion of

Afghanistan and the Iranian hostage crisis in the late 1970's and early 1980's, the committees began to eschew the policy of adversity towards the Executive that characterised the Church and Pike initiatives, and assumed a greater advocacy role for intelligence. From the period of benign neglect since the formal arrangements for oversight in 1947 to the early 1970's, and suspicion and doubt in the late 1970's, oversight entered a period of cooperation in the early 1980's (Van Wagenen, 2007:100-101). The approach of rejecting legislation as a means to regulate the conduct of intelligence activities in favour of other forms of regulation in the immediate aftermath of the scandals, also changed in 1978 with the enactment of the Foreign Intelligence Surveillance Act (FISA). Given the gap in the regulatory framework and Fourth Amendment protection, FISA sought to regulate the conduct of electronic surveillance of US persons for foreign intelligence gathering (United States: 1978c; Manget, 1996:6).

The Intelligence Oversight Act of 1980 reformed the oversight dispensation and conferred upon the congressional Intelligence Committees the sole responsibility for the CIA (United States: 1980a). The Act amended the Hughes Ryan Amendment to prescribe notice of covert action to only the Intelligence Committees, although initiatives that sought to introduce an intelligence charter in legislation were rejected (United States: 1980a; Johnson, 2003:14-15). Congress also enacted legislation which established statutory procedures for the handling of classified information in Federal criminal proceedings, and later adopted legislation to protect agent identities from disclosure (United States: 1980b; Van Wagenen, 2007:101).

5.4.3. The Judiciary

Although limited in scope and still deferential to the Executive, judicial review evolved substantially toward the end of the era of 'uneasy partnership'. The judicial activism of the 1960's; the changing approach of resolving international

disputes through legal means; the intelligence investigations of the 1970's; and the increasing number of statutes on intelligence, gave rise to increasing judicial aspirations in the security sector (Manget, 1996:4). This involvement manifested broadly, in terms of statute as well as constitutional First Amendment and Fourth Amendment rights (Manget, 1996: 8-10). The US Supreme Court also established the crucial principle that constitutional rights are inherently subject to restrictions given the importance of certain countervailing interests these restrictions are protecting. As such, the Court has continually formulated the standards which these restrictions must meet to be constitutionally valid (Lustgarten and Leigh, 1994:342-3). Given these developments as well as the overall reform in the regulatory environment, by 1980 the then US Attorney-General maintained that while some confusion prevailed in the interpretation of the law, "there was no longer doubt that intelligence is subject to definable legal standards" (Manget, 1996:4).

5.5. The era of distrust (1986-1989)

The 'Iran-*contra* affair' regarding the unlawful scheme that utilised the proceeds of arms sales to Iran to achieve regime change in Nicaragua, was revealed in a Middle-Eastern newspaper in 1986. This shattered the hard-earned trust between Congress and the Executive as it became apparent that the Reagan administration circumvented the Boland Amendments curbing covert action in Nicaragua, as well as the related constitutionally based appropriations process (Van Wagenen, 2007:101; Johnson, 2003:16). The Democrat-Republican disagreement regarding the use of covert action in Nicaragua threatened the bipartisan workings of the Intelligence Committees, and oversight as a consequence descended into acrimony as the Cold War era drew to a close (Johnson, 2003:16).

Although the structural and substantive limitations associated with the Inspector-General function were widely reported during the investigations of

the 1970's, establishing a statutory Inspector-General gained momentum only after deficient Inspector-General reports on the Iran-*contra* scandal again exposed these limitations (Snider, 2007a: 2,7). As a result, legislation was enacted in 1989 to provide for an independent Inspector-General appointed by the President with Senate confirmation. The Inspector-General accordingly gained considerable leverage with independent access and reporting to both Houses of Congress as well as the Intelligence Oversight Board of the President (Snider, 2007a:1). With the benefit of hindsight however, Johnson (2003:35) observed that while oversight had been more extensive in the US since the establishment of the Intelligence Committees, it had not satisfied the objectives set by the Church Committee; had been sporadic and inconsistent, and responsive to scandals and crises, while the Executive had been less than exemplary in its oversight of intelligence.

As the Cold War drew to a close, the US intelligence community was a distributed confederation of Services and in addition to the CIA, comprised of the FBI, which conducted foreign intelligence in the US; the signals intelligence branch, the National Security Agency (1952); the National Reconnaissance Office (1960); and the Defence Intelligence Agency (1961). The community also included the National Imagery and Mapping Agency; the State Department Bureau of Intelligence and Research; and the intelligence components of the departments of Energy and Treasury (Lowenthal, 2006:32; Odom, 2004:xx). The community functioned within a system of accountability characterised by a foreseeable, although in some instances broad internal and external regulatory framework, complemented by independent oversight and review of intelligence that involved all the branches of government.

6. COMPARISON OF INTELLIGENCE SERVICE ACCOUNTABILITY IN THE UK AND US

During the early Cold War period, the system of government in the UK coupled with the Cold War consensus on the Soviet threat to the UK, had the effect of enabling the conduct of intelligence according to Executive discretion with almost no restriction, checks and balances or protection of human rights. In this environment, the courts and the Legislature were deferential to security claims in the name of the Crown. In the US a similar approach could be observed where the supervision and control of intelligence was the exclusive preserve of the Executive, and the constitutional powers of the President as Chief Executive enforced this position. A national consensus regarding the danger to the US from communism consequently ushered in an 'era of trust' that had relied on an attitude of benign neglect and deference to the Executive that was reflected in the decisions of the Supreme Court and acts of Congress. Despite these apparent similarities however, the evolution of Intelligence Service accountability in the UK and US began to assume very different paths since these early developments.

Media revelations in the US of intelligence abuses both during the 1970's and again in the 1980's, resulted in fundamental reform to the system of Intelligence Service accountability as both the Executive and Congress were spurred into action. In contrast, intelligence failures and the exposure of abuses resulting from the over-breadth of intelligence interest in the domestic sphere in the UK, did not serve as a catalyst for reform as official responses to the public were often marked by cover-ups.

The fundamental importance accorded to human rights and the constitutional arrangement in the US, is reflected in the gradual management of the conflict between intelligence secrecy and democratic principles as the Cold War unfolded. This manifested in a system of Intelligence Service accountability

that sought to align itself with US constitutional principles, and the security dilemma was arbitrated by an interdependent compensatory system of checks and balances. Having entered the Cold War with both a domestic and foreign intelligence capability conducted without significant external supervision, reforms to the regulatory framework that were spawned by the revelation of abuses engineered an intelligence dispensation that is more in line with the ideals of the US Constitution. Although a comprehensive intelligence charter has not been defined in statute, the role of the Judiciary in shaping the nature and extent of intelligence exceptions to constitutional principles, and Congress in enacting enabling laws, have also been significant in this regard. While the covert involvement of US intelligence in foreign affairs and external conflict leaves much to be desired and would seem to be inimical to international law and its own purported values, its conduct in the domestic context occurs in an environment that accords the appropriate recognition to the constitutional rights of its citizens.

In a stark reflection of the contrasting attitude to Intelligence Service accountability in the UK and US, as the Cold War drew to a close, the objects, functions and powers of intelligence in the UK remained largely unregulated and unchecked in a manner that would indicate with clarity, the scope and exercise of discretion conferred upon the Intelligence Services, and lacked the force of law. The culture of secrecy was so pervasive that it also extended to the UK authorities denying the existence of a foreign intelligence capability outside of periods of war. While the regulatory framework for communications interceptions was motivated by court challenges mounted under the auspices of the European Convention on Human Rights against the *status quo* and appeared as exceptions to the unregulated environment, this may be a misconception, given the close control exerted by the Executive in this arena. Given the general void in arrangements for Intelligence Service accountability, the UK establishment was vulnerable to further challenges in the European Court for Human Rights as a result of the inherent contradictions between intelligence

practice in the UK and democratic principles. This external source of pressure was emerging as the main catalyst for intelligence reform, shedding some light on the culture of public administration in the UK.

At the end of the Cold War, the controversy about the source of authority to influence and direct intelligence policy was apparent in both the UK and US, especially between the Executive and the Legislature. This debate notwithstanding, arrangements for Intelligence Service accountability in the US evolved substantially within the Services and in all branches of government as the country was compelled to arbitrate its 'security dilemma'. In contrast, and notwithstanding the view of its acceptability within the UK establishment, the void in arrangements for intelligence accountability; the philosophy of intelligence conduct in the name of the Crown; and abdication of the management of security affairs to the Executive in the UK, would be unacceptable and could not pass democratic muster in the US.

Table 1 below provides a comparison of the framework and instruments for civilian intelligence service accountability at the end of the Cold War in the US and UK.

TABLE 1: A COMPARISON OF ARRANGEMENTS FOR INTELLIGENCE SERVICE ACCOUNTABILITY AT THE END OF THE COLD WAR IN THE UK AND US			
		UNITED STATES	UNITED KINGDOM
A	LEGAL FRAMEWORK		
1	Basic law or constitution enabling intelligence.	US constitution. President as commander-in-chief responsible for the conduct of foreign relations and hence intelligence.	Conducted in the name of the Crown by the Executive.
2	Constitutional restraints	Constitutional protections; Bill of Rights and standards of	No specific laws, protection of human

	protecting human rights from intelligence abuses.	the constitutional court.	rights in general dependent on common law.
3	Legislation enabling objects; powers and functions.	No statutory charter for intelligence in law. National Security Act and CIA Act are broad enablers. Foreign Intelligence Surveillance Act regulates electronic surveillance for foreign intelligence and Hughes Ryan amendment guides authority for covert action.	Interception of Communications Act the sole legislation for intelligence. General reliance on Executive discretion.
4	Executive regulatory framework.	Presidential Orders and NSC guidelines confer further intelligence functions and regulate the use of intrusive powers. Attorney-General guidelines also regulate the use of intrusive powers.	Limited to Maxwell Fyfe directive, a broad guide for domestic intelligence.
5	Clear definitions of national security.	Regulatory framework on intelligence affords broad interpretation.	Broad definition in Maxwell Fyfe directive.
6	Demarcation of civilian intelligence functions and intelligence from law enforcement.	Yes. FBI however has dual role of law enforcement/crime intelligence and foreign intelligence in US. CIA mandated to conduct foreign intelligence.	Yes. MI5 domestic and MI6 foreign, both demarcated from Police functions/crime intelligence.

B EXECUTIVE OVERSIGHT			
1	Supervision of intelligence.	The President has overall responsibility for intelligence. National Security Council supervises the CIA and intelligence as a whole. The Attorney-General is responsible for the FBI.	The Prime Minister has overall responsibility for intelligence. Delegation to Home Secretary (MI5) and Foreign Secretary (MI6).
2	Executive support mechanisms.	The President's Foreign Intelligence Advisory Board monitors intelligence effectiveness and Intelligence Oversight Board monitors unlawful activities.	No.
3	Special authority for conduct of covert action.	President, informing legislature.	Not apparent.
4	Inquiries	Dulles; Hoover; Clark; Murphy and Taylor Commissions on the functioning of intelligence. Rockefeller Commission in response to scandal.	The semi-permanent Security Commission and Franks Commission in response to scandal/failures.
C ROLE OF THE LEGISLATURE: OVERSIGHT MECHANISMS			
1	Independent oversight committees	Active Intelligence Committees in both Houses of Congress.	No dedicated committees on intelligence.
2	Role of the legislature:	Intelligence Committees control the intelligence purse.	Nominal parliamentary

	intelligence budgets		approval of budgets only.
3	Role of the legislature: enacting legislation.	Relatively active. Intelligence charters not legislated for.	No record of adopting intelligence legislation. One exception towards end of Cold War.
4	Legislative oversight of intelligence conduct and reforms	Active with mixed results.	Absent.
5	Inquiries.	Church and Pike inquiries in response to intelligence abuses.	No.
D	INDEPENDENT OVERSIGHT		
1	Public recourse mechanisms for intelligence		
1	Complaints mechanisms	Inspectors-General and legislative committees for intelligence conduct as a whole.	Judicial Tribunal for interceptions only. Executive staff officer for intelligence officers.
2	Independent review mechanisms		
1	Review of intelligence operations for effectiveness and lawful conduct.	Inspectors-General.	No comparative mechanism.
2	Financial audit.	Inspectors-General and Independent Audit Office with	Independent Audit Office circumscribed

		information access limitations.	in the intelligence realm.
3	Intrusive measure-specific review.	No.	Judicial Commissioner review of Ministerial approved interception warrants.
E	JUDICIAL		
1	Authority for use of intrusive measures.	Prior approval of electronic surveillance for foreign intelligence from the Foreign Intelligence Surveillance court.	No.
2	Public recourse intelligence abuse	No. Use of alternative mechanisms.	Tribunal for wrongful interceptions.
3	Activism in refining constitutionality of intelligence practices.	Strong record.	Absent.
4	Activism in protecting human rights and public disclosure of intelligence abuse.	Deferential to the Executive with a balanced approach to protecting human rights and public disclosure of intelligence abuses.	Almost exclusively deferential to the Executive.
F	STANDARDS OF TARGETING		
1	Standard for targeting of citizens	Only for gathering foreign intelligence with requisite authority. Domestic activities of citizens require application of the criminal standard, i.e. violation of law or potential	Intelligence threat-based standards for domestic or foreign intelligence purposes. Further standards not apparent.

		therefore. Restrictions on targeting citizens formulated in directives approved by the Attorney-General.	
2	Authority for use of intrusive techniques against citizens.	Court authority for foreign intelligence. Domestic activities regulated by standards of authority as for criminal investigation.	Not specifically regulated.
G	ROLE OF THE MEDIA		
1	Reporting abuses.	Active in investigating and disclosing intelligence abuses. No impeding official secrets laws.	Limited. Effective official secrets laws and restraining devices.
2	Attitude of the courts to government efforts to prevent media disclosure.	In the absence of official secrets laws, government must show harm to national defence, rather than mere disclosure of classified information.	On the side of government. Application of official secrets laws to prevent disclosure of classified information.
3	Special provisions to silence the media.	No.	Laws that compel media to disclose the identity of sources. System of voluntary prior official clearance restrains publication of sensitive information.

7. CONCLUSION

This chapter provided an historical overview of the evolution of Intelligence Service accountability in the UK and US during the Cold War period, and a broad comparison between the two countries toward the end of the Cold War. It highlighted intelligence in the UK and US as the sole and unchecked domain of the Executive, at least initially, especially in times of conflict and a heightened threat environment. It also emphasised that claims for greater intelligence accountability during the Cold War only succeeded and the Executive only conceded authority over intelligence when compelled to do so. This was evident in the US as intelligence abuses were exposed to the public during the 1970's and to a lesser degree during the 1980's. In the case of the UK, where potential scandals have been contained, greater accountability has been achieved as a result of the European Convention on Human Rights being invoked to point out the incompatibilities of intelligence practices with democratic norms. To the extent that this has been undertaken, this chapter also highlighted the different paths to intelligence reform in the UK and US, which follow the different styles of government in the respective countries and their democratic traditions and values.

The following chapter will examine the further evolution of the system for civilian intelligence service accountability in the UK during the post-Cold War period from 1989 to the end of 2009.

CHAPTER 4: THE EVOLUTION OF CIVILIAN INTELLIGENCE SERVICE ACCOUNTABILITY IN THE UNITED KINGDOM DURING THE POST-COLD WAR PERIOD

1. INTRODUCTION

The purpose of this chapter is to examine the evolution of the system for civilian Intelligence Service accountability in the UK from the end of the Cold War in 1989, with specific emphasis on the role of the European Convention on Human Rights (ECHR) and the terrorist attacks against the US and UK during September 2001 and July 2005 respectively. The reason for this is to explain how the system for intelligence accountability, including its organising principles; mechanisms and referent environment have been directly influenced by multilateral treaties and national security events. The chapter will commence with a discussion of the evolution of intelligence accountability in the UK from the end of the Cold War to the end of 2000, followed by a discussion on its further evolution during the period thereafter, which includes the terrorist attacks against the US and UK, up to the end of 2009.

2. THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS IMPACT ON INTELLIGENCE SERVICE ACCOUNTABILITY

The end of the Cold War ushered in an era of uncertainty that resulted in a new post-Cold War security paradigm in the UK. As the threat from subversion and espionage declined, Irish terrorism was at its height and international terrorism was posing a growing threat. While the priorities of MI5 and MI6 reflected this evolving threat environment, a huge vacuum also emerged as they began to grapple with the relevant mission of intelligence in the post-Cold War era (Goodman *et al*, 1994: 301). The intelligence community in the UK continued to operate without a statutory basis during this period, and given the minimalist reform policy of the Thatcher administration pursuant to the case of *Malone v.*

UK in the European Court of Human Rights (ECtHR) in 1985, UK intelligence remained vulnerable to further challenges in the Court (Foster, 2006:141).

2.1. Overview of the European Convention on Human Rights and its standards for the conduct of intelligence

The ECHR treaty and its protocols was first adopted in 1950 to protect human rights and fundamental freedoms in member states of the Council of Europe and compels them to secure the fundamental rights enumerated in it for those subject to their respective jurisdictions. The convention also establishes the ECtHR to investigate complaints from individuals in this regard, provided they have exhausted domestic remedies.

The ECHR is therefore a source for minimum standards for intelligence gathering. Its primary restriction in this regard is the principle of ‘accordance with the law’ which means that the exercise of state power, in particular coercive power, must have support in terms of statute law, subordinate legislation or case law. Of equal importance, the ECtHR has prescribed the need for minimum standards of foreseeability, and for those granting discretionary powers to establish careful criteria for the identification of targets; the objects of the exercise of power, and limits thereto. The Convention also establishes the concept of ‘necessity’, which involves a review of controls over the abuse of discretionary power. Article 8 of the ECHR provides for the right to privacy, arguably the most relevant article in relation to intelligence gathering. Given the chilling effect on free speech posed by the speculative nature of security intelligence gathering, Articles 10 and 11 provide for the rights to freedom of expression and association. In this regard, the primary utility of the ECHR and ECtHR is to imbue the system for intelligence accountability with minimum levels of foreseeability regarding legal authority to conduct secret intelligence (Cameron, 2005: 43; Council of Europe: 1950).

2.2. Reconciling the conflict between secret intelligence in the United Kingdom and the European Convention on Human Rights

In the cases of *Hewitt and Harman v. UK (No. 1)* and *Nimmo v. UK*, the appropriateness of the Maxwell Fife Directive (MFD) as the sole legal basis in support of the activities of the Security Service (MI5) was raised. The MFD, an administrative guideline, was derived from the royal prerogative, and made no reference to Parliament. Given that it established no formal statutory limits and could be amended without notice, it was unable to comply with the requirements of the ECHR. Furthermore, the ECHR permits restrictions on certain human rights on security grounds, but such restrictions must be authorised in law. The UK, in responding to the objection that it could not conduct secret intelligence without violating human rights as purported in these two cases, adopted the Security Service Act of 1989 to provide a statutory basis for the work of MI5 (Leigh, 2005: 80; Cameron, 2005: 45).

2.2.1. Statutory framework for domestic and foreign intelligence in response to the European Court of Human Rights

In giving effect to the ‘accordance with law’ principle, the 1989 Act established the objects and domestic intelligence functions of MI5 in broad terms, along with the threats that it is responsible for countering. The existence of the Secret Intelligence Service (MI6) was only officially acknowledged in 1992, and was followed by the adoption of Intelligence Services Act of 1994. This gave effect to the ‘accordance with law’ principle and established in broad terms the objects and foreign intelligence functions of MI6. This initiative, which also established the GCHQ in legislation, was part of the natural progression of placing the Intelligence Services on a statutory basis and aligning UK intelligence with ECHR standards. In keeping with the general practice of conferring broad authorities, neither the 1989 Act nor the 1994 Act

(founding legislation) defined the term national security (United Kingdom: 1989 and 1994; Leigh, 2005:80).

2.2.2. Alignment with the standards of the European Convention on Human Rights and the European Court of Human Rights

As well as establishing the objectives and functions of the civilian Intelligence Services, legislation also provided for certain intelligence gathering powers; review and oversight mechanisms, and an elaborate system of control features over civilian intelligence in the UK.

2.2.2.1. Executive responsibility and accountability

The founding legislation for intelligence in the UK formalised Ministerial accountability under the Home Secretary (MI5) and the Foreign Secretary (MI6), and vested operational control in the heads of Services with access to the Prime Minister. Although Ministerial responsibility is an important element of the founding legislation and enabled Ministers' to appoint the heads of Services, broad responsibility for intelligence remained with the Prime Minister as head of government. In this regard the founding legislation compels the heads to make an annual report on the Services to the Prime Minister and the respective Ministers'. The legislation therefore maintained the traditional arrangements for reporting and accountability for both MI5 and MI6. The contextualisation of the functions of MI6 within the framework of government policies established a basis for Ministerial control. The functioning of MI5 is ostensibly subject to fewer political controls (United Kingdom: 1989 and 1994; Leigh, 2005: 80, 82, 84).

2.2.2.2. *Intrusive powers, authority and limitations: interference with property*

The 1989 Act provides for the power of interference by MI5 with respect to any property authorised by a warrant issued by the Minister. The Act limits authority in this regard to circumstances where such interference is necessary in order to obtain information which is likely to assist the Service to discharge its functions and cannot reasonably be obtained by other means, and provides for a time limit to the warrant. The 1994 Act consolidated the powers and limitations for interference with property, and added interference with wireless communications authorised by a warrant issued by the relevant Minister in relation to MI5, MI6 and GCHQ. These provisions give effect to the ECHR and case law of the ECtHR, including the principles of ‘accordance with the law’; ‘necessity’; ‘control over abuse’; ‘standards of foreseeability’ and ‘objects and limits’ with respect to the interference with property, and wireless telegraphy, and complemented the Interception of Communications Act of 1985 which provides for mail and telephone interceptions by warrant (United Kingdom: 1985, 1989 and 1994; Cameron, 2005: 38).

2.2.2.3. *Statutory limitations and internal controls*

The ECtHR ruled in the case of *Rotaru v Romania* that internal controls must be in place to accompany broad authorisations to gather intelligence on the grounds of national security. It also ruled that the statute must establish the requirement for internal guidelines to limit the collection and disclosure of collected information (Cameron, 2005: 46). In this regard, the founding legislation charges the heads of Services to establish arrangements for ensuring that information is obtained and disclosed by the Services only for the discharge of their functions, and that they do not take any action to further the interests of any political party. The relevant Minister is also charged with establishing that the ‘obtain and disclose’ arrangement is in place prior to

considering any warrant, or the authorisation of MI6 activities abroad. The 1989 Act further limits the sphere of operation of MI5 to exclude executive functions such as arrest and detention in terms of the law; questioning of suspects, and prosecution which are the domain of the police and prosecution respectively (United Kingdom: 1989 and 1994; Leigh, 2005: 82).

2.2.2.4. Independent complaint mechanisms

In the case of *V et al v. Netherlands* the ECtHR established the requirement for a legal redress mechanism for responding to complaints of intelligence abuse and violation of human rights, although these mechanisms need not be the courts (Leigh, 2005: 80; Cameron, 2005: 44). The UK legislation accordingly established Tribunals for each of the civilian Services to investigate complaints from any person aggrieved by any conduct of the Services in relation to him or to his property. The Tribunals make judgments on the standard of 'reasonability' and are able to direct remedies that include the deletion of files; termination of inquiries and monetary compensation (United Kingdom: 1989 and 1994).

2.2.2.5. Independent review mechanisms

In the case of *Rotaru v Romania* the ECtHR established the need for 'external control', such as review, where legal authorities conferred on the Executive to gather intelligence are broadly defined. In this regard, the UK legislation provides for the Prime Minister to appoint judicial Commissioners for each Service to "keep under review" and report to him the exercise by the relevant Minister of their warrant powers, and to authorise the activities of MI6 abroad. In this regard the limited degree of 'external' control exerted by the part-time Commissioners was considered adequate by the Court to satisfy Article 8 of the ECHR in both the *Esbest v. UK* and *Hewitt and Harman (No.2)* cases, provided that internal controls were in place and there was no evidence of non-

compliance (Cameron, 2005: 46-7; United Kingdom: 1989 and 1994). Notwithstanding their wide-ranging powers however, the 2001 revelations in the House of Commons of the incapacity to conduct their functions did little to inspire confidence in the ‘independent’ Commissioners and Tribunals (United Kingdom, 2001d).

Table 2 below depicts the broad organisational arrangements for the civilian Intelligence Services in the UK.

TABLE 2: ORGANISATION ARRANGEMENTS FOR CIVILIAN INTELLIGENCE IN THE UK		
Object of arrangement	Security Service (MI5)	Secret Intelligence Service (MI6)
Functions	Gathering of domestic intelligence within the UK and abroad. Conducts covert work on behalf of MI6 in the UK.	Gathering of foreign Intelligence in the UK (except covert work) and abroad.
Ministerial control	Home Secretary.	Foreign Secretary.
Interference with property; and wireless communications	Limited to functions where information cannot be obtained by other means. Requires approval of the Home Secretary.	Limited to functions where information cannot be obtained by other means. Requires approval of the Foreign Secretary.
Statutory limitations	Internal guidelines required in law for limiting the collection and disclosure of information.	Internal guidelines required in law for limiting the collection and disclosure of information.
	Ban on party political	Ban on party political

	activities.	activities.
	Ban on policing work in the UK.	May not conduct covert work in the UK.
Complaint mechanisms	Security Service Tribunal	Intelligence Service Tribunal
Review mechanisms	Security Service and Interceptions Commissioners	Intelligence Service and Interceptions Commissioners

2.2.2.6. Parliamentary accountability

Upon the adoption of the 1989 Act, the Executive argued that it could not account to Parliament on its supervision of intelligence without compromising necessary secrets (Leigh, 2005: 86). After decades of Executive opposition however, embarrassments in the ECtHR and the 'arms to Iraq' affair, in which the government endorsed the sale of arms to Iraq by British companies, established the case for some parliamentary involvement in intelligence. The impetus however was to institute a manageable form of oversight as a means to pre-empt demands for conventional parliamentary oversight of intelligence. In this context, the John Major government conceded to the creation of the Intelligence and Security Committee (ISC) under the 1994 Act (Hindle, 2009: 1; Gill, 2009:931).

With nine members drawn from both Houses of Parliament, the ISC was charged with examining the expenditure, policy and administration of the Services established by law in the UK. Though it holds a similar remit, the ISC was not conceived as a parliamentary select committee but a committee of parliamentarians appointed by, and reporting directly to the Prime Minister, as opposed to Parliament. Other than the general exclusion of operational information from its purview, access to intelligence was further restricted on security grounds and conditions established under foreign intelligence sharing

arrangements (United Kingdom: 1994). The creation of the ISC was a significant achievement however, and introduced an element to the intelligence oversight architecture in the UK with a direct link to the general public (Gill, 2009: 931). Since its creation in 1994 to the end of 2001, the ISC invested heavily in building the trust of the Services. Its credibility and allegiance to Parliament was questioned however amid accusations of collaboration with the Executive in the cover up of revelations of unlawful intelligence practices by former intelligence officer, Cathy Massiter. During this period the ISC nevertheless developed a methodology of oversight within the confines of its remit and introduced financial accountability in the Services (United Kingdom: 2001e; Foster, 2006:157).

2.3. The further evolution of the framework for Intelligence Service accountability in the United Kingdom up to the end of 2000

MI5's assumption of the lead responsibility in the UK for countering Irish extremism evolved into its main priority in 1995, and enabled it to refocus its underutilised resources. As the ceasefire in Ireland created a capacity vacuum once again, 'organized crime' was accordingly established as one of its functions in 1996 (Chalk *et al*, 2004: 9). As the conundrum of post-Cold War missions unfolded, the relatively benign security environment emerged as conducive to intelligence accountability, and on a political level, the end of the Cold War and of the Thatcher government, established greater government openness (Hindle, 2009:1).

2.3.1. Incorporation of the European Convention on Human Rights into the domestic law of the United Kingdom

Despite its leading role in establishing the Council of Europe, the UK had not incorporated the ECHR into its domestic law. The incorporation thereof by the adoption of the Human Rights Act of 1998 was perceived by some elements

within government and Parliament as European interference with its legal system. Incorporation gave effect in UK law to the rights contained in the ECHR and required the UK courts to take account of ECtHR case law, and interpret UK legislation in a manner that is compatible with the Convention. In this regard, the principle of ‘sovereignty’ limited the effect of incorporation given that the UK courts, while able to annul subordinate legislation, are not able to disregard legislation adopted in Parliament. Such inconsistencies instead manifest in court ‘declarations of incompatibility’, the consequence of which is to ‘recommend’ changes to incompatible UK legislation. In this context, the most important implication of the adoption of the 1998 Act has therefore been to imbue the UK legal framework with human rights principles and to give direct effect to the ECHR in domestic law (Murphy, 2010: 5, 8, 19; United Kingdom: 1998).

2.3.2. Intelligence collection methods and the European Convention on Human Rights in conflict

In the cases of *Khan v UK* and *Halford v UK* respectively, the ECtHR ruled that intrusive surveillance and private communications interception were not in ‘accordance with law’ and were in violation of Article 8. Given the implications of the 1998 Act, these and other gaps in UK intelligence practice were still apparent and the Regulation of Investigatory Powers Act of 2000 (RIPA), was accordingly introduced to extend safeguards and align UK practice with the standards of the ECHR. Given the opportunity however, RIPA was extended to also address challenges to surveillance from changes in technologies; to confer increased surveillance powers in general, and has since been amended to keep abreast of such subsequent changes (Donohue, L, 2006: 121, 131).

2.3.3. Statutory framework for intelligence collection in response to the European Court of Human Rights

RIPA as amended is a statutory regime which regulates the methods with which the Services can gather intelligence in accordance with the standards of the ECHR, the most intrusive of which require Ministerial authorization. In this regard, RIPA makes provision for the investigatory powers of the Intelligence Services and certain public bodies, including the interception of communications from within the UK; the acquisition and disclosure of communications data; the conduct of directed and intrusive surveillance; the use of covert human intelligence sources, and the acquisition of the means to decrypt electronic data. These powers complemented those regarding the interference with property or wireless telegraphy in terms of the 1994 Act, and superseded the interception provisions contained in the 1985 Act. Furthermore, RIPA brought the use of directed surveillance; intrusive surveillance and covert human intelligence under statutory control for the first time (United Kingdom: 1994 and 2000a).

2.3.3.1. *Intrusive powers: authority and limitations*

The interception of communications; use of intrusive surveillance and acquisition of the means to decrypt information, requires authorisation by means of Ministerial warrant. The remaining powers conferred in terms of RIPA may be authorised by senior intelligence officials. RIPA confines the use of its enabling powers for Intelligence Services to grounds that are necessary for its functions, provided that information sought could not reasonably be obtained by other means and that an intrusive method must be proportionate to what is sought to be achieved. Interception warrants may also be granted to give effect to international mutual assistance agreements (United Kingdom: 2000a). These provisions give effect to the ECHR and case law of the ECtHR including the principles of ‘accordance with the law’; ‘necessity’ and ‘proportionality’;

‘control over abuse’; ‘standards of foresee-ability’ and ‘objects and limits’ with respect to methods for intelligence gathering in terms of RIPA.

2.3.3.2. Statutory limitations and controls

RIPA charges the Ministers responsible for the Services to ensure that arrangements are in place to safeguard the disclosure, copying and destruction of intercepted material and communications data, and requires each of the Services to establish detailed safeguards for the approval of the relevant Minister (United Kingdom, 2009d). RIPA also compels the relevant Ministers to issue Codes of Practice approved by each House of Parliament in relation to the exercise of the collection powers and duties under RIPA and the 1994 Act, and which must be taken into account in the review of the respective Commissioners. This reflected the position in the UK that statutory provisions, complemented by a number of non-statutory controls, established the basis for Executive and internal control of the intelligence process to secure its effective functioning and to safeguard it from abuse in terms of the standards of the ECHR. In this regard, the model of a Tribunal and Commissioner utilized as external remedies and review mechanisms to harmonise UK practice with ECHR provisions were modified under the terms of RIPA (Leigh, 2005:83,85; United Kingdom: 1994 and 2000a).

2.3.3.3. Independent complaint mechanisms

RIPA establishes the Investigatory Powers Tribunal as the sole forum in terms of the Human Rights Act of 1998 for considering actions incompatible with ECHR and which fall within its ambit. These include proceedings by persons aggrieved by any conduct of the Services in relation to them, their property or communications. As a result the Tribunal superseded the Interceptions and Service-specific Tribunals. In keeping with limitations in earlier legislation, the procedures of the Tribunal in terms of RIPA claim an exception on security

grounds and are therefore not in accordance with Article 6 of the ECHR on a fair hearing. These procedures enable it to award compensation; cancel warrants, or require the destruction of information wrongly obtained where appropriate (United Kingdom: 2000a; Leigh, 2005:82).

2.3.3.4. Independent review mechanisms

RIPA provides for the Interception of Communications Commissioner (ICC) to replace the Commissioner appointed under the provisions of the 1985 interceptions regime with a vastly extended remit. These are to “keep under review” the exercise of the powers and duties of the relevant Minister responsible for a Service to grant warrants for communications interception; of officials to authorise the acquisition and disclosure of communications data; and the adequacy of the arrangements for safeguarding the disclosure of intercepted material and encryption keys (United Kingdom: 2000a). RIPA also combines the functions of the Security Service and Intelligence Service Commissioners under an Intelligence Services Commissioner. These functions are extended to include a review of the further powers of the relevant Minister to authorise intrusive surveillance and the acquisition of the means to decrypt information. They also include a review of the powers of officials to authorise the use of directed surveillance; covert human sources, and the acquisition of the means to decrypt information, along with the safeguard arrangements for such acquisition (United Kingdom: 2000a).

2.4. The minimalist statutory response to the European Convention on Human Rights

Legislation in the UK established the overall framework for civilian intelligence accountability, formalised the statutory audit of MI5 and MI6 for the first time, and harmonised intelligence practice in the UK with the democratic principles espoused in the ECHR. This notwithstanding, reforms were regarded by some as

a minimalist interpretation of ECHR that were precipitated by Court challenges and merely 'legalised' existing practice. Gill (2007b) suggested that reforms were more concerned with management and authorization processes than with intelligence oversight.

3. THE EFFECT OF 9/11 ON INTELLIGENCE SERVICE ACCOUNTABILITY

9/11 heralded a major shift in the security and foreign policies of the UK, in which its support for the US 'war on terrorism' was central. As a result, counterterrorism once again assumed the focal point in the security framework of the UK and exposed its national security to the uncertainties of the US-led 'war on terrorism'. Although the 9/11 attacks were perceived to have resulted from intelligence failure in some views, intelligence was nonetheless elevated as the prime national instrument in the counterterrorism strategy of the UK. In this environment of heightened security threats, 9/11 represented a change of emphasis in intelligence accountability in the UK, from concerns about intelligence propriety during the 1990's towards its effectiveness in the 'war on terrorism'.

3.1. Government's strategic response to 9/11

The response of the UK government to the 9/11 attacks included its participation in the US coalition for military action against Al Qaeda, along with a multitude of domestic policies to combat the wider terrorist threat (Van de Linde *et al*, 2002: 103). This reflected the strategic policy of the UK to adopt an external war model and internal criminal justice model with special arrangements to counter the terrorist threat. Overall responsibility for counterterrorism resided in the Cabinet Office along with individual security departments. A host of Cabinet Committee's, among which the Committees on intelligence, and intelligence sharing were prominent, were created as a result of 9/11 to direct the intelligence aspect of the UK's participation in the 'war

on terrorism' (Van de Linde *et al*, 2002: 107-8; 113). In particular, the 9/11 attacks prompted the UK to reassess how intelligence information related to terrorism is gathered; coordinated and analysed, and precipitated a moderate reshaping of the architecture of intelligence in the UK (Burger, 2008: 64). The consequences of these reassessments had an effect on the broader arrangements for Intelligence Service accountability in the UK, both as a result of changes to the enabling environment for the conduct of intelligence, as well as in the mechanisms for its oversight and review.

3.2. The impact of legislation on intelligence accountability

The events of 9/11 heralded a proliferation of counterterrorism legislation in the UK, some of which invoked the derogation provisions of the ECHR applicable in times of war, and highlighted the policy of creating terrorist-related offences as opposed to utilising the ordinary criminal law to combat terrorism. In this regard, secret intelligence was at the heart of the administration of counterterrorism legislation in the UK.

3.2.1. Proliferation of terrorism legislation

Although the UK had recently completed an overhaul of domestic terrorism legislation in enacting the Terrorism Act of 2000, one of its first responses in the aftermath of 9/11 was to adopt the Anti-terrorism, Crime and Security Act of 2001. The 2000 Act introduced a broad definition of terrorism; extended the limit to seven days detention without charge for terrorist suspects; provided for the banning of designated terrorist organisations, and allowed suspects to be searched without any clear evidence of terrorist intent. These powers were complemented by the most controversial provision in the 2001 Act, namely the unlimited detention of foreign nationals in the UK who were believed to pose a threat to security based on inadmissible intelligence, and an extension of the limit to 14 days detention without charge (United Kingdom: 2000b and 2001c; Goldsmith, 2006:21). In response to the decision of the House of Lords that

unlimited detention of foreigners was discriminatory, the Prevention of Terrorism Act of 2005 was introduced and provided for the imposition of control orders where there was a reasonable suspicion, based on inadmissible intelligence, of a person's involvement in terrorism (Goldsmith, 2006:21). Control orders impose a whole range of obligations on an individual's conduct, is tantamount to house arrest, and was extended to include both UK and foreign nationals (United Kingdom: 2005b).

The Terrorism Act of 2006 was inspired by the July 2005 bomb attacks in London and was ostensibly meant to disrupt the training and recruitment of potential terrorists. The 2006 Act extended the limit for detention without charge to 28 days; created more permissive circumstances for the deportation of foreign nationals based on inadmissible intelligence, and criminalised certain behaviour (United Kingdom: 2006a; Goldsmith, 2006: 22). New powers did not end there as RIPA was extended to confront the challenges associated with encrypted information in 2007, although the Counter-Terrorism Act of 2008 failed to extend detention and introduce secret juries (United Kingdom: 2000a and 2008a).

3.2.2. Intelligence accountability in the context of permissive legislation

Counterterrorism legislation had the effect of expanding the scope of intelligence gathering and circumvented regular procedure in order to neutralise suspected threats. The effect of the use of exceptional powers in the immediate aftermath of 9/11 was to imbue the enabling framework for Intelligence Service accountability with a greater permissiveness. In this regard, the operation of secret intelligence which could not meet the evidential standard of the courts, was at the centre of the administration of exceptional measures to prevent; detect, and disrupt suspected terrorist activities and diluted accepted constitutional principles such as 'innocent until

proven guilty’; effected extrajudicial arrest and detention procedures, and transformed the traditional use of intelligence (Chalk *et al*, 2004: 51).

Given that counterterrorism is an area of intelligence that is prone to abuse, these changes also served to alter the terms of reference of the mechanisms for oversight and review in the UK. In the final analysis, the broad definition of threats and widespread application of new provisions affected the civil liberties of even those not intended as targets, as Muslims in general were placed at the centre of counterterrorism enforcement (Gilmore, 2011: 37; Foster, 2006: xiv). Along with the role of intelligence as the justification for the violation of fair hearing rights, the permissive conditions for intelligence gathering had a restrictive effect on freedom of expression and religion, along with more permissive circumstances for the violation of privacy rights.

3.3. The civilian Intelligence Services: impact of 9/11 on accountability

Although the civilian Intelligence Services maintained their core functions in the aftermath of 9/11, counterterrorism emerged as a central priority and fostered and intensified national and international intelligence sharing strategies (Omand, 2011:1). As a consequence, the operational environment for counterterrorism was imbued with the necessary resources; structural reforms; changes in strategy; and a more permissive intelligence gathering approach that demonstrated the transformation in orientation of accountability from concerns of propriety to those of performance effectiveness.

3.3.1. Orientation of reforms towards operational effectiveness

In the aftermath of 9/11, MI5 established a Counter-Terrorist Analysis Centre and the more permanent multi-Service Joint Terrorism Analysis Centre (JTAC) in 2003, under the command of the head of MI5 to coordinate intelligence on terrorist threats. The formation of JTAC was considered the most far reaching

of the structural reforms to UK intelligence in the aftermath of 9/11 (Burger, 2008: 70). It was not until 2006 however that the UK developed CONTEST, a cross-government integrated and streamlined approach to counterterrorism, each with an intelligence dimension of varying degrees. These included the prevention of terrorism; protection against attack; mitigation of its impact, and the prevention of extremism. Along with the JTAC, committees were established in the Home and Cabinet Office's to manage CONTEST (United Kingdom: 2008b:5, 25-26). The Services, having scaled down after the end of the Cold War, expanded at an unparalleled rate after 9/11. This is reflected in the growth in staff and the intelligence budget from under £1 billion in 2002 to £2 billion in less than a decade (Rifkind, 2010: 4).

3.3.2. Intelligence operations in a permissive environment

Counterterrorism is based on the identification and tracking of suspects and their plans and activities rather than on targeting material objects, and its objective is often slanted towards detection as opposed to an analysis of scenarios that are the hallmarks of other intelligence disciplines (Herman, 2003:2). In the domestic arena this presents heightened risks of unrestricted security intelligence gathering, invoking the requirement for more robust oversight while international intelligence sharing arrangements between states places Intelligence Services out of reach of oversight bodies (Gill, 2007b).

3.3.2.1. Domestic intelligence gathering: blurring of lines

National security intelligence in the UK witnessed a paradigmatic shift as a result of the transnational nature of the terrorist threat pursuant to 9/11. This transformation, which was first apparent in the response of the UK to Irish nationalist terrorism, is characterized by the disappearance of distinctions between foreign and domestic threats, and the integration of law enforcement at all levels of governance into counterterrorism work (O'Brien, 2008: 2). This shift is apparent in the emergence of regional counterterrorism units and in the

functions of the JTAC as a multi-service unit; in the inclusion of the army into counterterrorism, and in the integrated approach to counterterrorism at all levels of government espoused in the CONTEST strategy (Burger, 2008: 70; United Kingdom: 2008b: 4;25-26). This blurring of lines and overlap of functions, challenges the requirement for the effective separation of domestic from foreign intelligence and intelligence from law enforcement, to negate abuse and ensure effective Intelligence Service accountability. Joint operations enable the Police to circumvent the courts in favour of the less restrictive authorities of Ministers for gathering intelligence information. Compounding these complexities, neither MI5 nor MI6 have geographical limitations to their functions. The remit of MI5, which includes authority to conduct operations in the UK on behalf of MI6 mitigates this risk however. This arrangement reflects the position that the Home Secretary and MI5 have responsibility for domestic operations which may affect individuals in the UK (United Kingdom: 1989 and 1994).

3.3.2.2. International intelligence networks

During September 2001 the United Nations Security Council (UNSC) adopted Resolution 1373 and a number of ancillary resolutions as a result of 9/11 which were legally binding on member states. Among their provisions these resolutions advanced the cause of intelligence exchange between, and legislative reform within member states. In the UK compliance was initially achieved in the form of the Terrorism (United Nations Measures) Order of 2001 (United Nations:2001; United Kingdom:2001a). The UK also established a strategic framework to give effect to the realities of the intelligence sharing and national security dependencies inherent in international partnerships (United Kingdom: 2008b: 4). A major feature of the post-9/11 security environment has therefore been the development of intelligence collaboration between nations. On account of their importance, the UK courts have also accepted the ‘control principle’ underlying these arrangements that restrain

disclosure of shared information to domestic courts and oversight bodies (Gross, 2010:15). In this regard, interception warrants may also be granted for the purpose of giving effect to the provisions of any international mutual assistance agreement.

The US rendition in 2002 of UK resident aliens el-Banna and al-Rawi as a result of UK intelligence, brought MI5 into the rendition scandal (Gill, 2009: 933). In their quest to gather intelligence from detainees held abroad, MI5 also became embroiled in a myriad of allegations of complicity in US torture that had since appeared in the courts, in Parliament, and in official investigations (United Kingdom: 2005c; Hindle, 2009: 1). In this regard Gill (2009: 941) observes that formal intelligence sharing agreements and legal standards for information exchange and oversight of sharing regimes, may be unfeasible given the informality of these arrangements and effectively places them out of the purview of review agencies. It is apparent that these secretive arrangements bypassed the UK system of accountability, and oversight in this regard has been limited to ‘fire-fighting’, scandal-driven inquiries and the belated plan for guidelines on the handling of detainees (United Kingdom: 2007c and 2009c).

3.4. The 9/11 nexus between the branches of the state: the role of intelligence

The fundamentals of the counter strategy pursuant to 9/11, set the UK government on a collision course with human rights defenders as well as those branches of the state that operated mainly outside the ring of secrecy.

3.4.1. Confrontation over counterterrorism policy and legislation

Parliaments broad acceptance of some counterterrorism proposals of the Executive in the aftermath of 9/11 was qualified by concerns about the effectiveness of legislation; the effect of its powers on civil liberties and due

process, and whether the overall response was proportionate to the threat and therefore necessary (United Kingdom: 2001b). In this context, legislation was perceived by some as a panic response to the September 2001 attacks on the US and 2005 London bombings, and as a consequence, some of it was poorly drafted and unable to withstand challenges in the UK courts or reflect the principles of the ECHR. In this regard the lack of appropriate debate prior to the adoption of legislation was perceived as a constitutional breach by Ministerial order, as the government essentially turned a blind eye to parliamentary and public dissent (Payne, 2002: 49).

The use of special tribunals in the Anti-terrorism, Crime and Security Act of 2001 to hear cases of unlimited detention of foreign nationals suspected of terrorism on account of secret intelligence, was seen as a circumvention of judicial review as the means by which suspects could defend themselves against the powers of the state (Payne, 2002: 45; Goldsmith, 2006: 21). This system faced successive court challenges, gradually weakening it and the House of Lords declared the legislation incompatible with the ECHR. This culminated in the Executive circumventing the incompatibility ruling by introducing legislation to establish control orders (Goldsmith, 2006: 20).

The control order regime was central to the controversy surrounding the Prevention of Terrorism Act of 2005 and precipitated a rebellion of Labour backbenchers in Parliament and a confrontation between the Commons and the Lords that had all the hallmarks of a constitutional crisis (United Kingdom: 2005a). Among the compromises reached, control orders requested by the Home Secretary were subject to the confirmation of the courts, which are able to quash them or alter their obligations, and subject to a right of appeal to the High Court. The nature of judicial review prescribed in the Act afforded a high degree of deference to the Executive however (United Kingdom: 2005b). In this regard, the High Court declaration in 2006 that control order legislation was incompatible with Article 6 of the ECHR: the right to a fair trial was based on

procedural grounds, and did not affect the essence of the policy on control orders or the use of secret intelligence to justify it (Goldsmith, 2006: 21). The initiatives of parliamentary committees to address fair trial concerns including the operation of the Special Advocate system, had also been in vain although the courts continued to condemn the control order regime and its safeguards (United Kingdom: 2010a:50). These rulings discredited a key element of government's counterterrorism strategy and set the tone for challenging it under human rights law.

The London bombings precipitated a wider debate over the UK policy of unequivocal support for the US 'war on terror' and emphasised the domestic dimension of the Al Qaeda threat. The siege mentality that gripped the UK in its aftermath, also emboldened the authorities to call on civil society to recognise what expert opinion already knew: that civil liberties would have to be ceded to the authorities to counter a new level of threat. This strategy evolved out of the resolutions of the counterterrorism summit in the aftermath of the London bombings (Foster, 2006:206,211,213). Sensitivities over special powers were apparent as the Blair government suffered its first Commons defeat as Parliament closed ranks to defeat plans to extend the limit to 90 days detention without charge in the 2006 Act (Goldsmith, 2006: 22). Against this background, in an outburst that reflected its powerlessness, the parliamentary Committee on Human Rights announced the urgent need for independent oversight of civilian intelligence as well as Executive claims based on intelligence information, after the refusal of MI5 to respond to its questions on antiterrorism legislation (Daily Post, 2006:22).

In the 2009 case of *A and Others* concerning detention, the ECtHR ruled that the proceedings of the special Tribunal violated Article 5(4) of the ECHR, because crucial evidence derived from intelligence was not disclosed to the appellants. In the subsequent case of the *Secretary of State for the Home Department v. AF*, the House of Lords invoked this case and made a similar

ruling on appeals against control orders imposed under the 2005 Act (Crowther, 2010: 230,233). These cases highlighted the ongoing discourse over the controversial use of secret intelligence in judicial proceedings and the proportionality of terrorism laws.

3.4.2. Fact finding inquiries: the Iraq war

A ‘war of choice’ within the broader ‘war on terrorism’, the war in Iraq resulted in four separate inquiries in the UK into the intelligence to make a case for war. In this regard, the restricted House of Commons Foreign Affairs Committee inquiry during 2003 raised concerns about the politicisation of intelligence, and the ISC inquiry that followed concluded that the intelligence used to make a case for war omitted relevant facts and exaggerated the threat of Iraq to the UK (Burger, 2008: 65). Although the subsequent Hutton judicial inquiry exonerated the government of bad faith in relation to the Iraq dossier, the concomitant public exposure of the flawed intelligence used to make a case for war compelled the UK to announce the Butler inquiry in February 2004 (Gill *et al*, 2006: 137). The Butler Report proposed widespread recommendations to improve intelligence effectiveness and in keeping with earlier inquiries, underlined the occurrence of genuine intelligence failure and was primarily orientated towards the management of intelligence (United Kingdom: 2004; Burger, 2008: 69). The emergence of evidence concerning government abuse of intelligence to make a case for war and its narrow inquiry compared to that of Butler, affected the credibility of the ISC and highlighted that inquiries did not sufficiently probe the crucial concern of the politicisation of intelligence (Gill, 2009: 932). Unsurprisingly, the announcement of the Chilcot Inquiry in 2009 reignited the role of intelligence in the onset of the Iraq war as the controversy refused to subside (United Kingdom: 2009b).

3.5. Evolution of mechanisms for intelligence service accountability and the impact of 9/11 on their functioning

The 9/11 attacks introduced new dimensions to the oversight and review of intelligence in the UK. This was occasioned by the transformed environment in which intelligence was conducted, and increased the scale and complexity of challenges confronting the mechanisms for civilian Intelligence Service accountability.

3.5.1. Parliament and parliamentary oversight of intelligence

Parliament assumed an increased role in intelligence since 9/11 that was reflected in the extent of legislation that was enacted in this regard, and in the extent of inquiries and post-mortems instituted to discover facts, and investigate abuses and failures in relation to the civilian Intelligence Services.

3.5.1.1. The UK Parliament

The introduction of legislation to regulate intelligence signalled a change in the UK policy of parliamentary exclusion from involvement in intelligence. Together with the raft of counterterrorism legislation pursuant to 9/11, this introduced parliamentary debate on intelligence in the legislature on an unprecedented scale (United Kingdom: 2001d). The courting of the legislature with intelligence dossiers to support the Iraq war further signified this trend, and also highlighted the limitations of parliamentarians in this area (United Kingdom: 2004). In this regard, the established mode of ‘parliamentary’ oversight within the ring of secrecy in the UK, is the committee of parliamentarians (ISC). While such an arrangement is acceptable, parliamentary suspicion in the ISC is evident and prompted proposals for the unlikely formation of an arms-length arrangement for the oversight of the Services, independent of the Executive, reporting to Parliament (Daily Post,

2006:22). Given this context, a review of oversight arrangements prompted the Brown Government in 2008 to effect the cosmetic change that required the Prime Minister to consult with the opposition and Parliament on appointments to the ISC. More significantly, reforms precipitated debates in both Houses of Parliament on ISC Reports, thereby re-enforcing the trend of parliamentary involvement in intelligence in the UK (Gill, 2009: 935).

3.5.1.2. The committee of parliamentarians: Intelligence and Security Committee

Reflecting the narrow scope of its remit, the ISC made no substantial reference to human rights in any of its reports from its inception in 1994 until 2005, when 9/11 began to affect the course of its work and it inquired into the handling of detainees abroad (United Kingdom:2005c; Gill, 2009: 932). The ISC has since reported on two further inquiries into detainees held abroad: Rendition, in 2007 and Special Report on Binyam Mohamed in 2009, as a result of which it also conducted a review of guidelines for intelligence officers on handling detainees (Rifkind, 2010: 4). The detainees report was criticised for displaying an excessive empathy for the UK's dependence on US intelligence, and for failing to both confront the use of intelligence obtained under torture and the absence of formal arrangements for intelligence sharing (Gill, 2009:932-3).

Similarly the overriding conclusion of the uncritical Rendition report is that the UK Services had been unaware of the implications of US rendition policy (United Kingdom: 2007c). The case of Binyam Mohamed placed into sharp focus allegations of complicity of the UK Intelligence Services in the alleged mistreatment of UK subjects detained overseas in counterterrorism operations. In this regard, the Special Report on Binyam Mohamed raised serious ethical questions over the manner in which the UK responded to the terrorist threat, but ignored operational matters (Rifkind, 2010:5,6). In a series of cases, the courts ruled that MI5 had actively collaborated with the US in the unlawful

detention and rendition of Mohamed, forcing the ISC to re-examine its inquiry (Gill, 2009:934). Given these judicial findings, it was inescapable that any inquiry into allegations of MI5 complicity in torture would not result in recommendations for overhauling the ISC (Hindle, 2009:2).

The ISC conducted two inquiries into the London bombings. The first inquiry in 2006 was limited on account of ongoing litigation but was nevertheless criticized for its poor quality and reliance on oral briefings. The conclusion of the *CREVICE* trial, in which the suspects were tried for conspiring to carry out terrorist attacks in the UK, enabled the ISC to examine the links between its plotters and the London bombers, and to inquire into the July 2005 intelligence failure. The second inquiry was more probing and detailed as members examined relevant raw intelligence material in their examination of the judgements and actions of MI5. In responding to assertions of intelligence failure, the ISC concluded that given the resources and intelligence at the disposal of MI5 at the time, the attacks could not have been prevented (Gill, 2009: 936; United Kingdom: 2009a).

On its traditional role, the doubling of the intelligence budget in less than a decade after 9/11 along with the policy changes that accompanied the 2007 Comprehensive Spending Review, dramatically increased the statutory role of the ISC (Rifkind, 2010:4,9). Although the ISC has exceeded expectations in terms of the access to intelligence information that it was able to establish, it perceives itself more as a small element of the Executive machinery than as its overseer (Gill, 2007a:37). Given its reluctance to investigate allegations of unlawful intelligence activity in the aftermath of 9/11, the ISC has in the main conferred a greater level of assurance over the conduct of the Services than the facts had warranted, and failed to generate public or parliamentary trust in them (Phythian, 2007:95-97; Glees *et al*, 2006:94-95).

3.5.2. The Judiciary and judicial review of intrusive intelligence gathering

Together with the traditional function of the courts in this regard, the UK system of Intelligence Service accountability also includes a role for the Judiciary in conducting *post facto* reviews of the conduct of intelligence, and the use of intrusive intelligence gathering methods.

3.5.2.1. *Effect on the courts*

The courts encountered intelligence at a more intense and challenging level in the post-9/11 period given the imperative to accommodate terrorism cases within the framework of criminal law, and unravel the implications of special regimes such as control orders. After the judgment in the *Judith Ward* bombing case compelled the presentation of intelligence for examination in the courts for the prosecution of terrorism cases in 1992, the post-9/11 treatment of secret intelligence in actions taken by the state against individuals; civil actions brought by individuals against the state, and judicial inquiries, opened further scope for the Judiciary in the intelligence arena (Lander, 2001: 31; Gross, 2010:8). Using the ECHR as a standard, the Judiciary in the UK also assumed a heightened activism and served as a counterweight to Executive action in balancing the needs of national security with the rights of the individual. This however transpired in the context of the traditional view of the courts that unless the Executive is acting unlawfully, or the court concludes that a claim by the Executive for public interest immunity is not justified, the Judiciary would defer to it (Gross, 2010: 15).

3.5.2.2. *Judicial review*

The role of senior members of the Judiciary within the system of intelligence accountability in the UK has been a controversial one, given the perception of their advocacy, as opposed to oversight of intrusive intelligence methods.

a. The independent reviewer of terrorism legislation

The power to access secret intelligence on which certain coercive action by the state is based, emphasised the crucial importance of the statutory review of the powers conferred under terrorism laws since 9/11. These powers include proscription of organisations; arrest and detention; prosecutions for terrorist offences, and control orders. The authority of the reviewer and tabling before Parliament of detailed and informative reports, added an important layer of accountability that is evident in review campaigns against the malign impact of unduly permissive and poorly implemented laws on civil liberties. The part-time role and mostly uncritical support of the Independent Reviewer for the use of exceptional powers, despite counter evidence, would appear to question the weight of assurance emanating from this Executive appointment, however (Foster, 2006:193; United Kingdom: 2006d and 2009e).

b. The Investigatory Powers Tribunal

Given that the Tribunal is not obliged by statute to report on its activities and has elected not to hold public hearings, it has remained an opaque mechanism with little known about it. In part mitigation of this, a practice has emerged where the respective Commissioners publish in their annual reports complaint statistics with respect to the Tribunal, although the stratification of its cases into separate Services is not possible. In this regard the Tribunal upheld just one complaint in 2009, bringing to four out of 956 the number of complaints upheld since its inception in 2000 (United Kingdom: 2009d). The rightful jurisdiction and role of the Tribunal was also questioned after ISC investigations into certain individual cases dating back to 2002. Given their subsequent recourse to the civil courts, the little known Tribunal appears to have been bypassed by victims of extraordinary powers in the post-9/11 setting (Rifkind, 2010: 5; United Kingdom: 2010b:2,4). Given its record, these developments emphasise the absence of due process in its proceedings, and resultant lack of confidence in the Tribunal as a recourse mechanism.

c. Review Commissioners

The annual reports of the part-time Commissioners confer a high level of assurance on the propriety of the Services; Ministers and officials in the conduct of the powers and duties which they are required to review. Although sound in approach and supported by unfettered access to information, the scope of review work is rather limited, and is dependent on the professionalism and trust of the Services. In this regard neither review findings nor the use of intrusive powers are disclosed and reference is generally made to human error or technical problems without addressing substantive violations. In effecting a policy of non-disclosure, the Commissioners have adopted a tradition of supplementing a public annual report with a classified annexure containing details considered to be of a sensitive nature, essentially saving the Prime Minister the trouble of exercising his authority to redact them. The main reports are presented to Parliament by the Prime Minister and are issued as publications of the House of Commons (Foster, 2006: 624-5; United Kingdom: 2006b, 2006c, 2009c and 2009d).

The remit of the Intelligence Services Commissioner was amended by arrangement to include the monitoring of compliance with guidelines on interviewing detainees from 2009, and complemented the standing requirement for the Home Secretary to consult the Commissioner prior to requesting Parliament to extend the control order regime (United Kingdom: 2005b, 2009c). These developments would seem to further burden the part-time Commissioner, and given his different remit, the logic behind the requirement for consultation is also not entirely certain. The extent of their respective remits is vast considering the part-time role of the Commissioners, while their independence from government is not entirely certain. Given these circumstances, the limited scope of review work conducted may not warrant the high levels of assurance they convey on intelligence activities.

3.5.3. Media and civil society

In the aftermath of the embarrassing disclosures of former intelligence officers, the Official Secrets Act of 1989 sought to enforce government secrecy as it removed the public interest defence for the disclosure of official information and also criminalised secondary disclosure (Mendel *et al*, 2000:19). In the UK, a voluntary system, known as the Defence Advisory Notice system is in place to facilitate media requests for official clearance prior to publication of sensitive information. Against this background, restrictions on media publication through the use of the Notice System was widely criticised as a system of media self censorship to ward off statutory media restraints (Vallance, 2007:7). These restrictions did not shape the public discourse on intelligence however, and even as the ISC sought to facilitate some change in the relationship between intelligence and the media, the demystification of intelligence that followed intelligence reforms continued unabated in the post-9/11 setting. In the process the covert media-influencing role of intelligence in the debate regarding the Iraq war; the July 2005 London bombings and enhanced intelligence powers, was also exposed (Rose, 2007: 30-1).

The response of the UK to 9/11 and the events of July 2005 also generated an increasing activism as human rights organisations engaged in vociferous campaigns to oppose legislation with a negative impact on civil liberties (Payne, 2002:44; Valence, 2007:2). Recognising the need for more public engagement, government followed the release of the National Intelligence Machinery series with the publication for the first time in 2008 of its National Security Strategy and at once announced plans for the formation of a National Security Forum of external experts to advise on the strategy (United Kingdom: 2005d and 2008b). Amid the relentless interest in intelligence, the work of the Services was under constant examination in the courts, the media and civil society, and the civilian Services were compelled to engage the public about the nature of their challenges. As oversight reports and intelligence debates

were being proliferated in the public domain, interest in the secret hearings of the ISC was growing (Rifkind, 2010: 10). Above all, government's use of intelligence to make a public case for the Iraq war, set a precedent for openness and established public expectations on a whole new level (United Kingdom: 2004).

3.6. The central intelligence machinery

The central intelligence machinery located in the Cabinet Office is the prime instrument for Executive control and oversight of intelligence in the UK. The Prime Minister has overall responsibility for intelligence and leads the Ministerial Committee on Intelligence Services for intelligence policy. He is supported in this capacity by the Cabinet Secretary and Security and Intelligence Coordinator (Oleynik, 2006: 18). Ministerial control has grown substantially as a result of the statutory powers and duties of the relevant Secretary of State in the management of intelligence. In this regard Ministerial oversight is also supported by the Permanent Secretaries Committee and the Joint Intelligence Committee (United Kingdom: 1994, 2000 and 2005d). Given its emergence as a serious critic of the Services and the public awareness of intelligence that it established since 9/11, the ISC, also located within the Cabinet Office, began to agitate for a review of its status and powers. In this regard, it raised strong concerns about negative perceptions of its independence, and objected to its confined remit and limitations on access to sensitive information (Rifkind, 2010: 11).

4. CONCLUSION

This chapter has shown that the ECHR was the catalyst for the introduction of a framework for civilian Intelligence Service accountability in the UK as legislation established the objectives; powers and functions of the Services, and harmonised intelligence practice with the democratic principles espoused

in the ECHR. Given that these developments were a reaction to court challenges, the minimalist nature of reforms that resulted in a system of accountability that ultimately placed intelligence in the UK on a statutory basis and maintained the tradition of strong Executive control, was also emphasised. Arrangements for oversight and review were limited, compartmentalised and effectively controlled by the Executive. To the extent that it did harmonise intelligence practice in the UK with democratic principles, this was achieved in a relatively benign security environment.

This chapter also illustrated that the events of 9/11 and July 2005 transformed the framework for Intelligence Service accountability, as the organizing principles and environment for the conduct of intelligence became more permissive. As counterterrorism evolved as the central focus of the Services, the emphasis of Intelligence Service accountability accordingly shifted away from civil liberties in favor of security. This development was opposed as the media; human rights organisations; senior judges, and parliamentarians protested against the proportionality of special counterterrorism arrangements in which intelligence was central. As a result of 9/11, these peripheral mechanisms of intelligence accountability evolved to assume the vital role of holding the Executive to account for intelligence excesses as well as for the political abuse of intelligence. While the formal mechanisms for intelligence accountability engaged their functions on an unprecedented level as a result of 9/11; made a significant contribution in holding the Services to account; and developed their own models for oversight, they also seemed to confer a level of credibility upon the Services and the Executive that was not entirely warranted.

The following chapter will discuss the evolution of civilian Intelligence Service accountability in the US from the end of the Cold War to the end of 2009.

CHAPTER 5: THE EVOLUTION OF CIVILIAN INTELLIGENCE SERVICE ACCOUNTABILITY IN THE UNITED STATES DURING THE POST-COLD WAR PERIOD

1. INTRODUCTION

The purpose of this chapter is to examine the evolution of the system for civilian Intelligence Service accountability in the US from the end of the Cold War in 1989 to the end of 2009, with emphasis on the September 2001 terrorist attacks on the US, which had important implications for intelligence accountability. The chapter will commence with an overview of significant developments in civilian intelligence accountability in the US from the end of the Cold War in 1989 to the end of 2000, followed by a discussion on its further evolution during the period thereafter, which includes the September 2001 attacks (hereinafter referred to as 9/11) against the US, to the end of 2009.

2. THE EVOLUTION OF INTELLIGENCE SERVICE ACCOUNTABILITY IN THE US FROM THE END OF THE COLD WAR TO THE EVENTS OF SEPTEMBER 2001

The decline in the superpower rivalry between the US and the Soviet Union eliminated the central threat to US security. The failure to foresee this decline meant that the role of US intelligence in the post-Cold War period was initially uncertain.

2.1. Civilian intelligence in the early post-Cold War period

A whole range of threats occupied the security agenda of the US without any of these assuming the dominance of the Soviet threat. The early post-Cold War period was therefore characterised by a vacuum that required a redefinition of intelligence missions, and accordingly witnessed a steep decline in resources appropriated by Congress for intelligence (Lowenthal, 2006: 207, 233; Mahadevan, 2010:1). Although a disoriented CIA continued to overstate the

Soviet threat, it made serious efforts to alter its strained relationship with Congress in the aftermath of the Iran-*contra* scandal. The FBI in the meanwhile, had to contend with a Senate Intelligence Committee reprimand over its unlawful encroachment into the sphere of domestic civilian intelligence outside of its remit to gather foreign intelligence in the US (Goodman, 2006a:1; Johnson, 2003:16; United States: 2005a). These events established a 'new standard in comity between the branches of government' as congressional oversight of intelligence was reaching a new crest (Johnson, 2003:16). Despite the uncertain role of intelligence, the first George Bush Administration conducted no major intelligence reviews during this period, and focused instead on defence reorganisation, and the use of covert action. In this regard, the 'Revolution in Military Affairs' that unfolded during the Gulf War in 1991, soon highlighted the need for war-fighting intelligence, and extended the traditional functions of the CIA to include support for military operations (Warner *et al*, 2005:31,33).

2.2. Developments in the regulation of civilian intelligence activities

The Iran-*contra* affair ushered in stricter statutory oversight of covert action during 1990 that resulted in a compromise requiring its 'timely' notification to Congress (Van Wagenen, 1997:101). The tension between the Executive and Congress was apparent as the Intelligence Committees hosted public hearings, and proposed far-reaching intelligence reform in 1990 that would have resulted in significant changes to the National Security Act of 1947. The resulting adoption of the Intelligence Organisation Act of 1992 did not encompass these far-reaching proposals however, although it did represent the first successful attempt by Congress to enact intelligence legislation since the adoption of the National Security Act (Van Wagenen, 1997:101-102). In amending the 1947 Act, it specifically outlined the foreign intelligence remit of the CIA to include the gathering and coordination of human intelligence; the conduct of covert action, and liaison with foreign intelligence agencies. The Act also defined

covert action, and strengthened the authority of the Director Central Intelligence over intelligence community activities and budgets. In effect the Act aligned existing practice provided for in Executive orders and policy with the law, which lacked detail and clarity. The Act defined the composition of the intelligence community, and provided in law for the first time a comprehensive statement of its responsibilities and authorities (United States: 1992; Van Wagenen, 1997:102).

During 1994, legislation was enacted to exempt the CIA from freedom of information legislation. FISA, which regulated electronic surveillance for foreign intelligence gathering in the US by the FBI, which by definition included intelligence on foreign sponsored domestic threats, as well as traditional foreign intelligence, was also extended to include covert interference with property (Donohue, 2006: 49; Van Wagenen, 1997:101; United States: 1978c). The terrorist attacks in New York and Oklahoma resulted in the lowering of the threshold for gathering crime intelligence in 1995 to enable the FBI to detect terrorism in the US (United States: 2005a). This development maintained the requirement for individualised suspicion of criminal conduct with respect to US persons however, and distinguished the work of the FBI as a law enforcement agency rather than a domestic civilian Intelligence Service. The attacks also prompted the extension of FISA to include access to travel records for gathering counterterrorism information (Donohue, 2006:56).

The prospect of reforming certain intelligence functions along with the evolution of the military doctrine of the US into an intelligence-driven one that included an information gathering role for the CIA, added to the security policy debate in the US. This persuaded Congress to authorise a Presidential Commission to initiate a review of the role of intelligence in the post-Cold War period (Warner *et al*, 2005:33). The Aspin-Brown Commission, whose inquiries constituted the first major review of US intelligence since the Church and Pike inquiries, justified the need for intelligence in an ‘era of uncertainty’, and

underscored the importance of intelligence coordination (Warner *et al*, 2005:33-4). It also observed that covert action was undertaken permissively, and recommended a limitation of its use to compelling circumstances (Goodman, 2006a:4). The Aspin-Brown Report of 1996 served as a source for rather limited amendments to the National Security Act of 1947, that further strengthened the authority of the Director Central Intelligence (Warner *et al*, 2005:36).

2.3. Evolution of oversight mechanisms

In 1993, President William Clinton issued Executive Order 12836: President's Foreign Intelligence Advisory Board (PFIAB). First established by President Eisenhower, the new PFIAB maintained the general mission of its predecessors around the effectiveness, and legality of intelligence activities. Its credibility was questioned throughout the Clinton Presidency however when the appointment of its members was widely seen as a return for political favours (Lowenthal, 2006: 192; United States: 1993). Ongoing congressional initiatives to include the congressional agency, the Government Accountability Office, in the audit of the CIA were consistently opposed by the Executive (Kaiser, 2010:22). A significant development in the Judiciary had been the newly evolving practice of the courts during the early post-Cold War period to disregard the divide between foreign intelligence and law enforcement, and to authorise the subsequent use of intelligence gathered outside of the criminal code for criminal prosecution (Banks *et al*, 2001: 85).

Johnson (2003:30, 31) observes that intelligence cooperation with congressional oversight has traditionally been inconsistent, often characterised by stonewalling and dishonesty. In this regard, the congressional Intelligence Committees consistently confronted the challenge to balance secrecy and accountability, as well as perceptions of oversight as micro-management (Johnson 2003:31, 33). Amendments to the National Security Act of 1947 under-

taken during 1992, accordingly required the President to keep the congressional Intelligence Committees "fully and currently informed" of intelligence activities undertaken as well as "significant anticipated intelligence activity" (Donohue, 2006: 5). This clarified similar provisions in Executive Orders, and in theory secured committee access to intelligence received by the Executive, except for the Presidents Daily Brief (United States: 1981; Johnson, 2003: 33).

On a functional level, intelligence oversight since the formation of the Intelligence Committees has been one of advocacy, and transformed into adversarial terms only in public scandal-driven hearings, for which attendance was high in comparison to routine hearings. The quality of questioning has also not been of a consistently high standard (Johnson, 2003:28-29). During two decades of congressional oversight, the intelligence community had undergone significant reform, and the committees also assumed an important role in influencing this transformation, as well as authorising its budgets (Van Wagenen, 1997: 97).

The development of non-partisan congressional intelligence oversight suffered a serious blow however, as the Republican majority in both Houses of Congress during the Democratic Clinton Administration, resulted in political friction, and congressional disharmony during 1995. Previously immune to partisanship, the Intelligence Committees soon descended into separate party camps. A new dimension emerged as its Republican members became outright advocates for intelligence, leading to a period referred to as the era of 'partisan advocacy' (Johnson, 2003:17). This partisan effect weakened the intelligence oversight role of both the committees and the Executive (Goodman, 2006a:3; Johnson, 2003:35). Since these developments, the Intelligence Committees were inconsistent; responsive to scandals and crises, and without a systemic proactive approach to the comprehensive review of intelligence (Johnson, 2003:35). In this regard, non-partisan initiatives for intelligence reform

between 1991 and 2001, recommended improvements to intelligence oversight without a single one being implemented (Zegart, 2009:1).

The incoming Bush Administration commissioned the Scowcroft review of intelligence, although its report was never released as a result of the events of 9/11 (Warner *et al*, 2005:36). At the turn of millennium, new emerging threats confronted US security along with the information revolution, and the CIA was evolving into a more legitimate organ of state rather than a deniable activity in certain respects. After its decline as part of the Cold War peace dividend, intelligence was on the rise once again (Herman, 2003:1).

To the extent that they were undertaken, reforms to the system for civilian Intelligence Service accountability during the early post-Cold War period occurred in a relatively benign security environment. In this regard, the Iran-*contra* scandal ushered in a new era of distrust that focused on securing intelligence propriety, while the Oklahoma and New York City bombings in 1993 and 1995 respectively emphasised the imperative to advance intelligence effectiveness.

Table 3 below encapsulates the significant developments regarding the pre-9/11 situation relating to civilian intelligence accountability in the US.

TABLE 3: SIGNIFICANT DEVELOPMENTS, PRE-911 SITUATION RELATING TO CIVILIAN INTELLIGENCE ACCOUNTABILITY IN THE US
Framework for the conduct of Domestic Intelligence
US persons could only be targeted for intelligence gathering that resembled domestic civilian intelligence with respect to certain security threats that required the collaboration of such person with a foreign power. Such intelligence gathering is also subject to the approval of the FISA court.
Framework for the conduct of Foreign Intelligence
The vaguely defined functions of the CIA were clarified as the National Security Act of 1947 was amended to formally outline its responsibilities. The nature

and use of covert action was also subject to clearer statutory definition, and stricter statutory oversight and reporting to Congress.
The FBI also assumed responsibility for gathering foreign intelligence in the US, with the CIA focused abroad. These arrangements maintained a divide between domestic and foreign intelligence, and intelligence collection in, and outside of the US.
Management supervision and intelligence roles
The Director CIA continued to assume the dual role as Director Central Intelligence, and head of the US intelligence community. Successive legislation also strengthened this coordination role to enforce authority over intelligence community activities and budgets.
Congress and Congressional Oversight
Intelligence cooperation with congressional oversight has traditionally been inconsistent, and oversight mainly characterised as advocacy. Intelligence Committees also assumed an important role in influencing intelligence transformation and budget composition. Partisan politics weakened the oversight role of the Intelligence Committees however, resulting in oversight that has been reactive, and unsystematic. Initiatives for reform in this regard were eschewed by Congress.
Independent Oversight Mechanisms
The credibility of the PFIAB was questioned throughout the Clinton Presidency while congressional initiatives to include the congressional agency, the Government Accountability Office, in the audit of the CIA were consistently opposed by the Executive.
The role of the Judiciary
A newly evolving practice of the courts has been to disregard the divide between foreign intelligence and law enforcement, and to authorise the subsequent use of intelligence gathered outside of the criminal code for criminal prosecution. The FISA court also continued to assume an important role in authorising the use of FISA for intelligence gathering.

3. THE EFFECT OF 9/11 ON INTELLIGENCE SERVICE ACCOUNTABILITY

The demand for an investigation into the events of 9/11 gave rise to official inquiries in highly charged political circumstances (Lowenthal, 2006: 195). As the US declared a 'war on terrorism', its security strategy emphasised the role of intelligence as the primary national instrument therein, notwithstanding certain perceptions that it had failed to forewarn, and prevent the events of 9/11 (Herman, 2003:1). In this security environment, 9/11 represented a change in emphasis of intelligence accountability in the US, from concerns about intelligence propriety during the 1970s and 1980s, towards its effectiveness in the 'war on terrorism'.

3.1. Government's strategic response to 9/11

The Bush Administration's perception of 9/11 as a 'world-changing' event, and a crisis that presented an opportunity to project American power, influenced the nature and extent of its counterterrorism strategy (Fidler, 2011:2). In this regard the US Congress authorised the use of force against a broad range of targets suspected of perpetrating or supporting the 9/11 attacks, and this resulted in a comprehensive counterterrorism campaign using all elements of US national and international power, with intelligence as a prime instrument (Donohue, 2006:4; Perl, 2003:1).

Executive responsibility for directing the 'war on terrorism' resides with the President, and the NSC. In this regard, the NSC subcommittee, the Office of Intelligence Programmes, is the most senior executive body providing policy direction and oversight of intelligence. A number of Cabinet committees were also formed as a result of 9/11 to direct the intelligence aspect of the 'war on terrorism', and included the presidential advisory structure, the Homeland Security Council; and the Joint Intelligence Community Council (JICC), an advisory body on intelligence requirements and performance (United States: 1947, 2004a). The 9/11 incidents prompted a reassessment of intelligence

coordination and information sharing in the US, and along with greater resources, precipitated efforts to increase official powers to acquire counterterrorism intelligence, and conduct counter actions (Burger, 2008: 47; Gill, 2004:304). These reforms deeply affected the broader arrangements for Intelligence Service accountability in the US, and transformed the enabling environment for the conduct of intelligence as well the mechanisms for its oversight and review.

3.2. The impact of counterterrorism measures on intelligence gathering

After the speculation and uncertainty in the national discourse about curtailing civil liberties in response to 9/11, a range of extraordinary counterterrorism measures were adopted by the US. These measures, some of which were justified as being of a temporary nature, highlighted the policy of expanding intelligence gathering in and outside of the US that eroded traditional checks and balances.

3.2.1. Overview of significant counterterrorism legislation

The Bush Administration sought a whole range of extraordinary powers to prosecute its 'war on terrorism' amid perceptions that inadequate intelligence, and the separation of civilian intelligence from law enforcement, contributed to the failure to anticipate the events of 9/11 (Ezioni, 2005:42, 6; Berman *et al*, 2003:xx). In this regard, the scope of FISA was expanded to authorize the FBI to obtain access to the business and personal records of targets for gathering foreign intelligence. As a result, FISA, first enacted to regulate electronic surveillance, now also regulated interference with property, and access to the tangible records of targets (United States: 1978c, 2001). Of greater significance, Congress was persuaded to enact the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) of 2001 within a record 45 days

(Berman *et al*, 2003:xx). The USA PATRIOT Act bridged the intelligence-law enforcement divide, resulting in the blurring of distinctions between foreign and domestic threats and law enforcement investigations, as well as the manner to confront them (O'Brien, 2008: 2). These arrangements were effected mainly as amendments to FISA, as well as in the use of certain law enforcement tools that expanded their purpose beyond foreign intelligence gathering and criminal investigations respectively (Graves, 2010: 5,7; United States: 2001). Along with intelligence reforms enacted in 2004, this superseded the separate realms of foreign and domestic intelligence, and law enforcement (Donohue, 2006:53; United States: 2001, 2004a).

Military Tribunals were established in the aftermath of 9/11 by Presidential Order to hear charges formulated mainly upon intelligence information gathered by the CIA against suspected terrorists, and were formalised in the enactment of the Military Commissions Act of 2006. The Act authorised unlimited detention without charge of any person deemed an 'unlawful enemy combatant' by the US President; criminalised the provision of material support to suspected terrorists, and enabled the use of coerced testimony as well as sanitised intelligence information in the proceedings of tribunals. In subjecting terrorism charges to military proceedings, the Act also authorised the President to approve interrogation techniques utilised by the CIA abroad in possible violation of the Geneva Convention, as well as providing immunity in this regard (United States: 2006a; Cohn, 1: 2011; Nojem, 2001:4).

3.2.2. Intelligence accountability in the context of permissive legislation

The tribunal regime diluted judicial review of Executive power with regard to unlawful detention or deportation, and circumvented the criminal justice system in the US (United States: 2006a; Nojem, 2001:4). Furthermore, in expanding the purpose of FISA and law enforcement authorities in the USA PATRIOT Act, Congress enabled the Executive to deviate from the Fourth

Amendment search and seizure model. It did so by removing the requirement for individualized suspicion and accordingly removed the exclusion principle that limited the law enforcement interest of the FBI in a US person to the presence of a violation of law, and its foreign intelligence interest in such a person, to serious security threats that required the presence of a link to a foreign power (Herman, 2006: 71,74; ACLU:2006; Graves, 2010:5,7). This enabled the FBI to gather domestic civilian intelligence associated with counterterrorism, and in general in relation to purely domestic threats (Herman, 2006: 99). This is quite apart from the law enforcement and foreign intelligence functions of the FBI. These arrangements were eased with the minimization of judicial review, both in approving surveillance, as well as in assessing the constitutionality of Executive discretion in utilizing the authorities of FISA (Herman, 2006: 71,74). As a consequence, the Act also intrudes on the First Amendment model on freedom of speech; association, and exercise of religion (Herman, 2006: 69). In this regard, espionage conducted by the FBI in the US has increasingly been deployed against Muslims, Arabs, and South Asians in a form of religious or ethnic profiling (Graves, 2010: 10). These developments thus created further ambiguity in the law enforcement and civilian intelligence roles of the FBI, which is primarily a law enforcement agency.

In this regard, congressional opposition to the USA PATRIOT Act centred on the dilution of civil liberties, and the rule of law, although it focused unduly on Presidential assertions of authority rather than the substance of legislation (Etzioni, 2005: 2; Gill, 2004: 305). In recognition of the haste with which it was adopted, as well its invasive effect, Congress imposed four year sunset clauses on sixteen of its provisions (Herman, 2006: 71,103; United States: 2001). The renewal of sunset clauses was bitterly disputed, although such conflict was insubstantial, while individual initiatives to limit the most invasive provisions of the USA PATRIOT Act were often frustrated by procedural maneuvering, and partisan politics (Herman, 2006: 68, 69). The USA PATRIOT Act undermined

both congressional and judicial accountability with respect to its surveillance provisions. Against this background, Congress narrowly defeated opposition to renew, and make permanent, fourteen of the sixteen sunset provisions of the Act in 2005 (Herman, 2006: 103).

3.3. Inquiries into 9/11 and the Iraq war

The 9/11 attacks were investigated by two official inquiries, which were thereafter complemented by two further inquiries into the politicisation of intelligence in the US ‘war on terrorism’. The House Permanent Select Committee on Intelligence, and the Senate Select Committee on Intelligence (the Intelligence Committees) conducted the first public inquiry into 9/11, and established the Congressional Joint Inquiry in this regard (Bansemer, 2005: 47-8). The National Commission on Terrorist Attacks Upon the United States (9/11 Commission), which was mandated to recommend intelligence reform that reduced the potential for similar attacks, built on the findings of the Congressional Joint Inquiry, and evolved into the most influential panel of inquiry in US history (Warner *et al*, 2005: 37). Prior to the release of the 9/11 Commission report, the public discourse on intelligence shifted to the pre-war intelligence on Iraq that was used to justify the invasion of that country as an element of the US ‘war on terrorism’. In this regard the US Senate Committee on Intelligence, and the Commission on the Intelligence Capabilities of the US Regarding Weapons of Mass Destruction (WMD Commission) were established (Bansemer, 2005: 47-8).

The Congressional Joint Inquiry report during 2002 included recommendations for improving the management of the US intelligence community as a coherent entity; improving intelligence prioritisation; sharing intelligence across the intelligence community, and strengthening domestic intelligence capabilities (United States: 2002a and 2002b). The 9/11 Commission conducted a study of the 9/11 attacks, and its report of July 2004 concluded that the intelligence

community as a whole had suffered a failure of coordination, and joint action prior to the events of 9/11. It accordingly proposed a five-part plan, namely improving interagency joint action; reorganising the intelligence community structure; enforcing information sharing; strengthening domestic defense, and reforming congressional oversight of intelligence. The report incorporated more than 40 recommendations to strengthen the ability of the US to prevent future terrorist attacks (Burger, 2008:50-51; United States: 2004b). The Commission expressed concern with the duplication in structures for congressional oversight, and recommended their unification, as well as arrangements for greater awareness of intelligence within the Legislature. In this regard, the Commission proposed radical change to the congressional oversight model based around a small group that would be able to build expertise and trust, and recommended a Joint Committee on Intelligence (JCI) with exclusive jurisdiction for intelligence, and the authority to report legislation to each chamber (United States: 2004b).

The Senate Intelligence Committee report of July 2004 made a number of recommendations to improve intelligence analysis to avoid flawed products, without making a conclusive pronouncement on the abuse of intelligence to make a case for war in Iraq (United States: 2004c). The July 2005 WMD Commission report absolved the community of intelligence failure, and found that intelligence assessments on Iraq's weapons of mass destruction were not influenced by political considerations. The report contained 74 recommendations, mainly on the structure of the US intelligence community (United States: 2005b).

Although these inquiries were initiated in response to controversy around intelligence effectiveness, their reports led to reforms to the system for Intelligence Service accountability in the US.

3.4. Intelligence community and oversight reforms in the US

The release of the 9/11 Commission report in the midst of a Presidential election, provided an incentive to both the Executive and Congress to engage in intelligence reform. In this regard, President Bush issued three Executive Orders during August 2004 that implemented the primary recommendations of the 9/11 Commission. These established the National Counterterrorism Centre for the integration and analysis of terrorism information; enhanced the authority of the Director Central Intelligence, and introduced policies to enforce information sharing (Warner *et al*, 37: 2005; Bansemer, 2005:1-2, 56). In maintaining that Executive Orders were not sufficient to address the recommendations of the Joint Inquiry and the 9/11 Commission, Congress, motivated by the 9/11 attacks and its perception of misleading intelligence on Iraq, introduced the landmark intelligence reform initiative of the post-9/11 period in enacting the Intelligence Reform and Terrorism Prevention Act of 2004 (Burger, 2008:57; Lowenthal, 2006:207,276)).

The 2004 Act was strongly aligned to the recommendations of the Joint Inquiry, and the 9/11 Commission, and established the Office of the Director of National Intelligence (DNI) to head and manage the US intelligence community as a coherent entity, and serve as principle advisor to the President. The Act also established the National Counterterrorism Centre, along with the National Counter-proliferation Centre to coordinate intelligence activities within these respective domains (Burger, 2008: 57; United States: 2004a). The Act strengthened domestic security by conferring legislative status on the existing 'Intelligence Directorate' of the FBI, and established the Joint Intelligence Community Council at Executive level to facilitate the execution of intelligence policy. Against the trend of effecting intelligence reforms inclined towards operational effectiveness, the Act provided for a Privacy and Civil Liberties Oversight Board to counter the human rights effects of its potential permissiveness, and for an oversight function within the Office of the DNI to

monitor the independence of intelligence products (Lowenthal, 2006: 234; Tama, 2005:9-10; United States: 2004a). These reforms followed the creation of the Department of Homeland Security to coordinate domestic security in collaboration with the CIA and FBI (Lowenthal, 2006: 234).

Intelligence reform pursuant to 9/11 therefore focused on the structure and management of the US intelligence community as a coherent entity, and also established a more permissive environment for intelligence gathering and government discretion, both in the US, and abroad (United States: 2001,2004a,2006a). The budgets and resources of the Services also increased substantially, and by 2006, the CIA clandestine service tripled in size, and the intelligence analysis capacity of the FBI had doubled (Mahadevan, 2010:1). While the CIA maintained its statutory functions, reforms demoted it from the centre of US intelligence to enable it to focus on gathering foreign intelligence abroad. Reforms also strengthened the ability of the FBI to gather intelligence in the US, and allocated to it the lead role for countering international terrorism (Warner *et al*, 2005:38; Lowenthal, 2006: 234; United States: 2004a). These developments were informed by the imperative to avoid a recurrence of 9/11, and emphasised the orientation of intelligence accountability in the US towards greater performance effectiveness. While this orientation was expected in the aftermath of 9/11, consensus between the Executive and Legislature was crucial in effecting the most substantial intelligence reform in the US since 1947 (Gill, 2004: 298,310; Warner *et al*, 2005: 39). In this regard, disputes between the House and Senate were settled amicably, and the overwhelming desire that the DNI could prosecute the US 'war on terrorism', and synchronise the disparate US intelligence community was central in achieving a consensus for the reform agenda (Warner *et al*, 2005:39).

The centrality of Congress to intelligence reforms represented an important aspect of its role, although it also emphasised its vulnerability to assuming the role of management consultant at the expense of its oversight responsibilities

(Gill, 2004:315). In the midst of the review of congressional oversight precipitated by the 9/11 Commission, the prospect of dissolving the congressional Intelligence Committees seemed a step too far ahead, and Congress did not adopt the proposed joint committee model, or the alternative of maintaining the existing committees with enhanced powers to supplement budget authorization with those of appropriation. Congress instead established subcommittees of the House and Senate Appropriations Committees' that combined members of these Committees with those of the Intelligence Committees. The Senate also elevated the status of its Intelligence Committee, and ended the eight-year term limits for its membership to build and retain expertise (Kaiser, 2010: x; Best, 2010:11).

3.5. Domestic intelligence operations in a permissive environment

The USA PATRIOT Act enabled the FBI to utilize the intrusive powers inherent in FISA, a foreign intelligence gathering tool, as well as traditional law enforcement evidence gathering authorities such as national security letters, to gather intelligence information on US persons where the target was not the subject of a criminal investigation or foreign intelligence inquiry.

3.5.1. The policy of bridging the intelligence and law enforcement divide

The secret FISA Court was established to authorise the use of intrusive powers provided for in FISA to target US persons. This was dependent upon satisfying the court that the 'primary purpose' of such use was to acquire foreign intelligence information, and the target was an agent of a foreign power (United States: 1978c). Amendments to the operation of FISA were effected by relaxing this purpose to allow for the use of FISA where foreign intelligence constituted only a 'significant purpose' (Champion, 2005: 1686). The Act also removed the burden to prove the 'foreign agency' of a target to the FISA court, and substituted it with the mere requirement of a self 'authorized counterterrorism investigation' to warrant the use of FISA. The 'foreign

agency' requirement was also relaxed in the use of national security letters, which no longer required court approval (United States: 1978c, 2001). The relaxation of the 'purpose' and 'foreign agency' provisions consequently enabled the extension of FISA and national security letters into the realm of civilian intelligence gathering on purely domestic threats (United States: 2001; Herman, 2006: 99). These developments re-introduced a mission in the FBI, a law enforcement agency, in which US persons could be targeted for intelligence gathering without the presence of criminal conduct that would be necessary for the gathering of crime intelligence, or collaboration with a foreign power for the purpose of gathering foreign intelligence. This mission consequently closely resembled intelligence gathering associated with a domestic civilian Intelligence Service.

3.5.2. Unrestrained domestic civilian intelligence gathering

The dilution of standards of intelligence gathering with respect to US persons was premised on the need to cast a wider target net, without particular suspicion (Berman *et al*, 2003:2). In this regard, the annual average number of FISA orders spiked significantly since 2001; grew to four times its annual average by 2003, and in the period since 9/11 exceeded orders granted in the more than two decades since the inception of FISA. In this period, FISA orders also exceeded those granted under the criminal code in the US for the first time, highlighting the shift in the intelligence gathering strategy of the US government (Donohue, 2006: 47-8; Graves, 2010:7)). The permissive regime on national security letters has enabled the FBI to issue them at an annual rate exceeding a hundred times the annual number prior to 9/11. This regime has developed into an unrestrained tool for gathering information on US persons and expanding targets (Donohue, 2006: 57, 60). Graves (2010:6) estimates that the expansion of surveillance authority in the domestic context has resulted in the secondary targeting of up to 75 million US persons. In this regard, the only

requirement is that a self 'authorized investigation' is in place (Donohue, 2006:56-57).

In this regard, the decision not to establish a domestic civilian Intelligence Service reflected the perception that blurring the divide between intelligence and law enforcement within the FBI was the more effective approach to domestic intelligence gathering, and affecting even those distinctions designed to protect civil liberties (United States:2004b; Donohue, 2006:70; Berman *et al*, 2003:xx). Given that the FBI is a law enforcement agency with the responsibility for gathering foreign intelligence in the US however, the lack of relevant standards resulted in it conducting what closely resembles domestic civilian intelligence according to the rules of criminal investigation and foreign intelligence, and vice-versa. This has resulted in calls for a new concept of domestic civilian intelligence in the US (Berman *et al*, 2003:xx).

3.6. Foreign intelligence operations in a permissive environment

Prior to 9/11, terrorism was seen as a criminal offence, and also extended to include the statutory role of the FBI to 'render' to justice in the US, terrorism suspects abroad (Lowenthal, 2006: 234). In this regard, the 'war on terrorism' was not metaphorical, and instead signalled that elements of the US campaign against terrorism would be carried out according to the laws of war, as opposed to criminal law (Lummis, 2011:2). The global nature of threats since 9/11 also served to 'internationalise' intelligence; witnessed the appearance of extraordinary foreign intelligence gathering methods abroad, and the reawakening of the covert role of the CIA since the end of the Cold War (Herman,2003:11; Mahadevan,2010:2). The undefined space occupied by the 'war on terrorism', between law enforcement and intelligence on the one hand, and conventional war on the other, had serious implications for the oversight of foreign intelligence.

3.6.1. The use of unsupervised international intelligence networks

9/11 has been a major catalyst for intelligence sharing between countries, a practice that was formally mandated by the UN Security Council (Herman, 2003:11). In this regard the US had been a leading member of certain Cold War security arrangements, which were expanded to include new partnerships for civilian intelligence sharing and joint operations, while the CIA extended its intelligence partnership network to include more than 400 Services since 9/11 (Hunter, 2004:34; Sepper, 2010:155). In the aftermath of 9/11, these networks, which are characterized by secrecy; flexibility, and informality, were at the helm of the intelligence-driven counterterrorism strategy of the US. Shared information is aggressively protected to avoid compromising sources and methods, making sharing networks highly susceptible to manipulation (Sepper, 2010:160). In the US, the transnational activities of the CIA are self governing; out of the purview of congressional oversight, and constitute the area of weakest Intelligence Service accountability in the US. These circumstances permitted the CIA to obfuscate the source of crucial intelligence, and the reliability thereof, to distort intelligence assessments in support of the Iraq invasion (Goodman, 2006b:1). They also enabled it to circumvent safeguards established by US law and international treaties, and to perpetrate human rights abuses; interrogation; torture, and other coercive action in the conduct of its activities abroad (Gill, 2009: 941; Sepper, 2010:151,167,178).

The failure to regulate these activities impedes oversight of their legality, and may also render irrelevant statutes limiting intelligence activity in the US. This was evident in allegations of interception of the communications of US citizens by partner countries on behalf of the US (Sepper, 2010: 100-101). Oversight mechanisms in the US are also excluded from receiving information exchanged through partnerships, which limits the scope of oversight of network arrangements. In this regard, the House Intelligence Committee was unable to

complete its investigation into the joint signals interceptions security alliance of English speaking western countries, ECHELON, as a result (Sepper, 2010:105). Although the US courts rarely encounter intelligence shared through networks, when they have, confidentiality obligations to network partners have been prioritized over judicial scrutiny and the rights of defendants (Sepper, 2010:151).

3.6.2. Extraordinary intelligence gathering methods abroad

The CIA was placed under enormous political pressure to use torture as a method to extract targeting information from prisoners on further suspects (Goodman, 2006a:2). This strategy was aided by the statutory framework for designating these suspects as ‘unlawful enemy combatants’, and enabling their indefinite detention and torture at secret CIA prisons using interrogation techniques in violation of international treaties (United States: 2006a, 2009a; Gilmore, 2011:1-2). The resultant coerced testimony was utilised as sanitised intelligence information, before Military Tribunals that were devoid of the guarantees associated with a fair trial in accordance with international standards (Goldsmith, 2006:1). This strategy also extended to the US practice of extraordinary rendition, the relocation of suspects arrested in one country to another that is able to extract intelligence information on its behalf, thereby outsourcing the use of torture (Gill, 2004: 307). In this regard, the statutory role of the FBI to ‘render’ to US justice terrorism suspects aboard, did not apply to suspects after 9/11, who are instead considered as ‘unlawful enemy combatants’ (Lowenthal, 2006: 234).

The exclusion of Congress from the most sensitive intelligence activities in the ‘war on terrorism’ gave rise to mistrust, and prevented it from overseeing the misuse by the CIA of its operational authority (Goodman, 2006a:4,5). Allegations of CIA prisoner abuse, and holding and transporting prisoners, resulted in demands for congressional investigation, while individual members

of Congress also sought to establish statutory restrictions on interrogation techniques (Best, 2010:21). Although these initiatives were constantly frustrated by the Bush Administration, the Obama Administration approved legislation limiting the use of interrogation techniques by the CIA. This recent trend continued as the Senate Intelligence Committee adopted a resolution to review the detention and interrogation activities of the CIA since 9/11, and the government published new guidelines in this regard (Best, 2010: 21). The Executive also released the adverse 2004 report of the CIA Inspector-General into CIA detention and interrogation practices. The report identified a disturbing trend in the ethical culture of the CIA abroad in the post-9/11 era, and exposed the unlawful use by the CIA of 'waterboarding', and other inhumane methods to extract intelligence (ACS:2009). This was accompanied by notification of a criminal investigation into interrogation practices, the scope of which excluded inquiry into the legitimacy of related interrogation guidelines (ACS:2009). The end of the tenure of the Bush Administration coincided with the exposure of certain unlawful CIA activities, and invoked a new discourse in some quarters on the precise extent of the Agency's remit (Huff Post: 2009a).

3.6.3. Covert operations against terrorism suspects abroad

Since its decline after the end of the Cold War, covert action assumed an important position after 9/11 as an instrument in the conduct of US foreign policy. This was premised on the perception that terrorism was a predominantly foreign threat, and consequently focused the US counterstrategy on insulating the homeland, and targeting terrorist suspects abroad, using CIA paramilitary operations (Mahadevan, 2010:2). Contrary to its traditional form, where operations were sponsored through proxies, CIA paramilitary operations since 9/11 mainly assumed the form of unmanned drone attacks launched against terrorist suspects (United States: 2004b;Gilmore, 2011:1-2). Under these circumstances, suspects who were neither soldiers identifiable in

uniform, nor perceived as suspects against whom evidence of terrorist acts was required, were targeted. In this regard, suspicion premised on physical appearance was central, and risked the indiscriminate killing of civilians, along with legitimate US targets (Lummis, 2011:3).

Although the CIA drone programme is covered in official secrecy, and emphasises the targeting of Al Qaeda members, during the 18 months ending in April 2009, sixty CIA drone attacks suggest an average rate of fifty civilian deaths for every target, and underscore the use of unreliable or even indiscriminate targeting information purchased from local recruits (Porter, 2009:2). The 9/11 Commission recommended that these paramilitary operations should reside with the Military. Furthermore, the demise of threats that established the nature and rules associated with covert action had not prompted Congress to re-evaluate the conventional justification thereof as an alternative between diplomacy and military action, and for which it has been a strong advocate (Goodman, 2006a:4). As a result, covert action as undertaken by the CIA, was maintained by the Obama Administration as a cost and politically effective alternative to the US Military in the prosecution of the US 'war on terrorism' abroad.

3.6.4. The politicisation of intelligence and its oversight in the 'war on terrorism'

The campaign pursued by the Bush Administration to manipulate foreign intelligence in support of its public case to invade Iraq, politicised the use of intelligence; ensnared the CIA into the fabrication process in violation of its charter, and misinformed Congress in this regard (Goodman, 2006b:1-3). In a formal acceptance of its failures however, the CIA subsequently prepared a series of classified estimates during 2005, revising its pre-war WMD assessments on Iraq in the aftermath of the war (United States: 2006b). Given this background, the conclusions of official inquiries exposed the failure of

congressional oversight to seriously probe the politicisation of intelligence, and the inability of the CIA to provide independent intelligence assessments, free of political considerations, to those in power. These deficiencies were not addressed by the 9/11 Commission or the 2004 Act (Goodman, 2006a:2). The Senate Intelligence Committee, under Democratic control, revisited its investigation in 2006 to evaluate the subsequent evidence of the political use of intelligence, and found that the Bush Administration relied on intelligence that was flawed; presented intelligence that did not exist, and exaggerated threats that were not supported by intelligence to make a case for war against Iraq. The report did not expand on possible corrupt tradecraft however, or the existence of ethical concerns in the CIA (United States: 2006b).

In this regard, the protection afforded by the Republican-led Senate Intelligence Committee to the Bush Administration, also resulted in the committee leadership preventing the committee from investigating politicised intelligence on Iraq's alleged acquisition of uranium from Niger before it was publicly used by the President to make a case for war against Iraq in 2003; preventing an investigation into the role of the CIA in the abuse and torture of detainees; CIA policy on rendition, and surveillance conducted outside of the FISA process (Goodman, 2006a:3). The tendency of politicising oversight had the effect of diluting the leverage associated with Senate confirmation of certain senior intelligence appointments, and relegating the Intelligence Committees, who had jurisdiction over intelligence reorganisation, to minor roles in the subsequent legislative process (Goodman, 2006a:5,7). These developments reflect the inherent dynamic of intelligence oversight in the US political system, represented by the spill-over effect of opposition or support to the Administration by political groups in Congress along party lines (Lowenthal, 2006: 215). In this regard, the dynamics associated with oversight conducted independent of Executive influence and favour, were reflected in the marginalisation of the role of the Presidents Foreign Intelligence Advisory Board during the Bush presidency, amid the Boards confrontation of the

Executive on sensitive policy issues in the ‘war on terrorism’ (Goodman, 2006a:4). After its credibility was tainted during the Clinton Presidency, the relationship between the Board and the Executive also experienced strain amid the intelligence controversy surrounding the Iraq invasion, and concluded with the resignation of its Chairman, Ben Scowcroft (Lowenthal, 2006:192).

The events of 9/11 resulted in a fundamental alteration to the framework for the conduct of civilian intelligence as well as changing the system for holding intelligence to account into a permissive one, in the process shifting the balance from imperatives of human rights towards those of national security.

4. CURRENT MECHANISMS FOR CIVILIAN INTELLIGENCE SERVICE ACCOUNTABILITY

An increasing struggle for information control between the Executive and oversight mechanisms continued to characterise the framework for intelligence oversight. These events also had a significant impact on oversight and review arrangements in the US, as well as their scope of oversight authority.

4.1. Congressional oversight of intelligence

The traditional committee structure and associated arrangements for congressional oversight of intelligence that the 9/11 Commission concluded was dysfunctional and powerless, remains substantially in place. Furthermore, Congress has been unable to establish the objects; powers, and functions of domestic intelligence in statute, or adequately regulate the oversight of significant areas of foreign intelligence. The statute governing reporting of covert action is also vulnerable to misuse, with the result that the Intelligence Committees are excluded from overseeing sensitive intelligence activities in the ‘war on terrorism’ (Best, 2010:21; Huff Post: 2009b).

The significance of the annual intelligence authorization process is that since 1979, subject to the approval of the President, this provided congressional approval of intelligence budgets and activities; enacted changes to these activities and the laws governing intelligence, and established information requirements for oversight. Intelligence authorization legislation had not been enacted from 2004 to 2009 however as a result of disputes with the Executive on Intelligence Committee initiatives to regulate interrogation methods and detention in the 'war on terrorism'. Under these circumstances, budget authorisation was instead effected as part of congressional appropriation of intelligence budgets, and emphasised the limitations associated with the budget authorisation powers of the Intelligence Committees. Given these disputes, and the decline in the extent to which the Executive kept the committees informed on intelligence activities since 9/11, initiatives to reinstate, and enhance information sharing arrangements in this regard now constitute the major focus area of congressional oversight (Best, 2010: 3-4).

4.2. The Judiciary and judicial review of intelligence

The US courts encountered intelligence matters at a more intense level since 9/11 which required them to consider the detention and prosecution of terrorist suspects; the rights of 'enemy combatants', and the constitutionality of permissive intelligence gathering powers.

4.2.1. Effect on the courts

The US Supreme Court minimized the role of the Judiciary for the purpose of intelligence gathering in the US since 9/11 by interpreting the Fourth Amendment to authorize deviations from the principles of judicial review and individualized suspicion. As a result of this interpretation, the courts are reluctant to contest legislation enacted by Congress or to interpret this constitutional protection as providing judicial constraints on government

surveillance. In this context, the balance between human rights and national security imperatives used by the courts to establish Fourth Amendment rights favour the security claims of government (Herman, 2006: 69,104). Although the Supreme Court has not had the occasion to rule on the constitutionality of FISA, the finding of the FISA Review Court that FISA procedures are the equivalent of Fourth Amendment warrant standards, is in conflict with earlier conclusions of the courts; effectively sanctions the blurring of the law enforcement-domestic intelligence divide, and enables the admission of intelligence information gathered outside of conventional judicial control as evidence in criminal proceedings (Herman, 2006: 97,99; Berman *et al*, 2003:xx). In considering the reasonability of the most intrusive provisions warranted by the USA PATRIOT Act, the Supreme Court has decided thirteen of the fourteen Fourth Amendment cases it has heard in favour of the government, and in the process admitting the interpretation that they do not constitute a search or seizure as contemplated in law (Herman, 2006:130-131).

On the other hand, the courts have tempered government policy on indefinite detention, ruling that both US, and foreign ‘enemy combatants’ have the right to contest their detention in a court of law, and pronounced against the perception that a state of war constitutes a blank slate for the President with respect to civil liberties (Etzioni, 2005:35). Although the resultant use of Military Tribunals circumvented the criminal justice system, the courts continue to support fair trial rights, and rule against secret deportation hearings, and unlimited detention (Nojeim, 2001:4; Gill, 2004: 313). In this regard, since 9/11, the Judiciary assumes a limited but important role in curbing government action based on intelligence in the ‘war on terrorism’ (Nojeim, 2001:4).

4.2.2. Judicial review

Although the USA PATRIOT Act of 2001 maintains the constitutional requirement for a judicial order for surveillance in terms of FISA, it dilutes the FISA Court's review of surveillance applications (Berman *et al*, 2003:xx). FISA, initially enacted to gather intelligence on US persons who collaborate with a foreign power, is the main instrument through which the threshold for gathering domestic civilian intelligence has been lowered. Despite the safeguards associated with it, since its inception, the FISA court has generally approved all surveillance applications, and available statistics indicate that between 1979, and 2003, the court denied only three out of 16,450 such applications (Donohue, 2006: 47-8).

4.3. Independent review mechanisms

Independent review mechanisms are located mainly in the Executive branch, and occasionally in Congress. Their proximity to operational activities emphasises their importance since 9/11 in overseeing the Intelligence Services.

4.3.1. Inspectors-General of the CIA and Department of Justice

The Inspector-General of the CIA (IG) is appointed by the President with Senate confirmation and conducts a range of investigations into the operations of the Agency. Although most of these initiatives remain internal, a number of reports in this regard are published in redacted form, and include both reviews undertaken on the operational effectiveness, as well as the legality of CIA activities (United States:2011a). Given that the CIA is exempted from the unrestricted oversight arrangements of the Inspector-General Act of 1978 however, the CIA-IG is subject to certain operational constraints (United States: 1978a; Snider, 2007a:1). This was apparent as the IG was prevented from releasing his report on the 9/11 intelligence failure after the director of

the CIA refused to declassify it, and publicly rebuked his recommendations (Goodman, 2006a:5; United States:2007).

The sensitivity of the 2004 IG interrogation report, and its impact on the CIA, also resulted in the Agency questioning the independence and authority of the IG (ACS:2009). Against this background, the IG is required to communicate through the Agency head in exercising the crucial reporting function to the congressional Intelligence Committees (United States:1949). Since the exposure of substandard oversight gave rise to reforms in the IG function, the CIA IG appears to have displayed the necessary integrity and independence to balance the aforementioned dynamics associated with this internal role, to effect constructive oversight, and in the process added value to both the functioning of the Agency, and through its reports, to the congressional Intelligence Committees (Snider, 2007a:1-2,7; United States:2011a).

The Inspector-General of the Department of Justice, in which the FBI is located, is responsible for the internal oversight of the intelligence activities of the Bureau. Since 9/11, the IG has had to oversee the balance between human rights concerns, and the transformation of the FBI from a law enforcement, to a preventative Intelligence Service (IIRAC, 2004:21,22). This has been especially significant, given that certain aspects of this transformation have resembled the gathering of domestic civilian intelligence. In this regard, the IG has conducted a multitude of routine, and special inquiries into the intelligence activities of the FBI. Some of these are made public, and include both the efficacy and legality of those activities. In its inquiry on the Bureau's collection of foreign intelligence at secret CIA facilities abroad, the IG exonerated the FBI from any wrongdoing, and strongly advocated its cause (United States: 2008a, 2011b). In this regard, memoranda prepared in the Justice Department construed certain inhumane CIA practices as not constituting torture, and therefore an acceptable basis for interrogation. The report of the IG on the authors' violation of their ethical duties in supporting

the claims of the Bush Administration that torture techniques abroad were lawful, has not been released (Huff Post:2009a).

Inspectors-General also respond to complaints from members of the public aggrieved by the actions of the CIA and FBI. Given that the complaints function does not apply the rule of due process on security grounds, little is known about it. Intelligence Inspectors-General have traditionally cooperated with each other through the Inspector-General Forum, especially on common concerns, such as detention and interrogation in the aftermath of 9/11. Cooperation had also extended to official liaison with a range of congressional committees with an intelligence interest (IIRAC,2004:5). These arrangements simplified, and enhanced coordination among intelligence Inspectors-General, and were complemented by broader statutory cooperation arrangements established in 2008. Given the jurisdictional conflicts among the existing statutory Inspectors-General within the intelligence community, and the need to formally coordinate their reviews, proposals were being considered in 2009 to replicate the concept of integration by means of a statutory Inspector-General with comprehensive jurisdiction over the intelligence community (Kaiser, 2010: 27).

4.3.2. Concurrent developments

The persistence of the Intelligence Committees to establish a role for the Government Accountability Office in the audit of the CIA, has been resisted by both the Bush and Obama Administrations. The independent Privacy and Civil Liberties Oversight Board has also not been formally established since it was enacted in legislation in 2007 (Best, 2010:22; Hatch, 2011:x). In the meanwhile, the Presidents Foreign Intelligence Advisory Board was reconstituted by the Obama Administration during October 2009 with new membership (United States: 2009b).

Open inquiries into the role of intelligence in the 9/11 attacks, and the Iraq war were the result of public demands, and its reporting in the media placed intelligence in the public glare.

4.4. Media; civil society, and secrecy

The published report of the 9/11 Commission received wide public attention, and signified the growth in reporting on intelligence (Warner *et al*, 2005: 37). Sensationalist media reporting influenced the congressional approach to oversight however, and spawned the public relations and disinformation aspects of intelligence to counter negative media sentiment, as well as court public support since 9/11 (Etzioni, 2005:2; Lowenthal, 2006: 214, IIRAC, 2004:17-18). The role of civil society in monitoring the negative effect of intelligence on human rights has grown substantially since 9/11, even though government placed more emphasis on secrecy (Gill, 2004: 308,314; Herman, 2006:68, 95). The dependence of the media on official leaks of conscientious objectors has been met with a combination of restraining orders and intimidation tactics to neutralise whistleblowers (Sepper, 2010: 99; Goodman, 2006a:5). In this regard, Congress has resisted Official Secrets legislation, thereby preserving the public interest defence that may be invoked by whistleblowers (IIRAC, 2004:18). Although it has been crucial in building public understanding of intelligence, media disclosures have also compromised the security interests of the US (IIRAC, 2004:17,18). The media's vulnerability to official disinformation, and uncritical reporting also unravelled since 9/11, as it helped create momentum for war in Iraq (IIRAC, 2004:16).

Table 4 below encapsulates the significant developments regarding the post-9/11 situation relating to civilian intelligence accountability in the US.

TABLE 4: SIGNIFICANT DEVELOPMENTS, POST-911 SITUATION RELATING TO CIVILIAN INTELLIGENCE ACCOUNTABILITY IN THE US	
Framework for the conduct of Domestic Intelligence	
Intelligence gathering resembling domestic civilian intelligence was established by stealth post-9/11 by reformulating existing laws and removing the law enforcement-domestic intelligence barrier. In the absence of a clear charter, this lowered the threshold, and fundamentally altered the circumstances under which a US person could be targeted for intelligence gathering.	
Framework for the conduct of Foreign Intelligence	
The vaguely defined functions of the CIA were clarified in the National Security Act in the early post-Cold War period. Extraordinary intelligence gathering methods abroad as well as paramilitary operations introduced since 9/11. Conduct of certain CIA activities evolved from principles of deniability and non-detection, to open violation of international treaties and norms pursuant to 9/11.	
Management supervision and intelligence roles	
Adopted reforms to establish the US intelligence community as a coherent entity under the overall supervision of the Director National Intelligence. These reforms demoted the CIA from its central intelligence role, and conferred upon the FBI the lead responsibility for counterterrorism.	
Assertions of Executive privilege and secrecy grew in the aftermath of 9/11, along with assertions of power to act outside of the law to protect national security.	
Congress and Congressional Oversight	
Influential in intelligence inquiries, and reforms undertaken; established the enabling environment for the ‘war on terrorism’, and deferred considerable discretion to the Executive in deviating from the constitutional model on civil liberties. With respect to certain issues, tends to approach national security along party lines, in support of, or in opposition to the Executive.	
The role of the Intelligence Committees has been marginalised with regard to	

sensitive areas in the ‘war on terrorism’ as a consequence of a denial of access to information. Committees failed to honestly evaluate unlawful intelligence activities and failures, as well as to confront the Executive on its conduct in this regard. The limitations associated with the budget authorisation powers of the committees were exposed amid disagreements with the Executive. Committees widely perceived as dysfunctional, and failed to adopt proposed internal reforms pursuant to 9/11. Assumed an important oversight role, however often impeded by partisan politics, and failed to convey public assurance on intelligence. Excessive advocacy of intelligence results in perceptions of the committees as enablers rather than overseers.

Independent Oversight Mechanisms

Independent mechanisms added considerable internal value, although limited external assurance, and displayed a tendency to vindicate the Services in matters of public interest. Hostility towards these mechanisms apparent in rare instances of adverse reports on intelligence activities, or confrontation of Executive policies since 9/11. Crucial mechanisms established in legislation to oversee the impact on civil liberties of permissive intelligence gathering measures pursuant to 9/11, have not been operationalised.

The role of the Judiciary

The role of the Judiciary has been marginalised with respect to protecting the right against unreasonable search and seizure, pursuant to the introduction of an intelligence gathering regime resembling domestic civilian intelligence in the US. The courts also tended to interpret constitutional protections in favour of the security claims of the government with respect to disclosure of classified information. The Judiciary assumed a crucial role however with respect to its rejection of extraordinary intelligence gathering effected through detention without charge both in the US and abroad, as well as curbing assertions of inherent Executive powers to act outside of the law in the ‘war on terrorism’.

Role of the Media and Civil Society

Media reporting and civil society involvement in intelligence grew exponentially

since the events of 9/11. The US dispensation enables the invocation of the public interest defence in the event of disclosure of classified information, while the media has also been vulnerable to official disinformation in the US.

5. CONCLUSION

The system for Intelligence Service accountability in the US, although incomplete and inconsistent in a number of respects, reached a degree of maturity, and was strongly aligned to the constitutional values of the US as a result of substantial reforms undertaken during the Cold War period in this regard. The events of 9/11 changed the orientation of intelligence accountability from concerns of propriety to its effectiveness, and transformed the functioning of its elements, as counterterrorism assumed the central priority of US security. In this regard, permissive reforms enacted by Congress conceded to the will of the Executive for increased powers and discretion, and had the effect of eroding traditional checks and balances that enabled the FBI to gather intelligence in the US that resembled domestic civilian intelligence. It also enabled the CIA to engage in an unrestrained counterterrorism campaign abroad. The extension of the scope of existing intelligence gathering powers effected by these reforms enabled the expanded domestic activities of the FBI, and consequently established a capability that resembled domestic civilian intelligence in the US by stealth. As a result of this permissive environment, the fundamental condition, established pursuant to the mid-Cold War intelligence abuses, upon which US persons could be targeted for civilian intelligence gathering in the US, was eliminated.

The uncompromising strategy adopted by the US to prosecute its 'war on terrorism' abroad was accompanied by CIA activities that breached humanitarian laws; conventions and other international treaties. In this regard, this Chapter has highlighted that congressional acquiescence, and the prospect of further attacks, enabled the Executive to conduct an almost unrestrained

counterterrorism campaign, both in the US and abroad. This permitted the Executive to abuse intelligence information; dilute, and even circumvent legislation, and the mechanisms for Intelligence Service accountability. In this regard, congressional oversight was paralysed by political partisanship, and its oversight role significantly marginalised by the Executive. As a result, the Intelligence Committees were unable to adequately conduct oversight of the over-breadth of domestic collection conducted by the FBI outside of its law enforcement and foreign intelligence remit, or the clandestine activities and covert operations of the CIA abroad. Although judicial review of intelligence gathering had been marginalised since 9/11, it was able to assume a limited, but important role in restraining Executive action in ruling against certain extreme counterterrorism measures such as unlimited detention. In this regard, the Judiciary appeared to otherwise support the encroachment on the constitutional rights of US persons with regard to special measures that resembled domestic civilian intelligence collection. On the periphery, the media assumed an important role in reporting on developments in intelligence, and occasionally exposing abuses, while human rights defenders have been active in the US since 9/11 in confronting government encroachment on constitutionally protected civil liberties. It is clear that in a heightened threat environment, Executive control and intelligence effectiveness supersede all the other elements of Intelligence Service accountability. These developments reflected the Cold War consensus, and congressional and judicial deference to the Executive on national security affairs.

Congress, having deferred to the Executive in the aftermath of 9/11 to establish the permissive environment for it to conduct the 'war on terrorism' before being marginalized in this regard, also began to reassert its oversight role toward the end of the period under review. In certain respects, this repeats the Cold War pattern where the emphasis on intelligence effectiveness was questioned by the discovery of intelligence abuses, and was consequently followed by a period of reflection and focus on intelligence propriety. Whereas

these developments resulted from internal dissent and media disclosures, the restraint regarding certain aspects of the ‘war on terrorism’ reflects concurrent US security policy, and domestic and international public opinion on the appropriateness of the uncompromising US counterterrorism policy. In this regard, the effect of 9/11 on the system for Intelligence Service accountability has been to unduly distort the emphasis towards operational effectiveness, to the extent that the restraining effect of legislation and oversight on the conduct of intelligence has been significantly marginalised. The US response to 9/11 also highlighted the need for legislative involvement in establishing the concept for, and the objects, powers and functions for the practice of domestic civilian intelligence in the US, and foreign intelligence abroad, in compliance with the US Constitution; international treaties and other appropriate restraints that are able to reflect the purported values of the US.

CHAPTER 6: EVALUATION

1. INTRODUCTION

Security and Intelligence Services are essential components of the security architecture of democratic societies. The secrecy and intrusive nature of intelligence is however not compatible with a system of democratic governance, and threatens fundamental human rights to privacy, and freedom of expression and association. This study therefore sought to examine the evolution of the system of safeguards through which the US and UK sought to reconcile this incompatibility, and accommodate state Intelligence Services within their respective systems of government.

This chapter summarises the analysis presented in the study on the evolution of the environment and mechanisms for civilian Intelligence Service accountability in the US and UK, and compares the respective dispensations in this regard. It also evaluates the assumptions presented in the Introduction, and draws conclusions based on the evaluation in each of the previous chapters.

2. SUMMARY OF THE TEXT

This study commenced with the development of a conceptual framework for civilian Intelligence Service accountability. Chapter 2 accordingly defined certain basic concepts used in the study, and illustrated that intelligence accountability is a collective, interdependent system of checks and balances that provides assurance on the propriety and efficacy of Intelligence Services, thereby conferring a measure of credibility and public consent for their activities. In this regard, the architecture for holding Intelligence Services to account comprises of a multiplicity of instruments and actors, and revolves mainly around the governance of intelligence in the domestic sphere. It was emphasised that there is no precise model for intelligence accountability,

although certain basic prerequisites are necessary for it to pass democratic muster. In this respect, the presumption is that intelligence is not alien to democracy, but is in fact an indispensable resource for the advancement of national security within the framework of an interdependent system of checks and balances.

Chapter 3 provided an historical overview of the development of civilian Intelligence Service accountability in the UK and US during the Cold War period, and highlighted the unchecked dominance of the Executive over civilian intelligence during most of this period. In this regard, claims for greater Intelligence Service accountability during the latter Cold War period were only feasible as a result of the exposure of intelligence abuses in the US, and the invocation of incompatibilities in intelligence practice in the UK with the European Convention on Human Rights (ECHR). The chapter also compared and analysed the different approaches by which the civilian Intelligence Services in the UK and US were held accountable at the end of the Cold War. In this regard, arrangements for intelligence accountability in the US evolved substantially as the country was compelled to arbitrate its 'security dilemma', and was strongly aligned to its constitutional principles. In contrast, the philosophy of intelligence conduct in the name of the Crown resulted in the continued abdication of the affairs of intelligence in the UK to the Executive.

Chapter 4 examined the evolution of the system for civilian Intelligence Service accountability in the UK from the end of the Cold War in 1989 to the end of 2009, with specific emphasis on the role of the ECHR, and the terrorist attacks against the US and UK during September 2001 and July 2005 respectively. The chapter demonstrated that the Convention was the catalyst for the introduction of a framework for intelligence accountability in the UK, although the minimalist nature of reforms undertaken maintained the tradition of strong Executive control. Arrangements for oversight and review on the other hand were deficient in material respects, and effectively controlled by the

Executive. It was also illustrated that the events of 9/11, and the London bombings imbued the framework for the conduct of intelligence with a new permissiveness, and altered the terms for holding the Services to account. The emphasis of Intelligence Service accountability accordingly shifted away from civil liberties in favour of security. The proportionality of these developments was opposed by the peripheral mechanisms of intelligence accountability, while formal oversight mechanisms seemed to confer a level of credibility upon intelligence that was not entirely warranted.

Chapter 5 examined the evolution of the system for civilian Intelligence Service accountability in the US from the end of the Cold War in 1989 to the end of 2009, with specific emphasis on the September 2001 attacks. The chapter illustrated that 9/11 changed the orientation of intelligence accountability from concerns of propriety, to intelligence effectiveness, and transformed the functioning of its instruments. Intelligence reforms in this regard had the effect of eroding traditional checks and balances on the targeting of US persons, and enabled an unrestrained counterterrorism campaign abroad. It was noted that the effect of 9/11 on the system of Intelligence Service accountability, had been to significantly marginalise its restraining role on the conduct of intelligence in the US and abroad. In a heightened threat environment, Executive control and intelligence effectiveness supersede all the other elements of Intelligence Service accountability.

3. A COMPARISON OF ARRANGEMENTS FOR CIVILIAN INTELLIGENCE SERVICE ACCOUNTABILITY: THE UNITED KINGDOM AND THE UNITED STATES

The following sub-sections compare and analyse the arrangements for civilian Intelligence Service accountability in the UK and US since the onset of the Cold War, with an emphasis on the post-Cold War and current periods.

3.1. Framework and organising principles for the conduct of intelligence

The framework for the conduct of civilian intelligence in the UK and US evolved substantially since the Cold War to closely reflect their respective systems of government and democratic culture. In this regard, the separation of foreign intelligence from domestic intelligence has been a significant organising principle for civilian intelligence in both the US and UK. In the US however, a dedicated domestic civilian Intelligence Service has not been established.

3.1.1. The Cold War and early post-Cold War periods

During the early Cold War, national legislation established the CIA to conduct foreign intelligence, and provided for its objects; powers, and functions in deliberately broad terms. The FBI, a law enforcement agency, continued to gather intelligence that resembled domestic civilian intelligence by Executive Order. In the UK, MI5 and MI6 respectively, continued to conduct domestic and foreign intelligence as a deniable state activity, in which their existence was not officially acknowledged. As a result, the conduct of domestic and foreign intelligence in both the US and the UK lacked an explicit statutory framework, as well as parameters within which to account, and arrangements for the oversight of intelligence were not secured in law. Under these circumstances, as well as arrangements where the Legislature and Judiciary in the UK and US deferred to the Executive on affairs of national security, civilian intelligence was conducted outside of a system of democratic accountability or public consent, which was instead superseded by a national consensus on the Soviet threat.

The exposure of intelligence abuses during the mid-Cold War period however, developed the momentum for intelligence propriety in the US, in which a system of Intelligence Service accountability was adopted to manage the conflict between intelligence secrecy and US constitutional principles. In the

UK on the other hand, intelligence scandal was contained, and the culture of secrecy enabled the Executive to conduct intelligence according to its discretion without appropriate restraints. These developments reflected the `elitism and extreme secrecy associated with the political culture in the UK as well as its Westminster system of government, which is characterised by a fusion of the Executive and Legislature, and its domination by the Executive. In contrast, the US Administration was unable to discount public or congressional concerns of intelligence propriety, given the scope of congressional influence conferred by the separation of powers of the Executive and Legislature, and its fiscal authority in the US constitutional arrangement. The standard embodied in the US Constitution and Bill of Rights was also able to serve as a benchmark for intelligence reforms. This may be contrasted with the dependence in the UK on the common law for the protection of human rights in the absence of appropriate constitutional restraints protecting those rights from intelligence abuses. Given this void, as well as the limited influence of its Legislature in security affairs in comparison with the US, external exigencies emanating from the European Court of Human Rights (ECtHR) during the early post-Cold War period, were the catalyst for the introduction of a framework for intelligence accountability in the UK, as well as the incorporation of the ECHR into its domestic law.

National legislation accordingly established MI5 and MI6 in law as well as its objects and powers in detailed and explicit terms. In seeking to mainly avoid inconsistencies between UK intelligence practice and the principles of the ECHR however, this framework was minimalist in nature; merely formalised existing practice in law, and maintained the tradition of strong Executive control. While the Legislature and Judiciary were introduced into the architecture for intelligence accountability in the UK on a limited scale, these were controlled by the Executive, and would not have passed democratic muster as oversight arrangements had in the US. The system for intelligence accountability that evolved in the US curbed the circumstances under which a

US person could be targeted by the FBI for foreign intelligence gathering, as well as for intelligence gathering that resembled domestic civilian intelligence, and statutory arrangements involved the Judiciary in the pre-authorisation of intrusive measures in this regard. The UK in contrast, maintained a traditional domestic civilian intelligence function where UK persons could be targeted based on a broad category of threats on a low-threshold intelligence suspicion, and intrusive measures in this regard are approved by the Executive or officials, without any special limitations or protections.

3.1.2. The post-9/11 period

The events of 9/11 infused a new permissiveness into the statutory framework for the conduct of intelligence in the UK and US that eroded traditional checks and balances on domestic civilian intelligence collection, and enabled an unrestrained counterterrorism campaign abroad. In the US this erosion was more pronounced, as reforms effectively established by stealth in the FBI an intelligence capability with respect to counterterrorism that resembled domestic civilian intelligence, on functional terms similar to MI5. In certain respects, the statutory framework also marginalised the respective Judiciaries in the US and the UK from their restraining role on the conduct of intelligence.

A consequence of the elimination since 9/11 of the distinction between civilian domestic and foreign intelligence, and law enforcement, has been the potential to lower the threshold for gathering domestic civilian intelligence. In the UK, the effect of this dilution has not been entirely evident in the already existing permissive framework for domestic civilian intelligence. In the US however, in the absence of dedicated tools to gather domestic civilian intelligence, it enabled the use of foreign intelligence tools, as well as traditional law enforcement evidence gathering authorities, outside of criminal investigation or foreign intelligence gathering respectively, for intelligence gathering that resembled civilian intelligence on purely domestic threats. This

lowered the threshold and consequently altered the fundamental conditions upon which US persons could be targeted for intelligence gathering. In this regard, the amendment of FISA, and the marginalisation of the role of the Judiciary in administering its intrusive powers pursuant to 9/11, was effected to lower the threshold for gathering intelligence that resembled domestic civilian intelligence. This paradigm shift has resulted in a call for a new concept of domestic civilian intelligence in the US. This notwithstanding, the statutory involvement in the US of the Judiciary in the prior authorisation of intrusive intelligence gathering that resembled domestic civilian intelligence, is in contrast to the relatively unambiguous, but potentially unlimited regime for gathering intelligence in the UK, restrained only by Executive discretion.

Although a certain minority in the UK Parliament and US Congress opposed certain reforms and counterterrorism measures, the respective Legislatures conceded to the will of the Executive for increased powers and discretion that diluted legislation in certain instances, and deviated from conventional human rights standards. This culture of acquiescence reflected a national consensus in the UK and US on the nature of threats, and enabled the Executive to deploy the civilian Intelligence Services with relatively fewer restraints, in which intelligence information was manipulated; legislation bypassed to permit irregular intelligence activities, and the mechanisms for Intelligence Service accountability circumvented.

Notwithstanding the adverse effects of this heightened threat environment on the system for intelligence accountability, the regulatory framework for the conduct of intelligence, with the significant exception of domestic intelligence in the US, is nevertheless clearly articulated in both the UK and US. At the end of 2009, the powers and functions of domestic and foreign intelligence in the UK were regulated in primary legislation; Ministerial Codes of Practice, and internal intelligence guidelines. In comparison, national legislation evolved in the US from being a broad enabler during the Cold War into an intelligence

charter. It clarified the foreign intelligence functions of the CIA and FBI in law, and regulated covert action abroad as well as the use of intrusive powers that may involve a US person. This is complemented by Executive Orders; and National Security Council and internal intelligence guidelines. In contrast to the clearly articulated regime in the UK, the functions of the FBI that resemble domestic civilian intelligence are not clearly articulated in legislative charter however, and constitute a mixture of statutory and administrative sources. In this regard, the most intrusive powers that target US persons for gathering foreign intelligence, were first defined in legislation in 1978, expanded to include intelligence gathering on certain threats that resembled domestic civilian intelligence since 2001, and are subject to Attorney-General authorisation, and court approval.

Given the imperative to hold intelligence to account in the domestic context, the regulatory framework in both the US and UK has been imbued with various standards that underpin a code of professional conduct. These include the principle of proportionality; use of least intrusive method to gather intelligence; gathering for defined legitimate purposes, and political neutrality when targeting citizens. In this regard, the ECHR compelled the UK to enact intelligence legislation in relatively more detailed terms than is encountered in the US. This is a result of its restrictions that intelligence may only target UK persons in accordance with statutory or subordinate law that is foreseeable by those affected by it. Emphasising the imperative of domestic accountability, the CIA is proscribed from conducting covert operations in the US, and the FBI is responsible for gathering foreign intelligence in the US, covert or otherwise. In this regard MI6 is similarly proscribed, and MI5 is responsible for conducting all covert operations in the UK, including those for gathering foreign intelligence.

In contrast to the carefully constructed arrangements for intelligence accountability in the domestic context, covert intelligence activities abroad

are carried out by the CIA and MI6 with relatively less restraint with respect to human rights considerations, and higher levels of secrecy. In this regard, the use of intrusive methods abroad by the CIA and MI6 are governed mainly by the tradecraft principle of non-detection. Given that these activities are unlawful in the territory where they are conducted, and that international law is poorly defined in this regard, legislation makes provision for indemnification of MI6 members from prosecution in the UK. A similar arrangement is not apparent in the US however. Although the separate disciplines of civilian domestic and foreign intelligence constitute a crucial organising principle for civilian intelligence, and have been maintained in the US and UK, one of the major attributes of intelligence reforms undertaken pursuant to 9/11 has been to place less emphasis on this distinction, and greater importance on intelligence sharing and cooperation.

Table 5 below depicts the framework and organising principles for civilian Intelligence Service accountability in the UK and US.

Table 5: Framework and organising principles for the conduct of intelligence		
The Cold War period	US	UK
Early Cold War framework for conduct of civilian intelligence	Foreign intelligence regulated by broadly defined legislation and Executive Directives. Domestic intelligence conducted under Executive Order.	Domestic and Foreign intelligence conducted by the Executive in the name of the Crown, as a deniable state activity.
	Domestic and foreign intelligence maintained as separate disciplines.	
	FBI has dual	Intelligence and law

	responsibility for law enforcement, and intelligence that resembles domestic civilian intelligence. FBI also conducts foreign intelligence in the US.	enforcement clearly separated, although MI5 conducts covert foreign intelligence in the UK.
Evolution of regulatory framework	Development of a regulatory framework mid-Cold War to align intelligence practice with constitutional principles, as a result of exposure of intelligence abuses.	Continued practice of conducting intelligence according to Executive discretion. Human rights dependent on the common law. First challenges to UK intelligence in ECtHR.
Targeting of citizens	Minimised the circumstances under which US persons could be targeted for civilian intelligence gathering.	Targeting of UK persons based on intelligence suspicion and broad category of threats, without special limitations.
Late Cold War and Early post-Cold War framework for conduct of civilian intelligence	Further development of regulatory framework for the conduct of foreign intelligence, including covert action, and intelligence that resembles domestic civilian intelligence.	Introduced a legal framework for foreign and domestic civilian intelligence in order to comply with the ECHR. Laws formalised Executive dominance of intelligence.
The post-9/11 period	US	UK

Effect of 9/11 on regulatory framework	Increased intelligence powers and Executive discretion. Erosion of checks and balances associated with regulatory framework in domestic arena, especially in the US. Changes in the US regulatory framework facilitated use of torture abroad as an intelligence gathering method.	
Effect of 9/11 on citizens	Lowered the threshold for targeting US persons on domestic counterterrorism threats.	Threshold changes less pronounced in UK. Domestic intelligence more permissive than in the US, before factoring in the effect of 9/11.
Effect of the heightened threat environment	Manipulation and abuse of the framework for the conduct of intelligence evident.	Manipulation and abuse in this regard evident to a lesser extent compared to the US.
Current	US	UK
Regulatory Framework as a whole	Intelligence resembling domestic civilian intelligence inadequately defined and regulated, although most intrusive collection techniques subject to judicial approval. Foreign intelligence clearly articulated in legislation and internal framework.	Domestic and Foreign intelligence clearly articulated in legislation and internal framework. Most intrusive collection techniques subject to Ministerial control. System as a whole, more permissive than in the US.
Emphasis of framework	Framework and organising principles for the conduct	

	of civilian intelligence mainly undertaken in a domestic context, and own citizens. Foreign intelligence abroad practiced with fewer restraints.
Organising principles	Emphasis on professional conduct of intelligence officers; principles of proportionality, and political neutrality.
	Decline in emphasis on separation of domestic and foreign intelligence, with greater expectation of intelligence sharing and cooperation.

3.2. Instruments for civilian Intelligence Service accountability

Since the Cold War security consensus, the instruments of civilian Intelligence Service accountability outside of the Executive have developed substantially, although with numerous imperfections, to assume an important role in the architecture for holding intelligence to account.

3.2.1. Executive control and oversight

Reflecting its status in the security architecture, the head of the Executive assumes overall responsibility for the supervision and control of civilian intelligence in both the UK and US. In this regard both are supported in carrying out this role at the strategic and administrative levels, by national security committees and Executive office bearers. The creation of the office of the Director National Intelligence in the US pursuant to 9/11 established a dedicated senior Executive office with line responsibility for intelligence comparable to the dedicated ministries found in the UK. Ministers assume responsibility for approving the most intrusive intelligence gathering techniques such as communications interceptions and interference with property in the UK, while in the US, given the role of the Judiciary in this regard, Executive involvement is limited to the President authorising covert

action operations of the CIA abroad. Although the respective authorisation regimes and terminology are by no means identical, the use of intrusive intelligence gathering not requiring Executive or judicial authorisation, such as the use of sources, and non-intrusive surveillance, as well as targeting decisions, are generally approved by heads of Services and senior officials in both the UK and US. The Executive also formally authorises foreign intelligence priorities in both the US and UK within the context of a national foreign policy framework, although domestic civilian intelligence functions with greater operational autonomy. In this regard, the heads of Services are conferred with operational command to enforce political neutrality in the Services. In the US however, the Attorney-General has a dual responsibility for intelligence and law enforcement, in contrast to its clear separation in the UK.

Covert operations abroad are inherent in the tradecraft of the CIA and MI6, and are accordingly authorised at a line functional level by the head of Service in accordance with broad Executive approval. Covert action undertaken by MI6 abroad with plausible denial, is approved in the UK by the responsible Minister, presumably with the concurrence of the Prime Minister. Given the political and operational risks associated with US covert action however, as well as with certain covert operations that do not involve plausible denial, Congress conferred this responsibility on the President, who is required to also provide timely notification to the congressional Intelligence Committees in this regard.

The tradition of successive US Administrations since the 1950's to establish advisory boards to bring an external perspective to the Presidents responsibility for the management and oversight of intelligence, has not been replicated in the UK, where the involvement of civil society in holding intelligence to account seemed inimical to the practice of intelligence. Reflecting the extent to which the culture of secrecy in its public administration was evolving however, a similar, although more limited mechanism was being conceptualised in the UK in 2009. Commissions of Inquiry initiated by the

Executive in response to intelligence scandal and failure, as well as the functioning of intelligence, have been a feature of both the UK and US systems of intelligence accountability since the height of the Cold War. They however often appear to exonerate the Executive and deflect critical public opinion. The role of certain inquiries in the UK and US as a basis for intelligence reform has been significant however, as demonstrated in the work of the Rockefeller and 9/11 Commissions, and the Butler Commission respectively.

Table 6 below depicts Executive control and oversight in the UK and US.

Table 6: Executive control and oversight		
The Cold War period	US	UK
Overall responsibility for supervision and control of intelligence.	The President as Head of the Executive, supported by the Director CIA and NSC.	The Prime Minister as Head of the Executive. Ministerial support emerged later to replace a combination of direct control and autonomy of MI5 and MI6.
Involvement in approval of intrusive intelligence gathering techniques.	Sanctioning of the most intrusive techniques for use in US by Attorney-General under Executive Order. Reforms later limited Executive involvement to approving covert action.	Intelligence conducted as a deniable activity. Approval regime not entirely apparent.
Intelligence priorities	Close Executive involvement in prioritising foreign and domestic civilian intelligence.	
Operational command	Heads of Services conferred with operational	

	command, and MI6 and MI6 with substantial autonomy.	
Civil society involvement in Executive support.	Advisory Boards on management and oversight of foreign intelligence.	Inimical to UK system of intelligence oversight.
Commissions of Inquiry.	Mainly a response to intelligence scandal and failures.	
	The Dulles Inquiry and Rockefeller Commission were significant sources of intelligence reform.	The Franks and Denning Commissions widely seen as a means to deflect critical public opinion, although latter made first public admission of the existence of MI5.
The post-Cold War period	US	UK
Overall responsibility for Supervision and control of intelligence.	The President as Head of the Executive, supported by the Director National Intelligence and NSC.	The Prime Minister as Head of the Executive supported by Ministers; Cabinet Office and NSC.
Intrusive intelligence gathering techniques.	Involvement limited to approval of covert action, given the role of the Judiciary.	Ministerial approval of the most intrusive intelligence gathering techniques.
Intelligence priorities	Authorises foreign intelligence priorities. Domestic civilian intelligence operates with greater operational autonomy.	
Operational autonomy	Heads of Services conferred with operational command to enforce political neutrality. This	

	includes the use of intrusive techniques whose approval does not involve the Executive. In the US, CIA autonomy restricted by supervisory authority of the DNI.	
Separation of functions	Independent heads of Services given separation of intelligence and law enforcement.	The Attorney-General has a dual responsibility for intelligence and law enforcement.
Civil society involvement in Executive support	Advisory Boards retained with a broader intelligence remit.	Advisory Board under consideration by the Executive.
Commissions of Inquiry	9/11 Commission in the US and Butler Inquiry in the UK a source of wide-ranging intelligence reform. Other inquiries related to 2003 Iraq war widely discredited.	

3.2.2. Legislative oversight

Parliamentary Intelligence Committee oversight in the US has been influential in overseeing intelligence budgets and priorities since its formation. A similar trend is noticeable in the UK where parliamentary committee oversight was introduced only as recently as 1994, as the Intelligence and Security Committee (ISC) developed budgetary oversight of the Services as its core function. The limitations associated with Intelligence Committee influence on budget approval in both the US and UK, is apparent however. In this regard, Congress has authorisation and appropriation authority regarding the intelligence budget, while the dominance of the Executive in Parliament has ensured that parliamentary approval of the intelligence budget in the UK is only nominal. Although the role of the respective Legislatures in enacting intelligence related legislation developed according to different trajectories, the Intelligence Committees in both the UK and US assumed a peripheral role in legislative

reforms enacted pursuant to 9/11. In conferring greater authority on the Executive, the respective Legislatures in the UK and US failed however to concurrently strengthen intelligence oversight as well as regulate the conduct of intelligence abroad through network arrangements. In this regard, Congress in particular, failed to anticipate its own marginalisation by the Executive from overseeing intelligence in the ‘war in terrorism’.

Although they have been influential in certain aspects of intelligence transformation and matured substantially since their formation, the Intelligence Committees in the US have traditionally placed an excessive emphasis on intelligence advocacy; failed to conduct quality oversight, and were widely seen as inconsistent and dysfunctional. In this regard, the partisan politics that paralysed the committees during the Clinton Administration resurfaced to prevent it from investigating unlawful intelligence activities in the ‘war on terrorism’. The UK Intelligence and Security Committee on the other hand, has been commended for the quality of its budget oversight; grew in importance as a result of 9/11, and began to enter the realm of oversight of sensitive intelligence activities outside of its formal remit. Like its US counterpart, the committee however demonstrated an excessive empathy for the Services, and also failed to delve into crucial matters of intelligence failure and unlawful activity. Given the structural defects associated with its appointment and independence, the committee is regarded with suspicion in Parliament.

Although Intelligence Committee access to intelligence information in the US is regulated by statute, the committees have been constantly hampered by the deliberate denial of information and dishonesty of the Services, and were systematically marginalised from conducting routine oversight in sensitive areas in the ‘war on terrorism’ on the grounds of Executive privilege. Given its limited remit, in a twist of irony, the UK Intelligence Committee, whose access to intelligence is in fact limited by statute, has been able to develop excellent

cooperation with the Services on investigations that appeared to have been initiated with the concurrence of the Executive. In this regard, legislative inquiries in the US have nonetheless been prominent since the intelligence scandals of the 1970's; featured again as modes of inquiry into the events of 9/11 and 2003 Iraq war, and served as a basis for subsequent intelligence reform. In the UK, inquiries conducted by the Intelligence Committee began to feature since 9/11 as the parliamentary inquiry into the role of intelligence to make a case for war in Iraq, was complemented by a range of Intelligence Committee inquiries into the role of intelligence in the 'war on terrorism'.

The Iraq inquiries severely affected the credibility of the legislative committees in both the UK and US however, as they failed to adequately confront intelligence abuses in the face of a dominant and aggressive Executive. Given the influence it exerts on its 'parliamentary committee', it is apparent that the UK Executive considered it a preferred mode to investigate controversies associated with the 'war on terrorism'. The contrast between the UK and US in the level of cooperation and access to information, therefore reflects the greater independence of the US Intelligence Committees, and their potential to hold the Services to account, rather than a greater level of intelligence transparency in the UK. In certain respects, the UK Committee perceives itself as part of the Executive, in which it is located. Furthermore, parliamentary oversight in the UK also lacks the necessary stature encountered in the US Presidential system, with the inherent separation of powers between the Executive and Legislature.

The dysfunction in parliamentary oversight is apparent in both the US and UK, where the committees generally conferred a level of credibility upon the Services that was not entirely warranted. In conducting external oversight of secret intelligence, the Intelligence Committees in the US and UK nonetheless assumed the important role of public surrogate in which they succeeded in providing only some assurance on the effectiveness and legality of intelligence.

These developments, as well as proposals to reform parliamentary oversight in both countries, emphasised its limitations in holding the Executive to account, and consequently generating public trust and narrowing the credibility gap of civilian intelligence.

Table 7 below depicts legislative oversight in the UK and US.

Table 7: Legislative oversight		
The Cold War period	US	UK
Early Cold-War	Legislature deferred to the Executive on affairs of national security. A culture of acquiescence.	Combination of deference and exclusion from affairs of national security conducted in the name of the Crown by Executive.
Intelligence committees	Since the exposure of abuses during the mid-Cold War period.	No legislative committee involvement in intelligence.
Budget oversight	Developed significant influence of budget content.	-
Commissions of Inquiry and Intelligence reform	Since exposure of intelligence abuses. Far-reaching influence especially Church inquiry. Legislature enacted laws to regulate the conduct of intelligence.	-
The post-Cold War	US	UK

period		
Budget oversight	Significant influence in budget priorities, although without budget appropriation powers.	Functions limited to administration, hence developed budget oversight as a core function and excelled in this regard since 1994. Budget approval only nominal however.
Participation in post-9/11 legislative reforms	Committees marginal in the legislative process. Respective Legislatures conferred greater authority on Executive without associated increase in oversight of war on terrorism such as international intelligence networks, especially in US.	
Oversight since 9/11	US Committees marginalised from significant areas of intelligence.	Scope of committee work increased to include operational activities.
Nature of oversight	Characterised by excessive advocacy, and conferring credibility on intelligence that was not entirely warranted.	
Assessment of Record of oversight	9/11 Commission characterised committees as dysfunctional and failing to conduct quality oversight. Assumed important role in intelligence transformation however.	Excelled at budget oversight and exceeded the terms of its formal remit. Seen as an instrument of the Executive in this regard however.

Independence	Independent Committees with influence in the US system of separation of powers. Unity often impeded by partisan politics, preventing inquiry into intelligence abuses.	Accountable to the Prime Minister; perceives itself as part of the Executive, and regarded with suspicion in UK Parliament. Failed as a result to adequately delve into intelligence abuses and failures.
Inquiries	Significant influence on intelligence reform, although Iraq inquiries discredited.	Reports prepared mainly for Prime Minister. Influential in certain recommendations made. Iraq inquiries discredited.
Oversight reforms	Reform to Intelligence Committees debated in US and UK as a result of the constraining effect of 9/11 on legislative oversight. Committees nevertheless assumed limited but important oversight role and generating public trust.	

3.2.3. Independent oversight and review

The nature of independent mechanisms for conducting financial and operational oversight of intelligence, as well as public recourse mechanisms in the UK and US, reflect the level of maturity of their respective architectures for holding intelligence to account.

Financial audit of intelligence by independent legislative agencies were historically resisted in the UK and US until the activities of the FBI, including those which resembled civilian intelligence gathering, were subject to

Government Accountability Office audit after the intelligence scandals of the 1970's, and the Independent Audit Office of the UK was granted jurisdiction over the civilian Services in the early post-Cold War period as part of intelligence reforms in the UK. Although these arrangements were effected subject to strict limitations on access to sensitive intelligence information, the CIA has successfully resisted similar oversight in this regard.

While the US has adopted the independent Inspector-General concept to conduct comprehensive administrative and operational oversight of intelligence, the UK Services have not developed a similar internal oversight mechanism that is able to operate with unfettered access to intelligence information, as well as develop independent relationships with the Legislature. In responding to the ruling of the ECtHR for external mechanisms to oversee intelligence intrusion, the UK elected to appoint judicial Commissioners to conduct limited reviews of the approval authority of Ministers and officials in this regard. The control of the Prime Minister over these part-time Commissioners, as well as the limited scope of their work stands in stark contrast to the high level of uncritical assurance they convey within the scope of their respective remits however. In contrast, the Inspector-General in the US, whose independence is reinforced by statutory reporting channels to the Intelligence Committees, has not sought to convey broad assurances on intelligence activities. Instead, detailed oversight for the benefit of management, and to an extent, certain external stakeholders has been conducted. The Inspector-General and judicial Tribunal arrangements in the US and UK respectively, serve as recourse mechanisms in relation to public grievances over intelligence conduct. The opaque nature of these mechanisms from a public perspective, as well as the absence of due process in their investigations, however results in limited public confidence in them in the UK and US. Independent mechanisms conceptualised in both the US and UK to review the application of counterterrorism legislation since 9/11 have been of limited effect, given the non- functioning of the US Civil Liberties Oversight

Board, and the resource constraints and independence limitations associated with the Reviewer of Terrorism Legislation in the UK.

Table 8 below depicts the independent mechanisms in the UK and US.

Table 8: Independent mechanisms		
The Cold War period	US	UK
Financial audit	Resisted by US intelligence. FBI subject to audit since mid-1970's abuses, CIA excluded.	Intelligence in UK not subject to independent oversight.
Operational oversight	Introduced the Inspector-General concept to conduct limited oversight.	Judicial Commissioner introduced prior to end of Cold War to review Ministerial approval of interceptions.
The post-Cold War period	US	UK
Financial oversight	Cold War period status quo. Congressional initiatives to include CIA resisted by Bush and Obama Administrations.	Services subject to audit since 1994 legislative reforms with information access limitations.
Operational oversight	Inspectors General evolved as important part of oversight architecture.	Elected to utilise judicial Commissioners with limited remit and independence to review approval of intrusive measures.
Public recourse	Inspectors General that	Use of Tribunal that does

	do not apply the principles of due process, limiting public confidence in system.	not apply the principles of due process, limiting public confidence in system.
Counterterrorism and civil liberties	Oversight Board not operationalised.	Judicial Commissioner with limited impact.

3.2.4. Judicial review

While the UK does not have a formal constitution, the US Judiciary, by virtue of its rulings over intelligence matters before the courts, maintained a strong involvement in harmonising intrusive intelligence with constitutional principles prior to, and during the mid-Cold War intelligence abuse crisis. In this regard the ECHR, though extremely limited in certain respects, served as an alternative standard in the absence of a written Constitution in the UK, and in the post-Cold War period the ECtHR assumed the role of ‘Supreme Court’ in aligning UK intelligence practice to its principles. In the US, the Supreme Court minimised the role of the Judiciary since 9/11 however, as it sanctioned deviations from US constitutional principles to permit the FBI to gather intelligence that resembles domestic civilian intelligence. In the realm of UK intelligence practice however, domestic intelligence conducted under Executive discretion had been regulated in statute as a necessary element of the national security architecture, apparently immune from judicial interference.

The role of the Judiciary in the administration of counter measures enacted in legislation since 9/11 had been marginalised in both the UK and the US. In the US its role in authorising intelligence gathering against US persons in accordance with FISA was also minimised. In this regard, the Judiciary in both countries continued their overriding tradition of deference to the security claims of the Executive, and were reluctant to contest laws enacted by the

Legislature, even where human rights were impaired by counterterrorism measures. In both the US and the UK however, the Judiciary opposed Executive action in the name of national security that it considered as exceeding the terms of what it considered acceptable to defer to it. The Judiciary accordingly strongly opposed extraordinary counter measures whose execution was dependent on secret intelligence which could not be challenged in the courts, and in the US, curbed assumptions of inherent Executive power.

Table 9 below depicts judicial review in the UK and US.

Table 9: Judicial review		
The Cold War period	US	UK
Involvement in the conduct of intelligence	Policy of deference to the Executive later complemented to also assume vital role of reconciling intelligence practice with constitutional principles.	Policy of deference to the Executive.
Post-Cold War period	US	UK
Formulating intelligence standards	Interpreted constitutional principles to sanction intelligence that resembled domestic civilian intelligence.	The ECtHR began to utilise the ECHR as a standard for intelligence practice in the UK.
Approving intrusive intelligence	Role minimised since 9/11 but continues to authorise the most intrusive techniques targeting US persons.	Domestic civilian intelligence immune from judicial interference.

Role since 9/11	Marginalised in the administration of counterterrorism measures since 9/11 and generally maintained the practice of deferring to the security claims of the Executive in both the UK and US. As an exception, challenged the most extreme measures since 9/11 with some success.
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3.2.5. Role of the media and civil society

The events of 9/11 signified the growth in the intelligence reporting role of the media in the UK and US, and precipitated a greater level of public discourse in this regard. This continued a pattern that first developed as a result of the media's exposure of intelligence abuses in the US during the 1970's, and it's reporting of challenges to UK intelligence practice in the ECtHR during the late Cold War. In this regard, excessive official secrecy, and restraining orders on the media have been a common government trend in both countries to counter media openness. Official disinformation campaigns were also intensified in the UK and US in the aftermath of 9/11 to influence public opinion in this regard. The most significant difference in the approach to media reporting on intelligence between the two countries has been the use of official secrets legislation in the UK that removes the public interest defence, and criminalises the disclosure of secret information. This system is buttressed by a voluntary arrangement that entails official clearance of proposed media disclosures of sensitive information prior to publication. In the absence of official secrets legislation in the US however, the public interest may be invoked as a plausible defence by disclosers. The events of 9/11 also precipitated the growth in intelligence research institutions, as well as defenders against threats to human rights as a result of the counterterrorism strategy of the governments in the UK and US. In this regard, the proportionality of government's response to 9/11 was mainly contested on the periphery by the media and civil society in both the UK and US.

Table 10 below depicts the intelligence role of the media and civil society in the UK and US.

Table 10: Media and civil society		
The Cold War period	US	UK
Limitations on media reporting of state secrets	Use of restraining orders. Disclosers of state secrets may invoke public interest defence.	Use of restraining orders and official secrets laws barring reporting. No public interest defence.
Significance of media	Medium for exposure of intelligence abuses that led to subsequent reform. Source of public debate.	Limited role during Cold War period, especially given voluntary collaboration with government on intelligence reporting.
Catalyst for media reporting role	Exposure of intelligence abuses, and the Church and Rockefeller inquiries mid- Cold War.	Challenges to UK intelligence practice in the ECtHR late Cold War.
Post-Cold War period	US	UK
Media reporting	Continued to report on intelligence as a routine though restricted topic.	Reporting intensified as a result of early post-Cold War intelligence reforms.
Effect of 9/11	9/11 and the London Bombings signified growth in both the intelligence reporting role of the media, and the civil liberties industry. Also spawned the public relations and disinformation aspects of intelligence by government to influence public opinion.	

4. TESTING OF ASSUMPTIONS OF THE DISSERTATION

Three assumptions were formulated in the Introductory chapter.

4.1. Assumption: “Historical as well as recent global, continental and national security developments have had a significant impact on civilian Intelligence Service accountability in the US and UK”.

The Cold War consensus on the Soviet threat emphasised intelligence effectiveness in the UK and US. As well as perceptions of the inherent powers of the Executive to conduct intelligence, this minimised the importance of intelligence accountability outside of Executive control (Herman, 1996:27; Warner *et al*, 2005:5; Lotz, 2002:5). Although early-Cold War intelligence reforms in the US were accompanied by limited arrangements for congressional oversight, Congress displayed a reluctance to engage intelligence any more than it considered necessary, preferring to defer to the Executive (Nedzi, 1996:17). This consensus therefore superseded considerations for intelligence accountability in the US and UK, with a policy of deference to the Executive on the affairs of intelligence during most of the Cold War period.

The events of 9/11 and the July 2005 London bombings precipitated a broad range of performance oriented intelligence reforms in the US and the UK (Chalk, 2004:51). These reforms effected changes in the operation of traditional restraints in the realm of both domestic civilian and foreign intelligence, and had a fundamental impact on the framework of intelligence accountability in both countries. In this regard, the role of intelligence oversight and review mechanisms grew in scope and complexity. These mechanisms were also marginalised in both the US and UK, with respect to significant areas of domestic and foreign intelligence. These events also precipitated the growth in the role of the media and civil society in the architecture of intelligence accountability, and placed intelligence in the

public domain at an unprecedented level (Warner *et al*, 2005:37; Herman, 2006:68,95; Rose, 2007:30-31; Payne, 2002:44). In this regard, the practice of the Executive to use intelligence to court public opinion established a new public expectation on intelligence transparency (United Kingdom: 2004). Most significantly, the controversy arising from Executive conduct with respect to 9/11 and the July 2005 London bombings, also precipitated a new discourse in the US on strengthening parliamentary oversight of intelligence, and on reforming parliamentary oversight and intelligence review mechanisms in the UK, independent of the Executive (Best, 2010:3-4; Rifkind, 2010:11). The assumption formulated above can therefore be verified in this case.

4.2. Assumption: “The different democratic traditions of the US and UK are also reflected in the different approaches by which the intelligence communities of their respective countries are overseen”.

The mid-Cold War intelligence abuse crisis precipitated a departure from the Cold War consensus, and intelligence oversight in the US evolved into a series of mechanisms in the Legislature and Judiciary, independent from the Executive (Van Wagenen, 1997:100; Manget, 1996:6). These arrangements were complemented by semi-autonomous mechanisms within the CIA, and in the US Administration (Snider, 2007a:1; Lotz, 2002:6). Although media reporting of intelligence abuses was the catalyst, the rationale for oversight emanated mainly from the desire to reconcile the incompatibility between secret intelligence and democratic principles in the US (Hardy, 1996:6). The extent of public inquiry and consultation; the magnitude of resources committed to these mechanisms; as well as their relatively broad mandates and arrangements for their independent functioning, would seem to support this view.

In comparison, intelligence oversight in the UK is characterised by a number of arrangements for Executive oversight of intelligence under the effective control of the Prime Minister, established from the ranks of the Legislature and

Judiciary (United Kingdom: 1994). Under these circumstances parliamentary oversight in the UK consists of parliamentarians appointed by the Prime Minister, rather than a parliamentary committee, accountable to Parliament. In this regard, the remit of this committee is also restricted in comparison to the arrangement for Legislative oversight in the US. Judicial review mechanisms established in the UK are also appointed by, and accountable to the Prime Minister to conduct limited reviews of the approval authority of the Executive, as opposed to the US system of prior judicial approval of these actions (United Kingdom: 1994; United States: 1978c). The rationale for the creation of these mechanisms, which generally operate under severe resource constraints, is the imperative to comply with the minimum standards of the ECHR, and explains the minimalist approach to intelligence oversight adopted by the UK (Gill, 2007b). Under these circumstances, the practice of intelligence in the UK is conducted without adequate independent oversight, and the Executive is essentially accountable only to itself. These dynamics reflect the dominance of the Executive in the Westminster system of government in preserving its hegemony over intelligence to the exclusion of other oversight measures, in comparison to the separation of powers inherent in the US constitutional system of government that enforces a more substantive system of checks and balances over the conduct of intelligence. The assumption formulated above can therefore be verified in this case.

4.3. Assumption: “The secretive nature of the intelligence industry; the national security consensus of the Cold War and more recently, the US/UK war on terrorism, have threatened democratic values in both countries”.

4.3.1. The secretive nature of intelligence

Considered as a special category in public administration, and a distinct instrument of national security whose work is characterised by deception in

some respects, the civilian Services in both the US and the UK also depend on secrecy for their effective functioning. Although this dependency is normally incompatible with democratic values, this study has highlighted however, that the conduct of intelligence, and by extension, the secrecy associated with it, is not alien to democracy, but is considered an indispensable resource for the advancement of national security in the US and the UK. This proposition is premised on the condition however, that intelligence is conducted within a scope considered absolutely necessary, and a framework of appropriate safeguards. Under these circumstances, the broad susceptibility of intelligence to abuse where secrecy is applied or invoked is minimised. This proposition does not discount that an adequate system of safeguards provides only a reasonable, rather than absolute assurance in this regard, and recognises that intelligence is inherently susceptible to abuse, given the imperative for secrecy. In this regard, individual abuses are conceivably common, and the system of safeguards is also susceptible to occasional override, as exemplified by the conduct of the US government in waging the ‘war on terrorism’, and may threaten democratic values if consistently perpetrated. Intelligence secrecy, in the context of a system of safeguards cannot, of, and by itself, threaten democratic values however. The assumption formulated above can therefore not be verified in this case.

4.3.2. The Cold War consensus

The deference of the Legislature and Judiciary in the US and the UK to the Executive of their role to oversee the conduct of intelligence characterised the Cold War consensus, and resulted in the absence of an adequate system for holding intelligence to account. This increased the potential for the perpetration of intelligence abuses. In the US, this manifested as US persons and society as a whole were unlawfully targeted for intelligence gathering that resembled domestic civilian intelligence. This threatened democratic values in the US, and became apparent only during the mid-Cold War period as unlawful

intelligence activities were exposed (Hardy, 1996:6; Johnson, 2003:13-14). In the UK, intelligence abuses were often marked by official secrecy and cover-ups that masked its true magnitude and effect (Mendel *et al*, 2000:6; Phythian, 2008:1-2). Public disclosures do however indicate that the UK, in the absence of an adequate system for holding its Intelligence Services to account, was equally susceptible to intelligence abuse in the domestic context that threatened its democratic values (Mendel *et al*, 2000:19; Robertson, 1998:144). The assumption formulated above can therefore be verified in this case.

4.3.3. The war on terrorism

The perception of threats pursuant to the 9/11 attacks and the London bombings, and a disproportionate ‘war on terrorism’ conducted in response, significantly reversed the gains made in the US and the UK in narrowing the democratic deficit associated with the conduct of intelligence. In this regard, the US and UK governments introduced extraordinary domestic intelligence gathering methods, some of which were rejected by the courts as unlawful; unreasonably profiled certain minorities for targeting, and engaged in over-broad domestic civilian intelligence gathering (Chalk *et al*, 2004:51; Gilmore, 2011:37; Ezioni, 2005:6,42; Graves, 2010: 10).

In the US, intelligence gathering methods were abused to investigate ordinary crime, and circumvent the procedural hurdles of the courts (Donohue, 2006:53-54; Berman *et al*, 2003: xx). This had the consequence of misinforming the public about the nature of threats that new measures were intended to counter. The US also deployed extraordinary intelligence gathering methods such as torture and covert action abroad, in contravention of international law and its own Bill of Rights, in which the UK was found to be complicit, while both governments collaborated to manipulate intelligence to support the 2003 war in Iraq (Gilmore, 2011:1-2; Mahadevan, 2010:2; Hindle, 2009:1; Goodman, 2006b:1-3; Burger, 2008:65). In the US, assertions of Executive power

manifested in unlawful detention and interception of the communications of US citizens. These unlawful activities circumvented the US courts, while Congress was systematically marginalised from its role to oversee intelligence in the ‘war on terrorism’ (Gill, 2004: 307; Goodman, 2006a:3; Best, 2010:21). In this regard, Sepper (2010: 151) concludes that this policy of exclusion of the Legislature and Judiciary in the US, has resulted in the Executive having unfettered discretion in certain policy domains.

Although changes in the scope of intelligence gathering in a heightened threat environment, cannot, in itself be considered to constitute a threat to democracy, the conduct of intelligence in the US and abroad outside the system of intelligence accountability threatened civil liberties; the rule of law, and the political system of checks and balances and separation of power in the US. It is apparent that this tendency of myopia was less pronounced in the UK, and its government, with the assistance of an empathetic parliamentary oversight mechanism, was able to deflect allegations in this regard. Chalk however suggests that the void in oversight in fact resulted in a carte blanche counterterrorism campaign by the UK government (Chalk, 2004: xv). It is therefore doubtful whether the permissive system of intelligence accountability was able to adequately restrain intelligence from overreach and abuse that might have threatened democratic values in the UK as a result of its role in the war on terrorism. The assumption formulated above can therefore be verified with respect to the US, and to a lesser extent, the UK.

5. CONCLUSION

The civilian Intelligence Services in the UK and US evolved into more legitimate organs of state as the period under review unfolded, accompanied by the ongoing development of a democratic framework for the conduct of intelligence. Given that this was informed by the respective democratic traditions and systems of government in the UK and US, it was undertaken

according to different patterns and trajectories, and differed in material respects.

A national security consensus that discounts democratic accountability of intelligence as unimportant on account of intervening power interests, and where oversight and control of intelligence is arbitrated in secret by a political `elite, does not characterise the management of national security in the UK and US. Limited consultation on sensitive operations within the senior echelons of the Executive and Legislative in the US and UK, during both the Cold War, and the war on terrorism, reflect the dynamics of legislative deference to the Executive and intelligence secrecy respectively. Similarly, support to the Executive in concealing intelligence and human rights abuses in the UK and US in the ‘war on terrorism’, reflect the dynamics of partisan politics in the Legislature, as well as the dominance of the Executive in the realm of national security, rather than the presence of a secret consensus of a political `elite in the realm of national security.

Given the broad definition of security threats in the UK and US, as well as the subjectivity associated with target selection, the threshold for civilian domestic and foreign intelligence is subject to a high degree of Executive discretion. This, as well as intelligence secrecy and intimacy with political power, enables the potential for unrestrained intelligence gathering and manipulation, even within the context of a framework for intelligence accountability. In this regard, the tendency for excessive intelligence gathering; the use of intelligence for party political purposes; manipulation of intelligence in support of predetermined policies of the Executive, and Executive assertions of inherent power to use intelligence outside the framework of the law, have been prevalent in the UK and US throughout the period under review. These developments highlight both the limitations, as well as importance, of an adequate framework to hold intelligence to account. In this regard, intelligence oversight is conducted largely in a reactive mode.

Furthermore, the effect of intelligence secrecy and deception on oversight is to severely curtail its scope, as well as its ability to conceptualise the complex terrain of intelligence operations.

These dynamics, as well as the dependence of oversight and review mechanisms on intelligence cooperation, demonstrate that the system for intelligence accountability provides only limited constraints on intelligence activities, and limited assurance on its propriety. In the secretive world of intelligence, oversight is also confronted by the reality that intelligence is a coercive power of the state. Exercised at the highest level of national power, of which it is a major attribute, intelligence is also jealously guarded by the Executive.

ABSTRACT

Topic: A Comparative Analysis of Civilian Intelligence Accountability in the United States of America and the United Kingdom

By: I. A. Fazel

Supervisor: Prof M. Hough

Department: Political Sciences, University of Pretoria

Degree: Master of Security Studies

The purpose of the dissertation is to examine the evolution of the system of civilian Intelligence Service accountability in the UK and US with a view to comparing and identifying the similarities and differences between them. In this regard, the study provides a conceptual framework for civilian intelligence accountability as a prerequisite for credible state intelligence within a democratic framework. Although no precise model exists for holding Intelligence Services to account, it is evident that a system of checks and balances is necessary, and that the Executive cannot be the exclusive overseer of intelligence. The study examines the development of arrangements for intelligence accountability in the UK and US from the beginning of the Cold War to the end of 2009, and analyses the impact of the Cold War; the events of 9/11, and the London bombings in this regard. The study highlights that the systems for holding intelligence to account in the UK and US differ in material respects, and that 9/11 marginalised the restraining role of the system on intelligence. In this regard, the study also emphasises that intelligence failure is accompanied by concerns of intelligence effectiveness, and intelligence abuse, by concerns of intelligence propriety. The study concludes that systems for holding civilian intelligence to account are in the relatively early stages of their evolution; subject to inherent limitations, and therefore only able to provide limited constraints on the conduct of intelligence activities, and limited assurance on its propriety.

Key Terminology

Counterterrorism	Intelligence Service Accountability
Civilian Intelligence	Instruments of Accountability
Crime Intelligence	Judicial Review
Domestic Intelligence	National Security
Foreign Intelligence	National Security Consensus
Intelligence	Organising Principles
Intelligence Community	Parliamentary/Congressional Oversight
Intelligence Effectiveness	Proportionality
Intelligence Oversight	Statutory/Regulatory Framework
Intelligence Propriety	

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