



EXECUTIVE ORDER 12333

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OFFICE OF LAW AND POLICY

NATIONAL SECURITY DIVISION

JUNE 2010

~~TOP SECRET//COMINT~~



EO 12333 REVISION: OVERVIEW

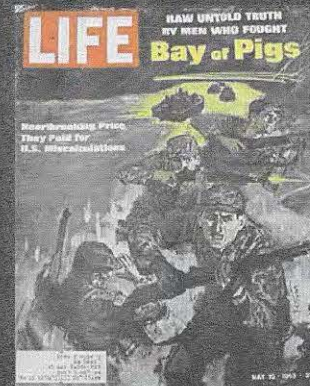
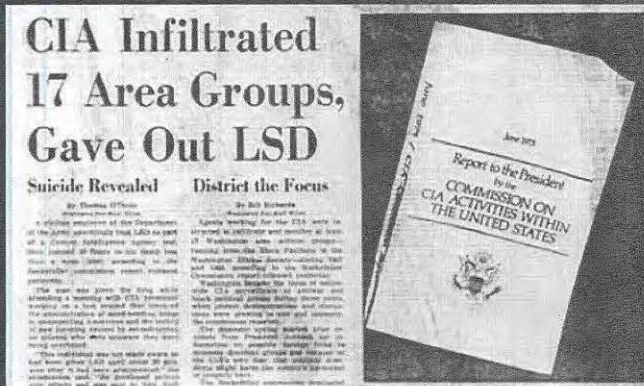
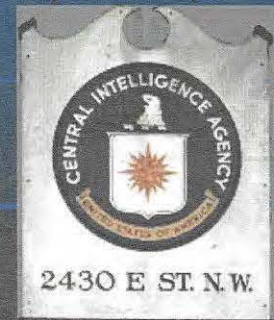
- **Background**
- **Role of DNI**
- **Role of other agencies**
 - **FBI, CIA, NSA**
- **Activities Inside the United States and Oversight**



PART I: BACKGROUND . . .

1945-1976

- CIA was the dominant player in the Intelligence Community
- Authority to conduct intelligence activities and operations primarily from the National Security Act and from NSC directives, in response to developments in the Cold War
- Oversight was informal: NSC played some role, and the DCI briefed the president orally to obtain approvals for covert actions and other sensitive operations
- Congressional oversight colloquially described as BOGSAT—“bunch of guys sitting around a table”



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PRIOR EXECUTIVE ORDERS: PRESIDENT FORD

EO 11905 (1976): UNITED STATES FOREIGN INTELLIGENCE ACTIVITIES

EO 11905 was promulgated in the wake of the CIA and FBI scandals of the 1960s and 1970s, as numerous Congressional committees criticized intelligence agencies. The executive order:

- Established policies to improve the quality of intelligence provided by the intelligence community
- Set out the responsibilities of Intelligence Community members
- Established comprehensive Executive Branch oversight mechanisms for the first time.



“Information about the capabilities, intentions and activities of other governments is essential to informed decision-making in the field of national defense and foreign relations. The measures employed to acquire such information should be responsive to the legitimate needs of our Government and must be conducted in a manner which preserves and respects our established concepts of privacy and our civil liberties. Recent events have clearly indicated the desirability of government-wide direction which will ensure a proper balancing of these interests.” (Section 5)

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PRIOR EXECUTIVE ORDERS: PRESIDENT CARTER

EO 12036 (1978): UNITED STATES INTELLIGENCE ACTIVITIES

- Established a panoply of intelligence coordinating and oversight committees within the executive branch
- Described respective responsibilities of IC members in further detail
- Elaborated upon limitations on the IC
- Set out very specific commitments for the President and IC members to ensure compliance with Congressional oversight, going beyond existing statutory requirements





EO 12333 (1981) UNDER REAGAN



“Timely and accurate information about the activities, capabilities, plans, and intentions of foreign powers, organizations, and persons, and their agents, is essential to the national security of the United States. All reasonable and lawful means must be used to ensure that the United States will receive the best intelligence available.”

WHAT IT DID:

- Described, in further detail, the respective powers and responsibilities of various intelligence community members
- Clarified coordination functions relating to the intelligence community as a whole
- Clarified what kind of information could be gathered by IC members, and more clearly described what kinds of techniques could and could not be used to collect this information.
- Mandated that IC members would comply with various statutory requirements pertaining to intelligence oversight, but provided the IC with more flexibility by eliminating the more detailed commitments in EO 12036.

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INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT

"The current position of Director of Central Intelligence should be replaced by a National Intelligence Director with two main areas of responsibility: (1) to oversee national intelligence centers on specific subjects of interest across the U.S. government and (2) to manage the national intelligence program and oversee the agencies that contribute to it."

9/11 Commission Report at 411

- **Implemented recommendations of the 9/11 Commission**

- **Belief that Director of Central Intelligence did not have sufficient authority over disparate elements of Intelligence Community**

- **Belief that too much information "stovepiped" by agencies**



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2008 REVISIONS EO 12333



From the Background Briefing by Senior Administration Officials, July 31:

" [T]his is the first significant adjustment in the executive order in several decades. With the passage by the Congress and signature by the President in the fall of 2004, the Intelligence Reform and Terrorist Prevention Act -- significant provisions in this executive order became out of date. And so... it was absolutely necessary to revise and update -- modernize this order.

...[I]t is a foundational document. It has a daily and significant impact on the activities of the intelligence community and the relationships in that important community. At the highest level, of course, the aim here is to create a more effective intelligence community, where these 16 agencies can be better integrated, work more collaboratively with one another, and also share more information freely."



" The revised Executive Order implements the reforms enacted into law by the Intelligence Reform and Terrorism Prevention Act of 2004 and creates a more unified, integrated, and collaborative Intelligence Community under the leadership of the Director of National Intelligence."

Statement by the White House Press Secretary, July 31

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PURPOSE OF CHANGES

- **Align with 2004 Intelligence Reform legislation and implement additional recommendations of the 9/11 and WMD Commissions**
- **Clarify and strengthen the role of the DNI**
- **Use experience implementing reform**
 - **Unique IC experience of current agency and department heads**
- **Establish durable framework for intelligence activities**
- **Maintain or strengthen privacy and civil liberties protections**



EO 12333 IN THE NEWS

The Washington Post

"Although the revamped order had been in the works for a year, its formal unveiling prompted a rare revolt from congressional Republicans, some of whom walked out on Director of National Intelligence Mike McConnell during a morning briefing. Rep. Pete Hoekstra (Mich.), ranking Republican on the House intelligence committee, led several GOP colleagues to the exit after complaining that the administration had made the changes secretly without consulting with congressional overseers..."

Joby Warrick, "Bush Unveils Spy Guidelines, Angering House Overseers," Aug. 1, 2008



The New York Times

"President Bush has approved a long-awaited revision of the executive order that governs the nation's 16 spy agencies, the latest effort to wrestle the competing bureaucracies into a single effort under the director of national intelligence."

Scott Shane, "Bush Issues Order Seeking to Unite the Efforts of U.S. Spy Agencies," Aug. 1, 2008

Los Angeles Times

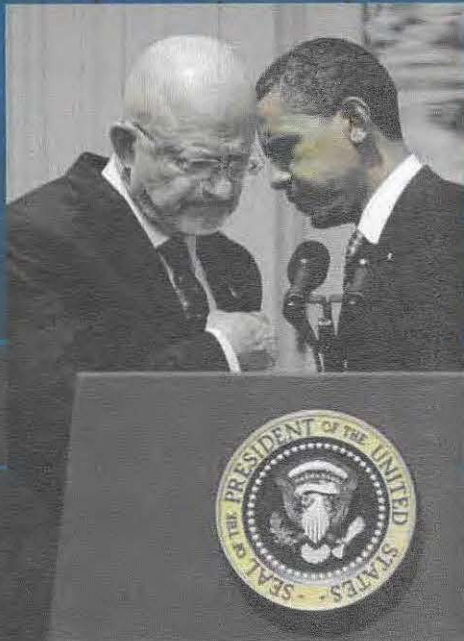
Two senior administration officials called the revisions "the most significant of its kind in more than a generation," representing the first revamp of EO 12333 since President Reagan issued it in 1981.

"Revamp of U.S. spy agencies centralizes power," Aug. 1, 2008

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PART II: THE ROLE OF THE DNI



- **Head of the IC**
- **Is the principal adviser to the President, NSC, and Homeland Security Council on intelligence matters**
- **Oversees the National Intelligence Program**



EO 12333 REVISION: AGENCIES OUTSIDE THE IC

- **All agencies shall provide the DNI with access to all information and intelligence relevant to national security**
- **DNI may provide advisory tasking to agencies outside the Intelligence Community**
- **Agencies must respond “to the greatest extent possible”**
- **AG approves implementing procedures**



Sections 1.3(b)(18); 1.5(e)

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ACCESS TO INFORMATION

“National Intelligence and Intelligence Related to National Security means all intelligence, regardless of the source from which derived and including information gathered within or outside the United States, that pertains . . . to more than one . . . agency; and that involves threats to the United States, its people, property, or interests; the development, proliferation, or use of weapons of mass destruction; or any other matter bearing on United States national or homeland security.”

Section 3.5(i); IRPTA Section 1012

- National intelligence: DNI to determine if information “pertains to more than one agency” in accordance with definition
- All agencies have responsibility to produce intelligence in a manner that allows the full and free exchange of information

Sections 1.1(g);

1.3(a);1.3(e);1.5(a)

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THE ROLE OF THE DNI . . .

IRTPA Section 1018

- Community implements DNI directives
- Procedures for Department heads to raise concerns if they see abrogation of their agencies' statutory responsibilities

Coordination of IC Intelligence Activities

- DNI issues overarching policies and procedures to ensure coordination of intelligence activities
 - Establish coordination thresholds; define types of activities to be coordinated; etc.



FUNCTIONAL AND MISSION MANAGERS

- **Functional managers**
 - Director of NSA—signals intelligence
 - Director of CIA—human intelligence
 - Director of the National Geospatial-Intelligence Agency—geospatial intelligence
- **Mission managers—principal advisors on regions, topics**
- **DNI may designate**

Section 1.3(b)(12)

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EO 12333 REVISION: HIRING AND FIRING

- **DNI must concur in selection of:**

- **Executive Assistant Director for National Security Branch of FBI**
- **Director of NSA**
- **Other intelligence officials**

- **DNI must be consulted in selection of:**

- **DoD intelligence positions, including military positions**
- **Assistant Attorney General for National Security**

Section 1.3(e)

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PART III: ROLES OF THE AGENCIES . . . FBI



- Collect, analyze, produce, and disseminate foreign intelligence and counterintelligence
- Conduct counterintelligence activities (inside and outside the U.S.)
- Conduct foreign intelligence liaison relationships with services of foreign governments or international organizations
- Provide technical assistance, whether within or outside the U.S., to foreign intelligence and law enforcement services

Sections 1.7(g); 1.13

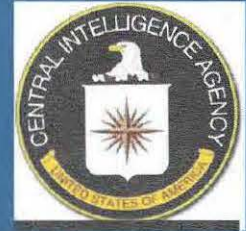


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CIA AUTHORITY AND RESPONSIBILITIES



- Collect, analyze, produce, and disseminate foreign intelligence and counterintelligence
- Conduct counterintelligence activities outside the U.S.
- Conduct covert action activities approved by the President
- Conduct foreign intelligence liaison relationships with intelligence or security services of foreign governments or international organizations

Section 1.7(a)



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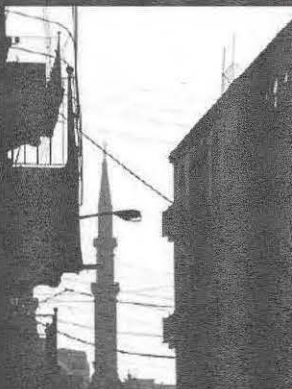


OUTSIDE THE UNITED STATES: COORDINATION

- Director of the CIA coordinates clandestine collection of foreign intelligence through “human sources or through human-enabled means”
- CIA also coordinates counterintelligence activities
- All agencies inform the Secretary of Defense of clandestine collection of foreign intelligence in combat area

Sections 1.3(b)(20)

and 1.5(j)



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NSA AUTHORITY AND RESPONSIBILITIES



COORDINATION TASKS AND EXCLUSIVE FUNCTIONS

- NSA has sole authority to engage in signals intelligence activities unless the Secretary of Defense specifies otherwise
- Collect, process, analyze, produce, and disseminate SIGINT for foreign intelligence and counterintelligence purposes, and control SIGINT collection and processing activities
- Create and operate a unified organization for all SIGINT activities
- Conduct foreign cryptologic liaison relationships



Section 1.7

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EO 12333 REVISION: OTHER SECTORS

ORIGINAL EO 12333 (1981)

- Little consideration of the national intelligence effort at a non-federal level
- IC allowed to provide specialized equipment, technical knowledge, or assistance of expert personnel to local law enforcement agencies where lives endangered



REVISED EO 12333 (2008)

- State, local, and tribal governments are “critical partners”
- IC should take their requirements and responsibilities into account
- IC also may consider requirements and responsibilities of private sector entities

Sections 1.1(f);1.4(g); 2.6

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PART IV: ACTIVITIES INSIDE THE UNITED STATES AND OVERSIGHT

Inside the US—

- Director of FBI coordinates clandestine collection of foreign intelligence through “human sources or through human-enabled means”
- FBI also coordinates counterintelligence activities
- All agencies inform the AG and DNI of intelligence activities not coordinated with the FBI
- AG approves all procedures for coordination



INSIDE THE UNITED STATES . . .

- **FBI collects foreign intelligence not otherwise obtainable**
- **Other agencies may collect if:**
 - **Significant foreign intelligence is sought**
 - **Not for purpose of acquiring information about the domestic activities of US persons**
- **FBI normally conducts physical searches and physical surveillances of US persons**
- **CIA may not conduct electronic surveillance**

Sections 2.3(b); 2.4

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INSIDE THE US: UNDISCLOSED PARTICIPATION

- **No one acting on behalf of IC may participate in organization in the United States unless:**

- **Intelligence affiliation disclosed, or**

- **Use procedures approved by AG**

- **Participation must be essential to achieving lawful purposes**

- **If purpose is influencing the organization or its members:**

- **FBI may participate in course of lawful investigation, or**

- **Other agency may participate if organization is composed primarily of non-IIS persons and acting on**

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OVERSIGHT PROVISIONS: SECTION 2.3

- Collection, retention and dissemination of US person information governed by procedures
 - Established by head of agency
 - Approved by Attorney General
 - In consultation with the DNI
- Changes:
 - DNI role
 - Information obtained from SIGINT may be disseminated to other agencies, subject to procedures



COMPARISON OF SECTIONS 2.3 AND 2.5

"The Attorney General hereby is delegated the power to approve the use for intelligence purposes, within the United States or against a United States person abroad, of any technique for which a warrant would be required if undertaken for law enforcement purposes, provided that such techniques shall not be undertaken unless the Attorney General has determined that there is probable cause to believe that the technique is directed against a foreign power or an agent of a foreign power..."

- Section 2.3: Agencies may collect information needed to protect safety of any person
- Section 2.5: AG must approve surveillance or search of US person for intelligence purposes where warrant would be required



USE OF THESE PROVISIONS IN GUIDELINES-DoD

“Electronic surveillance means acquisition of a nonpublic communication by electronic means without the consent of a person who is a party to an electronic communication or, in the case of a nonelectronic communication, without the consent of a person who is visibly present at the place of communication, but not including the use of radio direction-finding equipment solely to determine the location of a transmitter.” EO 12333 §3.5(c)

- DoD 5240.1-R—Procedure 5
 - Part 1—FISA
 - Part 2—Electronic surveillance or use of surveillance devices against US persons abroad where there is reasonable expectation of privacy
 - Part 3 and Classified Annex--Signals intelligence activities
- USSID SP0018—Not AG approved



5240.1-R PROCEDURE 5

- DoD and NSA officials may authorize emergency surveillance of U.S. person outside the United States when:
 - Time required to obtain the AG's approval would cause failure or delay in obtaining "significant" foreign intelligence, and failure or delay would result in "substantial" harm to national security
 - A person's life or physical safety is reasonably believed to be in immediate danger
 - The physical security of a defense installation or Government property is reasonably believed to be in immediate danger
- No more than 72 hours of collection without AG's approval
- Unless using life or physical safety provision, must find that target is agent of foreign power



PROCEDURE 5-EXAMPLES

[REDACTED]

(b)(1); (b)(3)

[REDACTED]

(b)(1); (b)(3)

[REDACTED]

(b)(1); (b)(3)

[REDACTED]

(b)(1); (b)(3)

[REDACTED]

(b)(1); (b)(3)

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CLASSIFIED ANNEX U.S. PERSON CAPTIVES

- Director of NSA may approve collection of US person's communications where the US person is reasonably believed to be held captive by a foreign power or by a group engaged in international terrorist activities

- Added in 1988

- Example of kidnapping of General Dozier in Italy

- Previously authorized on the basis of presumed consent

- AG notified when DIRNSA authorizes collection

- AG does not have to approve collection



General Dozier

Classified Annex § 4.A.1(a)(3), p.12



CLASSIFIED ANNEX AND NON-US PERSONS

- For non-US persons outside the United States who enter this country “in circumstances that suggest that the alien is an agent of a foreign power,” NSA has 72-hour grace period

[Redacted]

(b)(1), (b)(3)

- For those [Redacted] authorization. Examples:

must seek AG's [Redacted]

(b)(1), (b)(2)

[Redacted]

(b)(1), (b)(3)

[Redacted]

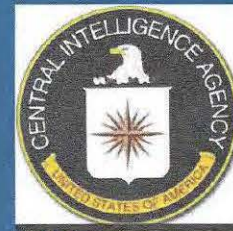
(b)(1), (b)(3)

Classified Annex §4.A.1(d)(2)

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CIA EMERGENCIES



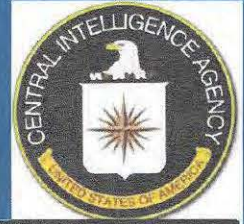
(b)(1); (b)(3)



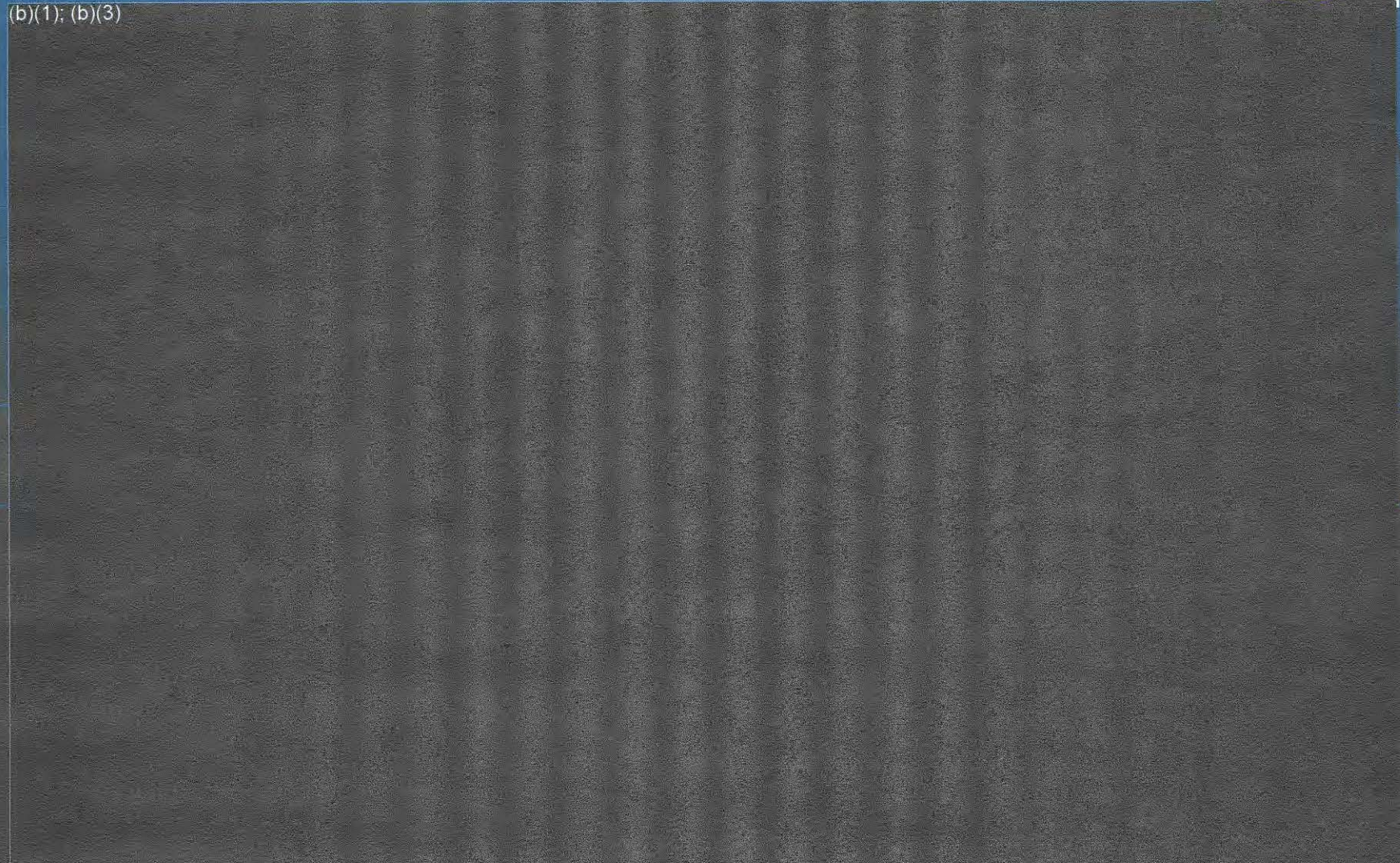
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CIA EMERGENCIES . . .



(b)(1); (b)(3)



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AG GUIDELINES AND FISA

- Procedures do not permit officials to authorize electronic surveillance as defined by FISA
- Procedures impose additional requirements
- Does FAA limit EO 12333 and the Guidelines?
 - FAA requires FISC approval or AG's emergency approval
 - Section 704: No element of the intelligence community may intentionally target, for the purpose of acquiring foreign intelligence information, a United States person reasonably believed to be located outside the United States under circumstances in which the targeted United States person has a reasonable expectation of privacy and a warrant would be required if the acquisition were conducted inside the United States for law enforcement purposes

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MCLAUGHLIN REPORT



"We saw a surprising level of disagreement, even among experienced experts, on whether current authorities allow intelligence collectors, analysts, and law enforcement personnel to seamlessly track terrorists who communicate with US Persons or who land on US soil and thus acquire US Person status. . . . Given the increased threats to the US homeland in the last year, including an increasing number originating here or involving US Persons, it takes little imagination to grasp how the next terrorist surprise could be the result of confusion or excessive caution about how to manage this issue." IC Review Panel, Report to the DNI on the Fort Hood and Northwest Flight 253 Incidents, at xiv (April 15, 2010)

- Examined Fort Hood Christmas Day incidents
- Found IC "confusion" about how to handle US persons data
- ODNI and DoJ must help the Community update, harmonize, and simplify guidelines



EO 12333 REVISION: REPORTING AND OVERSIGHT

IC agency heads must:

- Give officials responsible for privacy or civil liberties protection access to “any information or intelligence necessary to perform their official duties”
- Report violations of criminal law to the AG
- Report any intelligence activities that may have been unlawful to the Intelligence Oversight Board and DNI

Sections 1.3(e); 1.6(b)(c) and

(h)

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PRIOR LIMITATIONS ON THE IC REMAIN IN PLACE

- Generally, only CIA can conduct covert action (Section 1.7(a)(4)), and EO 12333 prohibits covert actions designed to have a domestic effect (Section 2.13)
- The prohibition on human experimentation remains (Section 2.10)
- The prohibition on assassination remains (Section 2.11)
- Members of the IC cannot use intermediaries to circumvent the prohibitions in EO 12333 (Section 2.12)



FUTURE DEVELOPMENTS?

- Issuance of multiple guidelines
- Use of DNI authority to task non-IC members, pursuant to Section 1.3(b)(18)
- Intelligence Community still not well coordinated or too centralized?