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FLYING UNDER THE RADAR OR AN UNNECESSARY INTELLIGENCE WATCHDOG: A REVIEW OF THE PRESIDENT’S FOREIGN INTELLIGENCE ADVISORY BOARD

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The intelligence community operates under the microscopes of numerous oversight groups. The legislative branch, in both the House and Senate, created a number of committees to oversee and investigate intelligence agencies. Within the executive branch, the Director of National Intelligence operates as the head of the intelligence community and performs the principle advisory function to the President on matters of national security. The executive branch also houses the frequently overlooked oversight body, the President’s Foreign Intelligence Advisory Board (PFIAB or the Board). Theoretically, the PFIAB’s function is to provide an additional level of accountability to the intelligence community. In practice, however, the PFIAB occupies a subdued and infrequently remarkable position within the advisory and oversight functions of the government. This article examines the historical impact of the PFIAB, following its role throughout different administrations. It then details some of the current shortcomings of the PFIAB and debates whether the PFIAB should be revamped or discarded.

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I. WHAT IS THE PFIAB?

Established by President Eisenhower in 1956, the PFIAB is an executive board that conducts oversight of the intelligence community. Its members objectively review intelligence activities by “assess[ing] the quality, quantity, and adequacy of intelligence collection, of analysis and estimates, and of counterintelligence and other intelligence activities.”¹ As an oversight committee, the PFIAB reviews the activities of each agency involved in intelligence gathering and reports its findings and recommendations directly to the President. This includes examining the “adequacy of management, personnel and organization” of the agencies, and advising the President on the effectiveness of the intelligence community and the legality of activities conducted abroad.² To aid the PFIAB in achieving these goals, members are afforded “access to all information that the PFIAB deems necessary to carry out its responsibilities[,]” including access to classified information and debriefing by CIA officials.³

To be a PFIAB member, one must only be a trustworthy and distinguished citizen and be appointed by the President—knowledge of intelligence issues is not a prerequisite.⁴ Each member serves at the pleasure of the President and receives no compensation.⁵ Former chairpersons and members of the PFIAB include prominent scientists, economists, former military generals, politicians, ambassadors, and former cabinet members and directors of intelligence agencies.⁶

II. THE PFIAB THROUGHOUT HISTORY

Since the inception of the PFIAB, almost every president has

1. Exec. Order No. 12,863, 3 C.F.R. 632, 632-33 (1994), *reprinted in* 50 U.S.C. § 401 app. at 64 (2000).

2. *Id.*, *reprinted in* 50 U.S.C. § 401 app. at 64 (2000)

3. *Id.*; *see also* VICTOR MARCHETTI & JOHN D. MARKS, *THE CIA AND THE CULT OF INTELLIGENCE* 334 (1974).

4. *See* Exec. Order No. 12,863, 3 C.F.R. at 632, *reprinted in* 50 U.S.C. § 401 app. at 63-64 (2000).

5. *See id.* at 634, *reprinted in* 50 U.S.C. § 401 app. at 64 (2000).

6. For a list of former PFIAB chairpersons, see President’s Intelligence Advisory Board and Intelligence Oversight Board, <http://georgewbush-whitehouse.archives.gov/piab/chairpersons.html> (last visited Apr. 2, 2009). Edwin Land, a notable member of the PFIAB during President Kennedy’s administration, developed new methods of intelligence gathering through the use of satellite imagery and the Lockheed U-2 Spy Plane.

utilized the Board to some degree. However, the role and influence of the PFIAB varies by administration. President Eisenhower created the PFIAB under the name President's Board of Consultants on Foreign Intelligence Activities as a response to problems with the Nation's foreign intelligence gathering.⁷ President Kennedy's relationship with the PFIAB remained strong during his tenure. While the Executive Order required only semi-annual meetings, the Board met almost weekly, with President Kennedy often seeking advice.⁸ After the Bay of Pigs Invasion in 1961, President Kennedy asked the PFIAB to assist in an attempt to reorganize the intelligence community, yet the PFIAB's efforts were largely ignored.⁹ President Kennedy also utilized the PFIAB during this time to seek recommendations regarding domestic spying activities of a *New York Times* reporter.¹⁰ Overall, of the PFIAB's 170 submitted recommendations to the President, 125 gained approval and only two were rejected, making President Kennedy's utilization of the PFIAB the most substantial since 1956.¹¹

President Johnson continued to draw upon the PFIAB; later, President Nixon formally expanded the Board's reach from foreign intelligence activities to all CIA activities.¹² Thus, the PFIAB assumed a more active role in the Nixon administration.¹³ In 1975, the Rockefeller Report concluded that the PFIAB's functions should be expanded to include CIA oversight.¹⁴ To that end, the PFIAB suggested that President Ford employ a "competitive analysis" comparing the CIA's conclusions of Soviet capacity in

7. See Exec. Order No. 10,656, 3 C.F.R. 300 (1954–1958); Judith Miller, *Advisory and Oversight Panels on Intelligence Named*, N.Y. TIMES, Oct. 12, 1981, at A27.

8. See NORMAN POLMAR & THOMAS B. ALLEN, *SPY BOOK: THE ENCYCLOPEDIA OF ESPIONAGE* 516 (2d ed. 2004); see also CHRISTOPHER ANDREW, *FOR THE PRESIDENT'S EYES ONLY: SECRET INTELLIGENCE AND THE AMERICAN PRESIDENCY FROM WASHINGTON TO BUSH* 272 (1995).

9. MARCHETTI & MARKS, *supra* note 3, at 335.

10. See Tim Weiner, *J.F.K Turns to the C.I.A. to Plug a Leak*, N.Y. TIMES, July 1, 2007, § 4, at 47.

11. POLMAR & ALLEN, *supra* note 8, at 516.

12. Compare Exec. Order No. 10,938, 3 C.F.R. 469, with Exec. Order No. 11,460, 3 C.F.R. 782 (1966–1970).

13. Stephen J. Flanagan, *Managing the Intelligence Community*, 10 INT'L SECURITY 58, 70 (1985).

14. President Ford established the Rockefeller Commission to examine domestic activities of the CIA and determine whether abuse of power was occurring. See COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES, REPORT TO THE PRESIDENT 271 (1975), available at http://www.aarclibrary.org/publib/contents/church/contents_church_reports_rockcomm.htm.

1975 against non-CIA analysts' conclusions.¹⁵ President Carter abolished the PFIAB in 1977.¹⁶ By this time, other committees provided the advisory function necessary for the intelligence community, making the role of the PFIAB superfluous and an obstacle to direct contact between the President and the CIA.¹⁷ Additionally, President Carter did not approve of the PFIAB's support for the covert and clandestine activities of the CIA.¹⁸

President Reagan pledged in his presidential campaign to re-establish the PFIAB and did so in 1981.¹⁹ President Reagan's PFIAB totaled twenty-one members, including some of his long-time friends. That number fell drastically in 1985 when President Reagan dismissed eleven members, citing the need to streamline the Board and focus on critical intelligence problems.²⁰ This streamlining effort was met with skepticism, as the resulting political balance of the PFIAB shifted in favor of then-Vice President Bush.²¹ In 1985, the PFIAB prepared a report, noting the vulnerability of the U.S. embassy in Moscow, prompting a plan to reduce Soviet Union employees at the facility.²² Overall, President Reagan's PFIAB "held considerable power in intelligence matters[,] but all of this changed under President George H. W. Bush, who decreased the influence of the Board."²³

President Clinton officially merged the PFIAB with the

15. Flanagan, *supra* note 13, at 70–71. This Team A/Team B structure required Team A, CIA analysts, and Team B, a group of specialized experts, to provide a retrospective analysis of Soviet strength using the information available to the CIA at the time of the CIA's initial estimate. See JOHN RANELAGH, *THE AGENCY: THE RISE AND DECLINE OF THE CIA* 623–24 (1987).

16. See Exec. Order No. 11,984, *reprinted in* 50 U.S.C. § 403 app. at 76 (2000). At that time, the PFIAB and the Intelligence Oversight Board were separate entities.

17. See Flanagan, *supra* note 13, at 71.

18. RANELAGH, *supra* note 15, at 662; see also POLMAR & ALLEN, *supra* note 8, at 516.

19. See Exec. Order No. 12,331, 3 C.F.R. 197 (1982); Miller, *supra* note 7, at A27.

20. Peter T. Kilborn, *Reagan Drops 11 in Foreign Policy Advisory Group*, N.Y. TIMES, Nov. 5, 1985, at A15 ("[T]he group had become an unwieldy 'monstrosity,' and . . . 'strife ridden and contentious. There were many people who normally disagreed so much it became useless").

21. *Id.*

22. Stephen Engelberg, *Reagan Was Told in '85 of Problem in Moscow Embassy*, N.Y. TIMES, Apr. 3, 1987, at A1. Ross Perot allegedly resigned from the PFIAB because of the administration's failure to comply with the Board's recommendations. *Id.*

23. Michael Wines, *Bush to Streamline Advisory Panel on Intelligence*, N.Y. TIMES, Mar. 16, 1990, at A9.

Intelligence Oversight Board, and set the number of members at sixteen; not surprisingly, many personal friends became members.²⁴ During the recent Bush administration, the PFIAB operated in the same fashion as in previous years, with the President issuing a new Executive Order late in his presidency.²⁵ In 2003, the PFIAB reviewed President Bush's apparently false comments in a State of the Union address concerning Iraq's alleged attempts to obtain nuclear materials from Africa.²⁶ Surprisingly, President Bush did not utilize the PFIAB to examine the CIA intelligence which led to the war in Iraq.²⁷ With President Obama now in the White House, the fate of the PFIAB is unknown.²⁸

III. SHORTCOMINGS OF THE PFIAB

The intelligence community requires a certain amount of oversight to remain objective and improve its performance. The PFIAB's current ability to contribute to this oversight function is limited, due to a structure that does not insulate the Board from political pressures, gives no incentive to participate, and creates tensions between members and the intelligence community. First, PFIAB members are not required to meet on a regular basis. Depending on the administration, the Board may meet weekly or every few months. Until President Bush's recent order, PFIAB members could also serve in other areas of the government, leading to a split focus or disinterested members. Furthermore, its volunteer-type membership offers no incentive for in-depth work. Overall, PFIAB members may not offer the level of attention

24. See Exec. Order No. 12,863, 3 C.F.R. 632, 632-33 (1993), *reprinted in* 50 U.S.C. § 401 app. at 63-64 (2000); see Douglas Jehl, *Elite Intelligence Panel Is Refilled, in Usual Way*, N.Y. TIMES, Apr. 25, 1993, § 1, at 28 ("That is what makes a place on the . . . Board . . . perhaps the plummiest of all White House appointments—and a post that often lands in the hands of those to whom Presidents and their parties owe favors.").

25. See Exec. Order No. 13,462, 73 Fed. Reg. 11,805 (Feb. 29, 2008). President Bush changed the Board's name to "President's Intelligence Advisory Board." *Id.*

26. See Walter Pincus, *White House Faulted on Uranium Claim*, WASH. POST, Dec. 24, 2003, at A01.

27. Editorial, *Reviewing the Intelligence on Iraq*, N.Y. TIMES, May 26, 2003, at A14.

28. *But see* Change.gov, Obama announces Panetta and Blair for Intel Posts, http://change.gov/newsroom/entry/obama_announces_panetta_and_blair_for_intel_posts/ (last visited Apr. 2, 2009) (noting that former Director of National Intelligence, Mike McConnell, is slated for a position on President Obama's "Foreign Intelligence Advisory Board").

required to effectively oversee intelligence activities and satisfactorily advise the President.²⁹

Second, those appointed to the Board are often friends of the President—not individuals able to make an intelligible evaluation of the various intelligence agencies.³⁰ Indeed, the PFIAB is often comprised of persons more qualified to make business assessments as opposed to intelligence assessments. This haphazard and undefined method of choosing members also raises partisanship concerns because an incoming President can hand-pick the PFIAB in accordance with that administration's views. As such, members may be unwilling to criticize the administration and propose hard-line changes to the conduct of intelligence activities.³¹ Additionally, this constant rotation suggests the PFIAB lacks the stability and experience needed to be an effective participant in overall intelligence oversight.³²

A final critique of the Board's structure concerns the tense relationship between the PFIAB and the intelligence community. Because its members have access to all information the PFIAB deems relevant, the Board can be an annoyance to those officials charged with sharing important intelligence with the members.³³

29. See AM. BAR ASS'N: WORKING GROUP ON INTELLIGENCE OVERSIGHT AND ACCOUNTABILITY, OVERSIGHT AND ACCOUNTABILITY OF THE U.S. INTELLIGENCE AGENCIES: AN EVALUATION 108 (1985) [hereinafter OVERSIGHT AND ACCOUNTABILITY]; MARCHETTI & MARKS, *supra* note 3, at 334 (discussing the PFIAB in the 1970s). "The PFIAB meets approximately once a month in Washington, and is thus of limited value as a permanent watchdog committee." *Id.*; see also David Everett Colton, Comment, *Speaking Truth to Power: Intelligence Oversight in an Imperfect World*, 137 U. PA. L. REV. 571, 611 n.177 (1988) (citing Martin Anderson, *Through the Looking Glass*, COMMON CAUSE MAG., July-Aug. 1988, at 13, 16).

30. See Jehl, *supra* note 24, § 1, at 28; Miller, *supra* note 7, at A27.

31. See OVERSIGHT AND ACCOUNTABILITY, *supra* note 29, at 72.

If one examines the membership of the [PFIAB], and the manner in which some of its members are chosen, one will see that it represents . . . (a) a patronage system to reward those who have been helpful to the party in power; (b) and kind of "Old Guard" membership who do not seem likely to raise fundamental questions that would help evaluate the quality of the system.

Id.; see also Robert Bryce, *Top-Secret Cronies*, SALON.COM, Nov. 17, 2005, <http://dir.salon.com/story/news/feature/2005/11/17/pfiab> (suggesting that former chairman Brent Scowcroft's dismissal stemmed from his open criticism of President Bush's handling of Iraq).

32. See MARK M. LOWENTHAL, U.S. INTELLIGENCE: EVOLUTION AND ANATOMY 143 (2d ed. 1992).

33. See Jehl, *supra* note 24, § 1, at 28 ("All this hunger for information is a

Suggestions by the PFIAB may also be met with cynicism by those with the ability to make changes. This problem is intensified due to the lack of intelligence know-how on the Board.

Even with a vibrant roster, the PFIAB still requires specific responsibilities to be useful. The prominence of the PFIAB varies throughout history, with some administrations demonstrating the Board's usefulness, and others highlighting its superfluous nature. The President has many advisors to turn to, including those directly involved in intelligence matters.³⁴ As of now, the PFIAB's role is limited to researching and reporting—its members cannot employ innovative techniques, such as the Team A/Team B exercise, without presidential approval. As such, the ability of the PFIAB to offer oversight and review beyond the measures already in place by other legislative and executive groups is doubtful.

IV. IS REFORM POSSIBLE?

Reforming the Board's structure may lead to more effectiveness and give the group legitimacy in the intelligence community, but such changes raise a host of new concerns. By assembling full-time positions and providing compensation, members may have the time and incentive to research and issue thorough advice.³⁵ Creating measures to further insulate the Board from partisan politics is also necessary.³⁶ Permanent and overlapping membership positions with each administration may counteract possible partisanship and prevent the President from dismissing those with unpopular ideas.³⁷ To be truly valuable, however, the PFIAB should be comprised of members who are familiar with intelligence matters.

These needed reforms highlight another critical element in

source of frustration for professional intelligence officers, who must brief members of the panel on closely held government secrets.”).

34. See LOWENTHAL, *supra* note 32, at 143 (the “PFIAB’s purely advisory role inherently limits its influence on intelligence policy . . .”).

35. See OVERSIGHT AND ACCOUNTABILITY, *supra* note 29, at 76. Adding more employees to the government’s payroll may be unwise in these economic times.

36. *Id.* at 35. Many responses noted a difference between being non-partisan and non-political, stating that policy formation is a function of politics and thus inherent in oversight. *Id.* at 35–38; see also Flanagan, *supra* note 13, at 72 (“Thus, if . . . composed of individuals from across the political spectrum with broad experience in intelligence and foreign affairs, the PFIAB could be a useful asset for a President inclined to use it constructively.”).

37. OVERSIGHT AND ACCOUNTABILITY, *supra* note 29, at 108; see Bryce, *supra* note 31.

intelligence oversight: maintaining distance to avoid diversion or becoming too empathetic with those being observed. Members who know enough about intelligence issues to make quality assessments may be hesitant to critique friends, former co-workers, and other acquaintances. Additionally, one aspect of the PFIAB that cannot be modified is its need for unrestricted access to classified information. Such information is critical to ensuring top performance. However, great risks are involved when another group of individuals becomes privy to the Nation's top secrets, especially those not in the public eye or subject to the public's approval.³⁸ Overall, it is unclear whether the benefits to changing the PFIAB's membership charter outweigh the obvious risks.

Expanding the PFIAB's mandate to include new tasks may further tangle the intelligence community and encroach on other oversight bodies. The 9/11 Commission Report suggested the existence of an executive board, or an expansion of existing boards (likely the PFIAB), to "oversee adherence to the [recommended] guidelines . . . and the commitment the government makes to defend our civil liberties."³⁹ However, this possible expansion was delegated to a newly created oversight board.⁴⁰ A recent report on the PFIAB argues that the Board should focus primarily on forward-looking tasks, such as "anticipating future technological trends or political developments" or providing "early warnings to the [P]resident and the intelligence community."⁴¹ Yet appointing the PFIAB this line of responsibilities does not alleviate the need for more knowledgeable members and ignores the presence of numerous oversight boards already engaged in this undertaking.⁴²

38. See Jonathan Weisman, *Bush Adviser Helped Law Firm Land Job Lobbying for CNOOC*, WASH. POST, July 12, 2005, at D01. This article raised a concern with James Langdon's dual role as chairman of the PFIAB and his trips to China to "help secure his law firm's role in lobbying for a state-run Chinese energy firm and its bid for . . . Unocal Corp." *Id.*

39. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 395 (2004), available at <http://www.gpoaccess.gov/911/pdf/sec12.pdf>.

40. See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1061, 118 Stat. 3638.

41. KENNETH MICHAEL ABSHER ET AL., CONFIDENTIAL AND PRIVILEGED: THE PRESIDENT'S FOREIGN INTELLIGENCE ADVISORY BOARD, LEARNING LESSONS FROM ITS PAST TO SHAPE ITS FUTURE 19 (2008), available at <http://www.georgebushfoundation.org/uploads/files/PFIAB%20Report.pdf>.

42. See Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1662-64 (2006) (discussing the functions of congressional oversight bodies).

While the PFIAB may be in a unique position to tackle these tasks in the executive branch, the necessary reforms will essentially transform the PFIAB into a twin of already-existing oversight committees.

Likewise, any propositions for expansion must take care to avoid the potential for undue interference with intelligence agencies. With the recent revamping of the intelligence community after 9/11, additional levels of management and bureaucracy may prove more harmful than beneficial. Thus, substantive additions to the PFIAB's protocol may actually be detrimental and constitute another burden in the already evolving intelligence community.

V. CONCLUSION

With a new administration in the White House, now is the perfect time either to institute needed reform or to recognize that others are in a better position to advise the President on such sensitive matters. Today, the PFIAB's role in overseeing the intelligence community and advising the President is low-key and lackluster.⁴³ Many reforms are needed to make the PFIAB a true contributor. The method of selecting members must be changed, as should the qualifications for service on the Board. Also, the PFIAB should be given specific mandates and tasks, whether it be reviewing intelligence mishaps or looking into the future. But overall, the risks and possible detriments associated with revitalizing the Board must be balanced against its real potential to be a *unique* oversight body.

43. But see ABSHER ET AL., *supra* note 41, at 2-3 for the proposition that the PFIAB's low profile is due to the "sensitivity of the issues it considered" and executive privilege.
