

ANALYSTS AND POLICYMAKERS: A CONFUSION OF ROLES?

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During the past year, we have witnessed two major cause celebres involving the relations between national policymakers and intelligence analysts in the sensitive areas of foreign relations and national security. The first involved the issue of whether the analysts who worked on the National Intelligence Estimate and other pre-war assessments were pressured or intimidated into finding that Iraq had Weapons of Mass Destruction (WMD) by high-level policymakers who wanted and needed such conclusions to further their preordained objectives to unseat the Iraqi President, Saddam Hussein, by military force. The second contratemps arose during the confirmation hearing of John Bolton as United States Ambassador to the United Nations. Opponents of the Bolton nomination asserted that on several occasions during his tenure as Assistant Secretary of State he had tried to transfer or have removed analysts who would not alter their findings on WMD to fit his own judgments on Cuba's or Syria's activities. Though the accounts of the interface between Bolton and intelligence analysts (and their superiors) varied considerably, the accusations of political interference with analysts' judgments on key foreign policy matters gave rise to provocative dialogues in the Senate as to the proper role of both policymakers and analysts when they join to produce critical judgments—some that could lead to war—on the capabilities and, more importantly, the intent of hostile governments and terrorist groups to manufacture and use such weapons.

At first, it seems hard to fathom how our extensive national intelligence apparatus has been operating for nearly sixty years without those relationships having been explored publicly before. Now, however, the ever-escalating stakes involved with the technological development of and access to new weapons, as well as the emergence of new kinds of enemies and perhaps a growing recognition of an accumulation of missed opportunities and past mistakes over the past half-century, have pushed the Intelligence Community (IC) to front and center. In the case of Iraq, two comprehensive and scathing

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critiques by the Senate Select Committee on Intelligence (SSCI)¹ and the President's Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (WMD Commission),² on which I served (2004-2005), of the tradecraft involved in analysts' pre-Iraq War work product did not entirely satisfy critics. Some suspected, notably, that the analysts had succumbed to pressures by policymakers to arrive at their conclusions, later proven "wholly wrong," that Saddam Hussein was embarked on an active effort to make and use WMD in 2002.³ This skepticism was refueled by the release of a contemporaneous memorandum written in July 2002 by "C"—head of the British MI6—reporting on "recent talks in Washington" to the effect that the Bush Administration was actively planning to go to war to achieve regime change in Iraq and that "the intelligence and facts were being fixed around that policy."⁴ No further specifics were offered on who said what to whom, but critics of the war and the Administration seized upon the memo as the "smoking gun" that was "proof positive" the intelligence community had been unequivocally politicized and bent to the will of the policymakers.⁵

In this short essay, I will briefly summarize the WMD Commission's findings both about alleged "politicization" of the Iraqi analysts and the causes of their lamentable shortfall on the pre-war estimates of Iraqi WMD, findings which closely parallel those of the Senate Intelligence Committee's report issued within the same year. After that I will probe some of my own views on possible conceptual confusion about just what the role of the intelligence analyst is, and the inherent difficulties in drawing lines between constructive and destructive interchanges between analysts and the policymakers who inevitably must provide the marching orders as to what information they want or need to conduct military or diplomatic policy. Finally, despite profound differences between the IC and other government bureaucracies, I offer some modest suggestions largely gleaned from administrative law for handling the delicate balance between professional integrity in fact-finding and usefulness to elected policymakers. The most controversial of these is that the IC take account of the likely consequences of its findings and judgments by setting

1. STAFF OF S. SELECT COMM. ON INTELLIGENCE, 108TH CONG., REPORT ON THE U.S. INTELLIGENCE COMMUNITY'S PREWAR INTELLIGENCE ASSESSMENTS ON IRAQ (Comm. Print 2004), available at <http://intelligence.senate.gov/iraqreport2.pdf> [hereinafter SSCI REPORT].

2. COMM'N ON THE INTELLIGENCE CAPABILITIES OF THE UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT (2005), available at http://www.wmd.gov/report/wmd_report.pdf [hereinafter WMD REPORT].

3. See, e.g., Seymour M. Hersh, *The Stovepipe*, NEW YORKER, Oct. 27, 2003, at 77; see also other sources cited in WMD REPORT, *supra* note 2, at 246 n.829.

4. Mark Danner, *The Secret Way to War*, N.Y. REVIEW OF BOOKS, June, 9, 2005, at 70, 70-71.

5. See, e.g., Danner, *id.*, at 70; Frank Rich, *It's Bush-Cheney, not Rove-Libby*, N.Y. TIMES, Oct. 16, 2005, § 4, at 12; cf. Michael Kinsley, *No Smoking Gun*, WASH. POST, June 12, 2005, at B9.

different thresholds of certainty and reliability for these findings dependent on the purpose of or context in which they are raised.

I. WHAT THE WMD COMMISSION HAD TO SAY ABOUT ANALYSTS

The WMD Commission's mandate was to "assess whether the intelligence community is sufficiently authorized, organized, equipped, trained and resourced to identify and warn in a timely manner of, and to support United States Government efforts to respond to the development and transfer of knowledge, expertise, technologies, materials and sources associated with the proliferation of Weapons of Mass Destruction . . . and other related threats of the 21st century . . ." ⁶ With regard to Iraq, we were directed to "specifically examine the intelligence community's intelligence prior to the initiation of Operation Iraqi Freedom and compare it with the findings of the Iraq Survey Group [the CIA-led post-invasion expert group that went into Iraq to look for WMD immediately after official hostilities ended] . . . relating to the development, . . . possession, . . . [or] potential or threatened use . . . of Weapons of Mass Destruction . . ." ⁷ In addition, the WMD Commission was specifically tasked to evaluate the challenge of obtaining information on WMD in "closed societies," and to compare the WMD intelligence we had on Libya prior to its 2003 decision to open its weapons programs to inspection and on Afghanistan prior to the removal of the Taliban with current assessments of how far advanced those programs actually were. ⁸

Appointed by President Bush in March 2004, the ten-person bipartisan WMD Commission produced a 600-page report a year later, rich in analysis of what went wrong in pre-war intelligence assessments and equally prolific in recommendations as to how they might be improved. During the same year, the independent 9/11 Commission scorned the intelligence community for not "connecting the dots" on pre-9/11 information concerning terrorist plans against the World Trade Center. ⁹ Largely due to their public hearings and in light of public opinion, Congress passed the first major overhaul of the intelligence structure since 1947, creating an "intelligence czar," the Director of National Intelligence, to head the fifteen intelligence units scattered among a half dozen executive agencies, including the Department of Defense, Department of State, Department of Justice, Department of Energy, and the CIA. ¹⁰ The new "Czar's" unenviable job is to insure integration of all fifteen

6. WMD REPORT, *supra* note 2, app. at 551 (Exec. Order No. 13,328, 69 Fed. Reg. 6901 (Feb. 6, 2004)).

7. *Id.* at 551-52.

8. *Id.*

9. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT (2004), *available at* <http://www.9-11commission.gov/report/911Report.pdf>.

10. Intelligence Reform and Terrorist Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004).

intelligence units' functions, and to spur the much-needed innovations necessary to keep up with our enemies' increasingly sophisticated capabilities, not only in acquiring the knowledge and expertise for development of their own WMD and keeping that expertise and intentions secret from us, but in discerning our WMD state of the art as well.

Retrospectively, the WMD Commission found that the IC's assessments of Saddam Hussein's WMD capabilities were "all wrong."¹¹ The National Intelligence Estimate (NIE) of October 2002 (the NIE is the most authoritative product of the IC, representing the combined efforts of all relevant intelligence agencies on a particular issue) said that Iraq *was* reconstituting its nuclear program when in fact no such efforts were underway.¹² Indeed, the failure of the United Nations inspectors' reports over an earlier four-year period to locate any such activity had strongly suggested this outcome already. The NIE's mistaken conclusion was based on what the NIE called the "compelling evidence" of Iraq's attempted procurement of high-strength aluminum tubes which a majority of intelligence agencies (spearheaded by the CIA) assessed were intended for use in centrifuges in a uranium enrichment process leading toward a nuclear weapon program rather than for the conventional rocket use Iraq proclaimed and which two agencies—the State Department and the Department of Energy—thought more likely.¹³ In the view of these agencies, the particular centrifuges were not well suited for nuclear use. Ironically, the Defense Department took what turned out to be the wrong side of this issue; even more surprisingly, its error was based on poor technical analysis of the tubes and a lack of up-to-date knowledge about missile weapons technology, the alternative use for the tubes.¹⁴ Rumors and forged documents involving a purported attempt by Iraq to purchase yellow cake (enriched uranium) from Africa for nuclear weapons use, never proven and ultimately not credited by the CIA or relied upon in the NIE, contributed to the debacle. There were skeptical participants from the Department of Energy in the NIE process who told the WMD Commission that, even though they discounted the centrifuge theory and said so in the NIE, they still "went along" with the majority judgment that Iraq was reconstituting its nuclear program because "DOE didn't want to come out before the war and say [Iraq] wasn't reconstituting."¹⁵ Only the State Department filed a dissent on the basic issue of whether Iraq had reconstituted its nuclear weapons program.

11. WMD REPORT, *supra* note 2, at 45.

12. Nat'l Intelligence Council, National Intelligence Estimate on Iraq's Continuing Program for Weapons of Mass Destruction 16 (2002), *available at* <http://www.fas.org/irp/cia/product/iraq-wmd.html> (declassified excerpts) (last visited Nov. 11, 2005) [hereinafter "NIE"].

13. *Id.*

14. WMD REPORT, *supra* note 2, at 67-71.

15. *Id.* at 75.

In the biological warfare area, the WMD Commission's assessment of the IC was, if anything, more scathing. Previous IC assessments of Iraq's development of biological weapons in the late 1990s had credited Iraq's asserted destruction of its prior Gulf war supplies of biological weapons. Despite recognizing that dual use equipment and components can serve both legitimate pharmaceutical purposes and WMD development, these earlier assessments found no evidence Iraq had embarked on a new program of biological warfare. But by 2000, the notorious "Curveball" came onto the scene—a former Iraqi engineer, now in the custody of a foreign intelligence service which would not allow him to be interviewed by U.S. intelligence. Curveball made over 100 reports on Iraq's alleged development of mobile production facilities for biological weapons which were relayed by the foreign intelligence service to our own IC. From the beginning there was discord within the CIA as to how credible Curveball was, with, frustratingly, no ability to vet him for ourselves. His reports, however, had enough internal inconsistencies and external contradictions to make some CIA officials distinctly uneasy.¹⁶ A combination, nevertheless, of poor internal communications within the CIA, and between the CIA and the Defense Intelligence unit about the intensity of these doubts, allowed Curveball's reports of mobile biological warfare units to carry the day in the end and to constitute the principal basis for the NIE and for Colin Powell's eve-of-war address to the United Nations on the existence of biological WMD production facilities. After the war, and after U.S. intelligence had the opportunity to interview Curveball personally, it was acknowledged that he was indeed a fabricator. Additionally, another source used for confirmation of Curveball's revelations was discovered to be a fabricator as well,¹⁷ yet this second source's tainted reports were inadvertently kept in the circulated reports about WMD for use by policymakers. With a dearth of human sources in Iraq to counter the fabricators, their prevarications won the day.

The chemical warfare intelligence was equally faulty. The NIE estimated stockpiles of up to 500 metric tons of chemical weapons, projections largely based on accompanying deficiencies in Saddam's reports to the U.N. inspectors and on aerial imagery at suspected sites of a certain kind of truck traditionally used to carry chemical weapons. Yet, what the analysts interpreted as increased activity at these facilities later turned out to be likely, at least in part, the result of taking the images at more frequent intervals.¹⁸

And, finally, the NIE found Iraq was developing unmanned aerial vehicles (UAVs) basically to deliver biological strikes—possibly against the U.S. The UAVs, in fact, were found by the postwar Iraq Survey Group (ISG) not to be intended for biological weapons, and corroborating information that an Iraqi agent had ordered software plans of U.S. sites for possible attacks was

16. *Id.* at 90-93, 94-105.

17. *Id.* at 84-85.

18. *Id.* at 117, 122-26.

mistaken.¹⁹ The inclusion of the software in orders of other neutral equipment was belatedly conceded to be more probably inadvertent.²⁰

This, then, was the intelligence analysis—prepared for the critical debate in Congress and at the U.N. on whether to go to war with Iraq on the basis of Saddam Hussein’s possession of WMD.

How could it have happened? One senior intelligence official called it a “perfect storm”—the convergence of a series of idiosyncratic faults in the way the intelligence agencies worked in this case and a healthy dose of just plain bad luck.²¹ But the WMD Commission was not so sanguine; it labeled “the 15 intelligence organizations . . . a [c]ommunity in name only” that “rarely acts with a unity of purpose”—“fragmented, loosely managed, and poorly coordinated.”²² Many of the same faults that plagued the Iraq exercise could be seen—though not in such magnitude—in examinations of intelligence operations in Libya and Afghanistan. The WMD Commission also studied intelligence operations in North Korea and Iran—the quintessential “hard targets.” Though our results in these two countries were classified in their entirety, we did pronounce: “Across the board, the Intelligence Community knows disturbingly little about the nuclear programs of many of the world’s most dangerous actors.”²³ The truth was that we had an embarrassing shortage of verifiable information on Iraq; we had pitifully few human spies in Iraq; aerial intelligence can be useful in spotting changes on suspected sites but it cannot always tell you what is going on inside buildings or what mobile trucks are being used for; and signals intelligence can often be thwarted by the target country’s change of communications systems, which erects technical barriers to our surveillance technologies. Poor tradecraft failed to execute or properly interpret the right tests for the most likely potential uses of centrifuges, and we did not insist on verification of the reliability of Curveball before placing such heavy reliance on his say-so. In short, our *affirmative* evidence of the existence of WMD was very thin indeed. Had the NIE said just that, we might be in a different place today. In the end, the Commission found that “one of the most public—and most damaging—intelligence failures in recent American history . . . was in large part the result of analytical shortcomings; intelligence analysts were too wedded to their assumptions about Saddam’s intentions.”²⁴

It was accepted wisdom in the IC that Saddam Hussein definitely intended to restore his former WMD capabilities as soon as he could: he had those capabilities in the Gulf War and for years thereafter, he used chemical weapons against the Kurds and Iranians, and he steadfastly refused to come clean with

19. *Id.* at 132-46.

20. *Id.*

21. *Id.* at 3.

22. *Id.* at 5.

23. *Id.* at 4.

24. *Id.* at 3.

the U.N. inspectors in his declarations of what happened to these stockpiles and production capacity. Was it not then reasonable to assume he would secretly begin reconstructing his old WMD programs, as his frustration with the interminable U.N. sanctions increased? The oil for food program allowed some respite from utter economic devastation, and after 1998 he was free of the intrusive U.N. inspectors. No one seriously considered or apparently even raised to any cognizable level the alternative explanation for Saddam Hussein's conduct, a hypothesis that apparently turned out to be the truth—namely that he was willing to destroy all the WMD he had as a way to get rid of existing sanctions, but that he either failed through incompetence to document their voluntary destruction or, more likely, he wanted to keep alive the deterrent against his neighbors—Iran and Israel—stemming from a belief that he still had WMD.

This assumption, largely based on history, that Saddam was secretly trying to recreate his WMD capabilities, was so embedded in the IC that the analysts too easily rejected any information that pointed the other way—even in the absence of any solid information supporting their preconception. Call it “group think,” “tunnel vision,” or whatever, they in effect switched the burden of proof to require positive proof that Saddam *did not* have WMD rather than concrete proof that he did have them.

The Commission also took to task the way in which the IC described their findings, both in the original classified NIE for policymakers and in subsequent declassified versions for public and media consumption. The uncertainties—the gaps in the IC's real knowledge—were not adequately conveyed; they did not explicitly reference the historical assumptions that were driving their analysis—Saddam's past record of using WMD and his dissembling to the inspectors. Of the forty caveats in the original NIE, fifteen were dropped altogether in the public version, creating a still stronger air of certainty. (The Commission similarly found the pieces on WMD in the President's Daily Briefing around this time “disturbingly one-sided.”) The language of consensus in the NIE—“*most agencies believe*”—obscured the fact that the agencies that dissented on particular issues (like the Department of Energy with the centrifuges and the Air Force with the intended use of the UAVs) were the most expert ones in their field, and a policy of “one agency, one vote” may not have been the right paradigm for evaluating their assessments.²⁵ In sum, the IC had distressing failures before—including failures to warn of Pearl Harbor and to predict the demise of the Soviet Union, the Indian nuclear tests, and the Bay of Pigs—but this one was a whopper.

The Commission's scope of recommendations involving the IC's analysis capabilities ranged far and wide. With a brand-new Director of National Intelligence (DNI) coming in to administer a brand-new statute, this was not the time for tinkering, but for big changes. The WMD Commission, like the

25. *Id.* at 181-86.

9/11 Commission before it, aimed for an integrated IC rather than the stovepipe structure of the past; “Mission Managers” on the new DNI’s staff would coordinate the work of all relevant agencies around particular priority issues.²⁶ These managers would direct and oversee both collection and analytic efforts throughout the whole IC on issues like China, North Korea, and WMD. (The new Intelligence Reform Act created a National Counterterrorism Center to do this for terrorist threats). A prime means to this end was the introduction of genuine information sharing, a recommendation everyone in the community agreed to in principle but seemed unable to effect in practice. Most experts said outmoded technology was not the real problem in information sharing; rather, the problem was a lack of common standards among the fifteen intelligence agencies for who could access what kinds of information—each agency wanted to keep its own sources and assets close to the vest (even to the point of denying sufficient information on sources to the analysts who were supposed to make credibility determinations on these sources in their reports). Moreover, the intelligence collectors were and are often understandably afraid of safety risks to their sources if their identities are widely spread about. A real culture change would have to happen *inside* the community to make information sharing work. And only if this change can be effected can the Mission Managers be expected to coordinate the sum total of relevant information for analytic purposes.²⁷ Civil libertarians of course have valid concerns about privacy as raw data races through cyberspace; the delicate balance between security of sources, privacy concerns, and acquisition of all the information necessary for sound analysis will not be an easy achievement, but it is crucial to intelligence reform.²⁸

The Commission made several key recommendations about the kind of workforce needed in a reformed IC, including analysts. These included recruitment of a more diversified core of analysts with training in languages and technology, greater career mobility and incentives, opportunities to move around among different parts of the community in the course of their careers, and pay for performance. The new breed of recruits should be able to move into the places and among the people where we need contacts and information, not sit behind an embassy desk or circulate at embassy cocktail parties. Arbitrary past standards, that our IC analysts must be, like Caesar’s wife, “above suspicion” and cannot even have relatives here or abroad that might be used to corrupt or intimidate them, would have to be rethought. Not only do we

26. *Id.* at 19, 25, 317-19.

27. *Id.* at 28-29, 320.

28. Since the Commission Report was issued, the U.S. Government has acknowledged, after prior leaks, a four-year-long secret NSA surveillance of communications between U.S. persons and alleged al Qaeda members abroad. The members of the WMD Commission had no knowledge of the secret program. Many members of Congress have said the program violated U.S. law and Congressional bills are pending to address the issue.

need more agents of black, brown, yellow, and every other hue, but they need to speak the languages of the people from whom they seek information; they need new platforms from which to commingle and obtain information in hard target countries. The new recruits will also need to understand and use technical equipment to aid them in their job. Analysts especially need the greater familiarity that comes from field exposure with the background and context of the societies whose information they are evaluating.²⁹

The Commission also recommended that the IC, including the analysts, should reach out into the open society more for its raw material. There is a well-documented tendency among IC insiders to overvalue secret or classified information and to undervalue the open sources of information which often are as or more reliable and comprehensive. In the age of the Internet, the proliferation of specialized media, and street communications, such undervaluation is negligent. Up to now, the IC's use of open sources has been embryonic and underfunded, and our analysts have not been adequately trained or equipped to use them. Amazingly, the Commission found that some intelligence analysts did not even have the capacity to utilize Google. For these reasons, it recommended a new Open Sources Directorate in the CIA to enhance the availability of open-source materials to analysts, collectors, and users of intelligence.³⁰ There were other ways as well in which the IC should go public: using independent outside experts more frequently, especially as they provide the kind of historical, cultural, political, and economic background that often gives context to individual incidents or pieces of information, and which was sadly lacking in the case of the Iraq WMD analyses. Many outside experts can be tapped as well for specific observations gleaned from their international visits and contacts. Particularly in the case of biological warfare, the Commission was told the expertise lies primarily outside the government and cannot be recruited inside; thus, new efforts had to be made to secure the benefits of that expertise for IC research within the confines of scientific ethical tenets.³¹

In general, as the WMD Commission moved along in its investigations, it became increasingly clear that the analyst was at the core of both the major problems and the most likely solutions in the IC. Given that the drafters of the Iraq NIE had little new or recent information about WMD, it was the untoward inferences the analysts drew from that information, the inadequacy of their vetting of shaky sources, the failure to speedily withdraw from circulation information known to be false, a disinclination to specify the assumptions they were operating under in drawing their conclusions, and the overconfident language in which they wrapped the conclusions that lay at the heart of the debacle.

29. WMD REPORT, *supra* note 2, at 20, 321-26.

30. *Id.* at 22-23, 377-80, 395-400, 510-12.

31. *Id.*

In the Commission's view, the world of the analyst had to change. First, she must have more direct communication back and forth with the collector to insure the collector obtains what the analyst needs and the analyst understands the provenance of the raw data. In some cases, collectors and analysts might profitably work side by side. In any case, the Mission Manager should assure that all analysts and collectors working on a specific issue under his direction are connected and share data. The analyst would have specialist, open-source analysts to consult. Some analysts would be freed from the daily demands of current requests to work on long-term strategic issues. Other analysts would be specially assigned to conduct research and present alternative hypotheses and arguments to counter the "group think" phenomenon so omnipresent in the Iraq situation.

Analysts were encouraged to be more candid about what they know, what they are uncertain about, and what inferences they are drawing from particular data or assumptions. The "siren call of certainty" must be resisted. All-sourced copies of earlier analyses or papers upon which a current analytical product relies would be stored and indexed for diligent or skeptical policymakers to see for themselves. Analysts would conduct "lessons learned" exercises on important analyses to see what they did right and wrong. The President promised, and Congress has already approved, a sizeable increase in both IC collectors and analysts; however, the conclusion is inevitable from the Commission's report that hiring hundreds of new analysts will not accomplish much unless the system under which they work is dramatically changed.³² For once, fiscal conservatism and intelligence reform may go hand in hand.

What did we see as the greatest obstacles to reform? Natural ennui, reluctance to share knowledge with other agencies, and turf protection; the spy world is Washington bureaucracy in spades. Hopefully, a new DNI and new leaders of several of the intelligence agencies would have a stake in seeing the community regain its prestige in the world and would move a reform agenda along. But the Commission did not assume the old ways would *give* way easily; it concluded that only strong leadership from the top down would accomplish lasting reform.

The FBI, which until recently was predominantly a law enforcement agency, is a case in point. The FBI now has significant domestic intelligence-gathering and analysis responsibilities, but the structure—the Intelligence Directorate—it originally set up to oversee these new duties had virtually no independent authority from the Agency's old-line law enforcement structure. The Commission recommended a new National Security Service within the FBI which would report to the DNI as well as the Attorney General on intelligence matters so that the DNI can coordinate domestic intelligence and

32. *Id.* at 387, 389, 407-09, 411-14, 424-25.

foreign intelligence for terrorism, WMD, etc.³³ There has also been recurrent conflict over who—the CIA or the FBI—has primary responsibility for gathering foreign intelligence on U.S. soil—a dispute hopefully settled by a recent Memorandum of Understanding.³⁴ Still, a newspaper report a few months after the WMD Report said that the FBI was having difficulty recruiting and placing over 500 newly-authorized analysts. One-third of the spots were vacant and many were doing “escort, trash and phone duty”; others were merely giving low-level research assistance to regular agents; they were frequently denied access to needed FBI intelligence and many quit in frustration.³⁵ The nagging worry remained whether a primarily law enforcement culture used to gathering evidence for prosecution can reorient itself—at least in part—to the different modes of piecing together bits and pieces of information and producing intelligence estimates for policymakers that will never pass through a courthouse door. The next year or so would tell the tale.

II. WHAT HAS HAPPENED SINCE?

I have now described the Commission’s principal findings and recommendations involving analysts, to all of which I subscribe. I also indicated at the start that in the area of analyst-policymaker relationships, I thought there was more profitable probing yet to be done by others. Before moving on, however, I take a brief detour to survey what has happened to these Commission recommendations in the year since the Report was issued.

The Commission noted that predecessor commissions had “identified some of the same fundamental failings we see in the Intelligence Community, usually to little effect.”³⁶ The IC “has an almost perfect record of resisting external recommendations.”³⁷ Yet, a remarkable amount of implementing work on the WMD Report appears to have been done. Within a month, the White House announced that seventy of the Commission’s seventy-four recommendations would be adopted, including the most controversial ones, such as the reorganization of the FBI’s intelligence functions under a new National Security Service which would be subject to the coordination and budget authorities of the DNI as well as the FBI’s regular boss, the Attorney General.³⁸

33. *Id.* at 30-31.

34. *Id.* at 31.

35. David Johnston, *Antiterror Head Will Help Choose an F.B.I Official*, N.Y. TIMES, June 12, 2005, at A1; Melanie W. Sisson, *The F.B.I.’s 2nd-Class Citizens*, WASH. POST, Dec. 31, 2005, at A19.

36. WMD REPORT, *supra* note 2, at 6.

37. *Id.*

38. See, e.g., Dan Eggen & Walter Pincus, *Spy Chief Gets More Authority Over FBI*, WASH. POST, July 20, 2005, at A1; *Negroponte Will Control Bureau’s Intelligence Side*, WASH. POST, July 30, 2005, at A1; Douglas Jehl, *Bush to Create New Unit in F.B.I. for Intelligence*, N.Y. TIMES, June 29, 2005, at A1; Editorial, *Intelligence Shuffle*, WASH. POST,

The *Washington Post* called it a reform “potentially profound and warrant[ing] public attention.”³⁹ The *Associated Press* advised: “[E]ven some of the administration’s critics are not calling this another reordering of the deck chairs, but rather changes with potential to lead to better intelligence collection and analysis.”⁴⁰ The *New York Times* complimented the President on doing “all Americans a service . . . by ordering reforms that offer the real possibility of plugging the national security holes that allowed the 9/11 hijackers to plan, train for and carry out mass murder without being noticed.”⁴¹ Some remained skeptical that an FBI culture attuned to law enforcement, not intelligence gathering, may simply be too deeply rooted to be changed, and that radical reform, like the creation of a domestic MI5—the scourge of civil libertarians—would prove necessary.⁴² Nonetheless, despite much backdoor lobbying and doomsayer predictions, this basic reorganization was in place within months.

That was not all. In July, the new DNI Deputy Michael Hayden, former head of the National Security Agency (NSA), told Congress that the NIE process was being overhauled to assure that, unlike the Iraq NIE, future ones would be based on credible information.⁴³ And here an apparently “profound” cultural change has taken place in the instructions for these seminal documents handed from the top down. Hayden demanded “new, critical scrutiny to both human and technical intelligence, including reports from agents, satellite photographs and intercepted communications.”⁴⁴ Their focus would be on “who said what, why, and why do we think . . . [it] true.”⁴⁵ Hayden described the change as a “major breakthrough,” but not without its own internal costs.⁴⁶ The sea change would inevitably result in estimates that “proved much less definitive than in the past.”⁴⁷ And senior policymakers would have to operate with “a higher tolerance for ambiguity.”⁴⁸ Analysts would be encouraged to be

July 4, 2005. at A16; Johnston, *supra* note 35.

39. *Intelligence Shuffle*, *supra* note 38.

40. Katherine Shrader, *Q & A: How May Overhaul Affect Spy Agencies?*, ASSOCIATED PRESS, June 30, 2005, available at <http://www.wtopnews.com/index.php?nid=116&sid=537795>.

41. Editorial, *Reforms at the F.B.I. and Justice*, N.Y. TIMES, July 1, 2005, at A18.

42. William E. Odom, *Why the F.B.I. Can't Be Reformed*, WASH. POST, June 29, 2005, at A21.

43. Douglas Jehl, *Top Spy's No. 2 Tells of Changes to Avoid Error*, N.Y. TIMES, July 29, 2005, at A1; Terence Samuel et al., *Everyone Knows It's Nicer to Share*, U.S. NEWS AND WORLD REP., May 23, 2005, at 18 (stating 10,000 classified websites and data repositories and 125 databases have been made available since 9/11, amounting to 6000 bound copies of the *Encyclopedia Britannica*).

44. Jehl, *supra* note 43.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

“forthright about what they did not know.”⁴⁹ One quite specific change Hayden mentioned was that “the circle of senior intelligence officials required to be given detailed knowledge about other agencies’ sources would be widened.”⁵⁰ With respect to the NIE, Hayden (a participant in the Iraq NIE) pointed out that each of the fifteen separate intelligence unit chiefs endorsed the final product with only limited knowledge of the areas within the expertise of other units; in Hayden’s case, that was NSA intercepts and communications. Now each agency whose sources are a basis for part of the NIE must articulate to its colleague agencies its specific “confidence in the source,”⁵¹ and presumably the reasons why. (On a personal note, it is easy to see how in the Iraq NIE, the CIA’s disclosure of its limited contacts with Curveball and the extent of its heavy reliance on him, as well as the basis for the National Ground Intelligence Center’s (NGIC) finding that the centrifuges would not likely be rocket-related, might well have changed the direction, or at least the certainty, of that now notoriously mistaken document.) According to Hayden, this new NIE rule had already been in effect for months when he testified and had produced a quite differently toned NIE on Iran.

Other reported changes directly related to the recommendations—including more information sharing by CIA operatives in the field with the analysts about their sources,⁵² and changes in the format and focus of the daily Presidential briefings to include non-CIA sources—were “part of a broader overhaul intended to add to the quality and breadth of intelligence provided to policy makers” and to call attention to differences between agencies’ views of critical intelligence issues as well as “to highlight the limits of our knowledge.”⁵³ The NGIC, singled out by the Commission for special criticism of its analysis of the centrifuges, said it had instituted changes in training and procedures to improve future analyses;⁵⁴ the new HUMINT human resources agency inside the CIA to instigate innovations in the recruitment, training and usage of all community-wide human assets has been created, although the Senate Intelligence Committee reportedly wanted to place it under the DNI’s direct control;⁵⁵ an Open Source Directorate to initiate and innovate more widespread accessibility and use of open source information by analysts has

49. *Id.*

50. *Id.*

51. *Id.*

52. Walter Pincus, *Intelligence Information Emphasized*, WASH. POST, July 20, 2005, at A4.

53. Douglas Jehl, *Intelligence Gathering for Bush Is Overhauled*, N.Y. TIMES, July 20, 2005, at A18.

54. Walter Pincus, *Negroponte to Review Intelligence Changes*, WASH. POST, July 2, 2005, at A18.

55. Walter Pincus, *CIA Spies Get a New Home Base*, WASH. POST, Oct. 14, 2005, at A6; Walter Pincus, *CIA to Remain Coordinator of Overseas Spying*, WASH. POST, Oct. 13, 2005, at A4; Walter Pincus, *New Office to Oversee Intelligence Abroad*, WASH. POST, June 29, 2005, at A19.

been established;⁵⁶ and a National Counter Proliferation Center will act as a tasking and coordinating group for analyzing and collecting information on WMD across the community.⁵⁷ Mission managers have been allocated for “a short list of top-priority challenges” including North Korea and Iran.⁵⁸ A new plan to target U.S. assets of banks and businesses conducting transactions with listed Iranian, North Korean and Syrian companies involved in illegal weapons trade has been announced.⁵⁹ Two Commission recommendations, however, were rejected: one classified, and the other suggesting sanctions against two of the intelligence units whose mistakes in the Iraq NIE appeared most inexcusable.⁶⁰

The new CIA Director has also announced that he intends to send more case officers and analysts abroad and to encourage them to engage in “calculated risk-taking” in new covert arrangements—“We are going to be in places people can't even imagine.”⁶¹ “Analysis is the engine that drives the CIA,” he said, and further promised more competitive analysis in the future.⁶² “We are not afraid to publish opposing perspectives, if they exist. This gives policymakers more with which to work.”⁶³ And, finally, the DNI has conducted, per the Commission’s suggestions, “a high-level review” of the satellite programs to avoid “sucking resources from the rest of the intelligence budget.”⁶⁴

Of course it’s too soon to crow, and the proof will be in the pudding just now settling in the oven. Still, it bears some reflection why this much has gotten done so quickly. The answer, I think, lies in three factors: the speed and relative efficiency with which the investigation got done so that its acceptance and implementation was of political as well as substantive value to the Administration; the unanimity and nonpartisan nature of its findings and the fact that it worked quietly and without public fanfare; and finally, its employment of staff who knew not only how the intelligence community worked but where the bodies were buried. But other Commission reports, gathering dust on archival shelves, have had all these attributes, too. In the end,

56. Scott Shane, *Intelligence Center is Created for Unclassified Information*, N.Y. TIMES, Nov. 9, 2005, at A17.

57. Pincus, *New Office to Oversee Intelligence Abroad*, *supra* note 55, at A19.

58. Douglas Jehl, *North Korea and Iran Win Special Notice at Spy Center*, N.Y. TIMES, Jan. 12, 2006, at A13.

59. Dafina Linzer, *U.S. Plans New Tool to Halt Spread of Weapons*, WASH. POST, June 27, 2005, at A1.

60. Douglas Jehl, *White House Is Said to Reject Panel’s Call for a Greater Pentagon Role in Covert Operations*, N.Y. TIMES, June 28, 2005, at A6.

61. Walter Pincus, *Goss Plans To Expand CIA Spying and Analysis*, WASH. POST, Sept. 23, 2005, at A6.

62. *Id.*

63. *Id.*

64. WMD REPORT, *supra* note 2, at 546-47; Douglas Jehl, *Review Leads to an Upheaval in Spy Satellite Programs*, N.Y. TIMES, Sept. 30, 2005, at A16.

I attribute much of our success in getting the report implemented to the circumstance that at least a few Commission members had close enough personal and professional ties with senior policymakers that they could—more importantly they did—insist on getting who and what we needed to investigate and on accessing those policymakers to urge quick action on our recommendations. The Commission had two meetings—relatively lengthy and substantive—with the President, relevant Cabinet members and national security advisors. The co-chairs had additional numerous contacts with key officials. The report also came out at a time when—in part due to the Iraqi intelligence failures but in part due also to the new situation created by the Intelligence Reform Act of 2004—top jobs were opening up in the community. In several instances, Commission staff ended up in those jobs, bringing with them their most recent commitments to the reforms in the report. And while controversy raged in some quarters about whether Administration officials had made overblown or inaccurate statements about the intelligence they did receive in the prewar months, it was distinctly to the Administration's advantage to cooperate fully in disclosures that the intelligence they got was faulty and in following through with earlier promises to fix it. All these factors went into a warm welcome for the report and an unusually comprehensive implementation of its reforms.⁶⁵

Still, as the Commission recognized, structural changes alone are never enough to reform institutions. Leadership is paramount; of late, the media is starting to carry more critical stories of the IC, stating that the CIA is “bleeding talent,” “adrift,” and morale is “crippled.”⁶⁶ And the DNI has not escaped flak for “not paying enough attention to the pressing need to pull together the 15 autonomous intelligence agencies,” instead laying too “light a hand” in managing them, concentrating on his role as the President's chief advisor and on producing a national intelligence strategy. Concerns that the 2004 Intelligence Reform Act does not provide the DNI with sufficient authority to manage the IC have resurfaced, especially with respect to the Department of Defense, which has increased its own intelligence activities exponentially in the last year.⁶⁷ “Information sharing is an area where the progress has been

65. See, e.g., Douglas Jehl & Richard W. Stevenson, *A Reminder of How Debate Over Prewar Intelligence Continues to Shadow Bush*, N.Y. TIMES, Nov. 15, 2005, at A23; Richard W. Stevenson, *Bush Contends Partisan Critics Hurt War Effort*, N.Y. TIMES, Nov. 12, 2005, at A1 (“After simmering for much of this year, the issue of how the Administration used prewar intelligence has boiled over again in the last few months.”).

66. Dafina Linzer, *A Year Later, Goss's CIA Is Still in Turmoil*, WASH. POST, Oct. 19, 2005, at A1; see also Walter Pincus & Dafina Linzer, *Panel Briefed by Spy Manager Who Quit*, WASH. POST, Sept. 22, 2005, at A9.

67. WMD REPORT, *supra* note 2, at 342 (urging “assertive leadership” by the DNI); WMD Report at 539 (stating Commission's most prominent theme is “stronger and more centralized management of the Intelligence Community”); Siobhan Gorman, *Broad Duties Test Spy Chiefs*, BALT. SUN, Oct. 16, 2005, at A1; Douglas Jehl, *Little Authority for New Intelligence Post*, N.Y. TIMES, Oct. 14, 2005, at A16; Walter Pincus, *Negroponte Unveils Intelligence Strategy*, WASH. POST, Oct. 23, 2005, at A9.

slower than hoped,” a member of the House Intelligence Committee complained.⁶⁸ He warned that at some early point the DNI is going to have to “pick a battle with one of the agencies—and win.”⁶⁹

III. THE ANALYST: A (WO)MAN IN THE MIDDLE

So far, I have dealt with the Commission’s critique of and recommendations for reform of the environment in which the IC analyst is recruited, trained, equipped, evaluated, and rewarded (or not). I now turn toward an area in which the Commission’s inquiry was limited and in which I believe a deeper institutional analysis is merited. That is the area of analyst-policymaker relationships.

This was an aspect of the Commission’s report that attracted both attention and criticism not for what it said but for what it did not say. The WMD Commission said nothing about how the policymakers used the intelligence that was given them by the IC—whether they hyped it, misstated it, exaggerated it or even made some up. This omission was labeled “timidity” by *The New York Times* and worse, puppetry, naiveté, or stupidity by others.⁷⁰ The response is a straightforward one—the Commission’s mandate was explicitly limited to the capabilities of the intelligence community; there was never any question that we were not authorized to evaluate the policymakers’ use of that intelligence. Indeed, apart from the express words of the mandate, it is unrealistic to think that any President would appoint a bipartisan Commission to critique his or his top officials’ personal credibility in an election year. Commission members—particularly those of the opposite party—might of course be criticized for being satisfied with half a loaf when a comprehensive look at how intelligence affected the Iraq War would require a perusal of the actions of both analyst and policymaker. But having taken on a designated task, I am not persuaded the Commission could ethically have plunged ahead like a runaway jury to explore whatever it thought necessary.⁷¹ My own view is that it was a service—albeit a limited one—to do the intelligence piece of the puzzle while the evidence, and the personnel involved, were still fresh, rather than waiting until the “right” Administration came along to do the complete job.

68. Gorman, *supra* note 67.

69. *Id.*

70. Editorial, *A Profile in Timidity*, N.Y. TIMES, Apr. 1, 2005, at A22.

71. As the debate about policymakers’ use of prewar intelligence heated up again in 2005, there were several media reports clarifying the Commission’s limited inquiry into the intelligence sources themselves rather than policymakers’ use of them. See, e.g., Dana Milbank & Walter Pincus, *Asterisks Dot White House’s Iraq Argument*, WASH. POST, Nov. 12, 2005, at A1 (“[T]he Commissions cited by officials, though concluding that the administration did not pressure intelligence analysts to change their conclusions, were not authorized to determine whether the administration exaggerated or distorted those conclusions.”).

The SSCI, which set out to do its own study of both parts of the Iraqi fiasco but which was proceeding extremely slowly in the second phase, was galvanized into action by a two-hour Senate shutdown precipitated by the Democrats in protest of its inaction.⁷² Fortunately, that follow-up examination is now being done, for the issue continues to smolder in the public discourse.⁷³ But had the Commission attempted to do it in 2004, I suspect we would have destroyed the consensus we were able to reach on the performance of the intelligence community.

The sole aspect of the analyst-policymaker relationship with which the Commission did deal, though not to everyone's satisfaction, involved the issue of whether the Iraq analysts were unduly pressured by the policymakers into inflating their WMD findings. The Commission concluded that, despite the grave errors of judgment and sloppy workmanship, the analysts' findings that Saddam Hussein had reconstituted his WMD program were not the result of political pressure from the policymakers.⁷⁴ This finding was received with skepticism in many quarters, including respected think tanks and mainstream media, as well as anti-war activists. For instance, reports that Vice President Cheney made ten trips to Langley to talk with analysts and recurrent complaints by analysts of persistent questioning from policymakers were cited in newspaper reports as evidence of undue pressure.⁷⁵ Yet, intensive questioning of the Iraq analysts by the Commission and its staff, as well as their sworn testimony before the Senate Intelligence Committee, produced a chorus of denials by the analysts that their WMD conclusions reflected a reaction to political pressures.⁷⁶ Such denials of course do not by themselves carry the day for all skeptics; they could reflect limitations of the questions asked of the analysts or even self-denial of their real motivation. More importantly, they do not necessarily resolve a number of problematic aspects of policymakers' and analysts' roles in the intelligence-making process. These issues arise not only from the unique structure of the IC itself and its *sui generis* place in the Executive Branch of the government, but also from an increasing tension throughout that Branch between the professional demands for independent fact-finding and the imperatives of potent policymaking.

All of the Commission's recommendations about the treatment and performance of policymakers will be nullified if in the end they succumb to

72. Stevenson, *supra* note 62; Carl Hulse & David D. Kirkpatrick, *Partisan Quarrel Forces Senators to Bar the Doors*, N.Y. TIMES, Nov. 2, 2005, at A1, A13-14; Walter Pincus, *Intelligence Probe Takes Shape*, WASH. POST, Nov. 10, 2005, at A7.

73. *But see* Stevenson, *supra* note 65 ("[T]hat inquiry is unlikely to be completed any time soon . . .").

74. WMD REPORT, *supra* note 2, at 8, 11, 51, 188-92; *see also* Eric Lichtblau, *No Evidence of Pressure on Iraq Data*, N.Y. TIMES, Nov. 7, 2005, at A14.

75. Walter Pincus & Dana Priest, *Some Iraq Analysts Fear Pressure from Cheney Visits*, WASH. POST, June 5, 2005, at A1; Jim VandeHei & Walter Pincus, *Cheney's Office Is a Focus in Leak Case*, WASH. POST, Oct. 18, 2005, at A1.

76. Lichtblau, *supra* note 74, at A14.

pressures by policymakers to make their analyses come out one way rather than another. Thus I will try to explore what the contours of that relationship are and what possible additional external restraints might be placed upon it, as well as what internal controls the IC might adopt to better protect the analyst who faces an intensified version of a dilemma that is—in the view of some—coming more and more to permeate Executive Branch professional service.

A. Who Does the Analyst Work For?

The intelligence agencies are part of the Executive Branch. The new Director of National Intelligence (DNI), like the former Director of Central Intelligence (DCI), serves at the pleasure of the President, not for a specified term like the FBI Director or the Comptroller General. Fourteen of the fifteen intelligence units that make up the IC are located inside other Departments—Defense, Homeland Security, Energy, Justice, and Treasury; the CIA stands alone as an independent executive agency. Except for the CIA, these agencies serve under the direction of their Cabinet secretaries as well as the DNI. The basic statutory function of all these intelligence units is to provide intelligence on request to Executive Branch officials and to Congress, which provides oversight of the IC through its House and Senate Intelligence Committees.⁷⁷ In short, the IC's "customers" are the policymakers, and so far as tactical intelligence is concerned, the military command structure. These officials ask the IC daily for specific pieces of information as well as periodically for more comprehensive surveys of issues involved in foreign policy and military operations. According to the Commission:

Analysts are the link between customers and the Intelligence Community. They provide a conduit for providing intelligence to customers and for conveying the needs and interests of customers to collectors. This role requires analysts to perform a number of functions. Analysts must assess the available information and place it in context. They must clearly and concisely communicate the information they have, the information they need, the conclusions they draw from the data, and their doubts about the credibility of the information or the validity of their conclusions. They *must* understand the questions policymakers *ask*, those they are likely to ask, and those they should ask; the information needed to answer those questions; and the best mechanisms for finding that information. And as analysts are *gaining unprecedented and critically important access to operations traffic*, they must also become *security gatekeepers*, revealing enough about the sources for policymakers to evaluate their reporting and conclusions, but not enough to disclose tightly-held, source-identifying details.⁷⁸

77. WMD Report, *supra* note 2, at 416 (“‘Typical’ customers include not only the President and senior policymakers, but also members of Congress, military commanders, desk officers in executive agencies, law enforcement officers, customs and border patrol officials, and military units in the field.”).

78. *Id.* (emphasis added).

But obviously that is not the end of the matter: intuitively, the analyst's job is perceived as more than one of subserviently doing the bidding of the policymaker. It is not the same, for instance, as the relationship between a judge and a law clerk, or even a policymaker and her special assistant who asks the aide to research a question and provide a recommendation, but who in the final analysis makes her own judgment about whether to accept it and may require the assistant to redo the assignment so as to make the best arguments and find the most persuasive factual basis for a different position that the assistant may not agree with. The analog to the analyst's predicament is, after five decades, still not clear. What is the analyst's responsibility when he does not agree with what he knows to be the policymaker's desired result?

We can agree that the analyst's "customer" is the policymaker, and it is the policymaker whom she should serve by providing as much useful information to him as possible. But should "useful" in this context be defined solely by the policymaker? Indeed, discussions by intelligence insiders stress the dominance of policymakers in the analyst-policymaker relationship. "[T]he needs of policymakers—especially what hands-on officials seek in support of their daily management of issues—have to be a central concern of intelligence makers. This is no trivial point."⁷⁹ At the same time, however, they recognize that "the national interest is not well-served by an assessment much admired by policy officials that does not meet the standards of sound analytic tradecraft,"⁸⁰ and warn that "emphasis on close support of policy officials encourages politicization of analysis."⁸¹ But "[i]f effective relations between intelligence and policy professions require the former to provide close support to the daily business of the latter, any mission statement that seals off intelligence analysis from politics seals it off from a significant role in the policymaking process."⁸² Thus, "[I]f the President wants to defy what the analysts see as the ground truth in country X, analysts are professionally obligated both to point out the long odds and to provide judgments and insights to shorten those odds."⁸³ The marriage between tradecraft and policy relevance is an uneasy one.

In sum the analyst must maintain her professional ethic of not allowing her own judgment to be distorted to satisfy a policymaker's desire, but at the same time to be effective she must maintain a good relationship by engaging in as close a dialogue with the policymaker as is needed to perform the task.

But was that standard, or more accurately "guidance," enough in a national crisis like the one in which the Iraq NIE was issued? Given a general awareness, inside as well as outside the IC, of the potential impact of the NIE

79. Jack Davis, *Defining the Analyst's Mission: Facts, Forecasts and Fortunetelling*, in *Intelligence and the National Security Strategist: Enduring Issues and Challenges*, 275, 295-97 (Roger Z. George & Robert D. Kline eds., 2004).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

on impending executive and congressional action with respect to Iraq, as well as a keen sense of how the Executive policymakers wanted their questions of WMD in Iraq answered, is that reliance on the tradecraft tenets of objectivity in fact-finding and analysis enough to keep analysts safe, or do they need additional protections, including some “rules of engagement,” to restrain policymakers?

First, let’s consider the importance of the context in which an analyst makes a judgment. Is it not naïveté to think that analysts will block out awareness of the real-world effects of their judgments in foreign policy matters? The Commission found “the gathering conviction among analysts that war with Iraq was inevitable” permeated the climate in which they worked.⁸⁴ How could it be otherwise? That awareness indeed should actually accentuate the importance of analysts giving the policymaker the benefit of their best judgment based on what they know and do not know. Might there not be different quality thresholds for different kinds of intelligence reports, dependent openly upon their predictable consequences? Right now, the “one size fits all” approach says that no matter how minor or major the inquiry, each analytical piece deserves the same level of care and attention. Thus, an intelligence estimate preparatory to deciding whether to put more agents in a trouble spot or to initiate a covert or clandestine operation is conducted under the same standards as one that is acknowledged to be a prerequisite to going to war. Specifically, why would it not make sense to require a higher degree of proof or evidence for a “finding” that will almost certainly lead to an international crisis or war than one that is providing long-term strategic planning data or tactical intelligence for the agencies’ more routine operations? Consider the judicial model: the burden of proof necessary to stop a person on the street for brief questioning is “reasonable suspicion” he may be about to commit a crime; to arrest a suspect there must be “probable cause” to believe he has committed the crime; to win a civil suit there needs to be a “preponderance of the evidence” on the applicant’s side. An administrative agency need only show “substantial evidence” (maybe less than 50%) to withstand a judicial challenge, but to convict and imprison an accused there must be proof beyond a reasonable doubt. The consequences dictate the degree of confidence the system must have in the result of its deliberations. There are other examples of proportionality of procedures and standards of proof fitted to degrees of risk of error in the law. The Supreme Court has enumerated them: “the . . . interest that will be affected by the official action . . . the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.”⁸⁵

Is it unnatural to think such a nuanced system could have application to

84. WMD REPORT, *supra* note 2, at 190.

85. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

intelligence analysis which admittedly has to patch together pieces of disparate information from sources of varying reliability and often has to use a pithy database from which to infer momentous conclusions? Is it not common sense to demand a higher level of confidence in concluding that a perceived enemy is actively reconstituting a nuclear capability, including a delivery mechanism that can reach the United States, than it is to send a commando raid into a hostile country to see what their workers are actually doing inside a suspicious plant? The WMD Commission found that awareness of the real-world context in which analysts are plying their trade does affect their judgment. Our research showed that the “general assumption that Saddam retained WMD and the backdrop of impending war . . . affected the way analysts approached their task of predicting the threat posed by Iraq’s WMD programs. . . . [T]his atmosphere contributed to analysts’ use of a worst-case-scenario or heightened-burden-of-proof approach to analysis . . . [and] to the too-ready willingness to accept dubious information as supporting the conventional wisdom and to an unwillingness even to consider the possibility that the conventional wisdom was wrong.”⁸⁶ If the expected consequences are likely to produce a heightened degree of both external (by policymakers) and internal pressure on analysts, why not explicitly build that awareness into the tradecraft in the form of a higher burden of proof so as to impel analysts to be even more careful in their fact-finding?

Yet that is not the way the process works now. Analysts—in good faith—may believe foreign policy decisions are best made by elected officials and it is not the analyst’s job to define the public interest insofar as foreign policy is concerned. Thus, the DOE analysts who discounted the aluminum tube basis on which other agencies found Iraqi nuclear reconstitution nonetheless voted to support the majority opinion in the NIE which found that evidence compelling in part because they “did not want to come out before the war and say [Iraq] wasn’t reconstituting.”⁸⁷ Although everyone may agree that the proper role of the analyst is not a post-decisional one to back up the policymakers’ already-arrived-at decisions, but rather a pre-decisional one to inform those decisions, we know that the apparent policy implications of a finding or inference one way or the other can subtly influence their judgments, particularly where the evidence is ambiguous. Had the IC accurately evaluated the absence of WMD—even just the absence of a nuclear weapons program—in pre-war Iraq and said so, the real-world consequences in foreign policy direction might have been quite different. Why should analysts not be challenged—even encouraged—to use higher thresholds for findings where implications for foreign policy are devastatingly apparent?

The way in which the Commission confronted accusations that policymakers had pressured analysts into finding WMD reconstitution invoked

86. WMD REPORT, *supra* note 2, at 190.

87. *Id.* at 190.

an admittedly narrow definition of “politicization”—whether analytical judgments were actually changed as a result of policymakers’ interventions. It did note the somewhat broader definition the CIA’s Ombudsman used in his investigation of such complaints—whether there was “any unprofessional manipulation of information and judgments” to please policymakers’ preferences.⁸⁸ Based on interviews with those analysts, both the Commission and the Ombudsman concluded there was not “politicization.”⁸⁹

Critics who nonetheless accused the IC of “cooking their own books” do make some valid points.⁹⁰ The Commission did find some evidence that analysts were subjected to pressure from within the agency, more than from without. It cited examples where intermediate superiors discouraged contrary opinions to the given wisdom that WMD existed and encouraged analysts to fall into line: “In the case of pre-war assessments of Iraqi WMD, working-level WINPAC analysts described an environment in which managers rewarded judgments that fit the consensus view that Iraq had active WMD programs and discouraged those that did not.”⁹¹

We criticized as well “a failure of management to actively foster opposition views” and found this attitude continued even after post-war surveys of the IC itself revealed no WMD.⁹² Inexplicably, at that point analysts who pushed for explicit repudiation of the earlier pre-war assessments were chastised and removed from the offending unit.⁹³ In this sense, Iraq was a dramatic but not an isolated example of the internal pressure for conformity: a 2004 survey revealed 17 percent of WINPAC (the anti-proliferation unit) analysts said they worked “in an atmosphere in which some managers who [held] strong views [made] it difficult to publish opposing points of view.”⁹⁴

These findings suggest that even without any overt outside pressure on analysts they can be affected by a climate of conformity and disapproval of superiors if they deviate from accepted views. But, of course, those superiors also are likely to be appointed by the top echelon of their agencies—those leaders with the most frequent contacts with the highest level of policymakers so that internal processes on some occasions may reflect a trickle-down of policymaker pressures exerted at the highest levels. This is especially true when top IC officials become publicly identified with a particular policy position—a situation devoutly to be avoided. Granted, the leaders of the intelligence community need to be perceived as having the confidence of the political leaders from the President on down if their advice and judgment are to

88. *Id.* at 188 (footnote omitted).

89. *Id.* at 188.

90. *See* Rich, *supra* note 5.

91. WMD REPORT, *supra* note 2, at 191 (footnote omitted).

92. *Id.* at 191-93.

93. *Id.* at 193-94.

94. *Id.* at 191-92.

be taken seriously and if they are to access resources for their agencies. Some Presidents have been known to cut their CIA directors out of the loop entirely. Yet, once the IC leader voices a public opinion or predilection on an issue still under consideration inside the IC, he can be sure it will plummet to the bowels of the IC. Thus, no less than the analyst, like Caesar's wife, the intelligence chief should be above suspicion as to the impartiality and fact-based nature of his judgments and reports to policymakers. The Commission did, however, relate some disturbing past examples of changes in institutional judgments by prior heads of the CIA to reflect policymakers' preferences.⁹⁵

Intelligence analysts, of course, do not operate in a free-standing environment; they operate within bureaus and agencies and hierarchies, subordinate to superiors who evaluate their work for competence and reasonableness. A superior should retain the right to correct or reject an analyst's work on the basis of its intrinsic worth as analysts can be sloppy or oblivious or just plain unpersuasive. There must be room for the ordinary give-and-take between superiors and subordinates in the IC as elsewhere in the Executive Branch.

But, the right to find or argue responsibly against the prevailing views of an agency seems still not to be stabilized in practice. It should and hopefully will now not only be part of the analyst's initial training, but also a part of the continuing on-the-job education of intermediate managers and superiors who pass on the analyst's work and do his evaluations. Only where the managers support the analysts' independence up the line can it be achieved. Thus, it was a comfort to read in the John Bolton confirmation hearings that analysts whose judgments allegedly were repeatedly being challenged by Mr. Bolton were protected from alleged retaliatory actions by their superiors in the State Department.⁹⁶

The WMD Commission sought to institutionalize mechanisms of dissent, alternative analyses, and "Red Teams" to argue a devil's advocate position on important issues. In that way the policymaker can at least be apprised of the best thinking in the IC even if it runs contrary to the intelligence community's ultimate position. If Deputy DNI Hayden's testimony is credited, that is happening now with respect to the NIE which may be less "definitive" than those of old.⁹⁷ But, candidly, not every request for information or even every NIE needs or can expect to get a systematic development of alternative hypotheses or a devil's advocate exercise even though palpably crucial ones like the Iraq NIE should. Even in these less dramatic cases, however, the internal agency position and culture may require changes in the direction of

95. *Id.* at 248 n.847.

96. Glenn Kessler, *As Vote Nears, Focus is on Bolton's Actions*, WASH. POST, May 12, 2005, at A5.

97. See Jehl, *supra* note 43; see also Maura Reynolds, *Intelligence Office Gives Dissenters Their Due*, L.A. TIMES, April 14, 2006 at 1 (ten top intelligence officers report they now incorporate dissenters' views into their analyses).

tolerance for dissent. For example, it may be useful to keep systematically an internal record of serious differences or disputes between analysts and their superiors that is available to later investigators or ombudsmen. The Commission itself urged that “[a]nalysts . . . readily bring disagreement within the Community to policymakers’ attention, and . . . be ready to explain the basis for the disagreement.”⁹⁸

In the end, the integrity of the analytic process depends on the analyst’s own and the IC’s perception of her role, as well as the agency’s tolerance and encouragement of responsible contrary views. Although egregious incidents of policymakers exerting overt pressures to affect intelligence judgments may occur, the Iraq experience suggests the more sinister influences are likely to be subtle ones that permeate the internal workings of the IC itself.

B. Rules of Engagement: When Do Policymakers Cross the Line?

There is, however, no doubt that on occasion determined policymakers do make their desired results known to the analysts. The IC promotes the ideal that “close professional ties between analysts and policymakers usually promote frankness, mutual respect, and even mutual dependence . . . these in turn promote analysis to help understand how to deal with tough problems, not analysis to please.”⁹⁹ The WMD Report, as well, advised that:

Good-faith efforts by intelligence consumers to understand the bases for analytical judgments, far from constituting “politicization,” are entirely legitimate. This is the case even if policymakers raise questions because they do not like the conclusions or are seeking evidence to support policy preferences. Those who must use intelligence are entitled to insist that they be fully informed as to both the evidence and the analysis.¹⁰⁰

So far, so good. But this ideal posits two government servants searching in tandem for the best intelligence available with which to make public policy. There is of course a darker side—the policymaker hell-bent on getting facts and judgments from intelligence analysts to back up his preferred position. The former head of intelligence at the Department of State unequivocally announced: “policymakers never once applied any pressure on coming up with the ‘right’ answer on Iraq.”¹⁰¹ DOE analysts testified similarly. Not a single

98. WMD REPORT, *supra* note 2, at 419 (the Commission also urged analysts across the IC to explain in a common parlance to policymakers varying degrees of certainty in their work).

99. Davis, *supra* note 79, at 287.

100. WMD REPORT, *supra* note 2, at 83 (quoting CENTRAL INTELLIGENCE AGENCY, DCI NONPROLIFERATION CENTER, NEW EVIDENCE OF IRAQI BIOLOGICAL WARFARE PROGRAM (SIR 2000-003X) (Dec. 14, 2000)).

101. *Id.* at 83 (quoting CENTRAL INTELLIGENCE AGENCY, DCI CENTER FOR WEAPONS, INTELLIGENCE, NONPROLIFERATION, AND ARMS CONTROL, IRAQ: MOBILE BIOLOGICAL WARFARE AGENT PRODUCTION CAPABILITY (WINPAC IA 2001-050X) (2001) at 1, 7).

analyst interviewed said his judgment had been affected by policymaker pressure.¹⁰² Yet, much has been made of the fact that Vice President Cheney made ten visits to intelligence analysts while they were preparing various reports on WMD (not the NIE).¹⁰³ And one skeptic has commented to me personally that in business, if a mid-level official working on a report gets several visits from the CEO, he quickly gets the message of how his report should read. (I'm not sure that's right; the message may be only: "This is important. Do it right.") The question, of course, is when do insistent questioning and repeated demands for more evidence to support the policymakers' conclusions become illegitimate pressure? Should it depend primarily on the individual self-confidence or seniority of the analyst to withstand excessive demands? Is that the gold standard for the relationship? Or do policymakers have some obligation to adhere to restraints on the intensity and level of their engagement with analysts?

Given the inevitable psychological advantage of a high or even mid-level policymaker in one-on-one interactions with the analyst, there is risk that even without any overt demands on the part of the policymaker the analyst may alter her judgments based on what she thinks the policymaker wants to hear and how his good graces might benefit or injure her career. One of the State Department officials interviewed suggested that arm twisting is rarely used or needed; some analysts may engage in self-censorship to retain good relationships with their policymaking clients. When that happens, it is hard to discern from the outside unless an analyst's conclusions suddenly and sharply vary from prior expressions on the same subject. Self-originating changes will more likely be in tone or emphasis. Thus, the Commission report compares pre-NIE judgments of the IC that Iraq "could" have biological weapons to the NIE estimate that Iraq "has" biological weapons. In 2000, a report stated that "credible reporting from a single source (Curveball) suggests" Iraq has produced biological

102. *Id.* at 80 (quoting NIE, *supra* note 12, at 5, 35).

103. See Hersh, *supra* note 3; VandeHei & Pincus, *supra* note 75. Though it was not in the Commission's purview of inquiry, many media reports have focused on alleged pressures from the Vice President's office to find a connection between Iraq and al Qaeda. One quotes Richard Kerr, former Deputy CIA Director, to the effect that in his thirty-two years of service he had never seen such "hammering" by an administration on finding evidence of the link. Editorial, *Decoding Mr. Bush's Denials*, N.Y. TIMES, Nov. 15, 2005, at A28. Another cited the SSCI Report as describing "repeated unsuccessful efforts by the White House and its allies in the Pentagon to persuade the CIA to embrace the view that Iraq had provided support to al Qaeda," including draft speeches rejected by Secretary Powell and CIA Director George Tenet as exaggerated and unsubstantiated. Stevenson, *supra* note 62. David Ignatius describes a Cheney aide's insistence on establishing the link by identifying Iraq intelligence agents in a photo with Mohammed Atta in Prague despite CIA skepticism: "The CIA would literally measure ears and noses in surveillance photos of the alleged meeting to show the report was phony, but Cheney's aides would tell them to go back again, and then again"; "In a heated conversation . . . CIA Deputy Director John McLaughlin is said to have insisted: 'I'm not going back to the well on this. We've done our work.'" David Ignatius, Op-Ed., *The Real Crime: White House vs. CIA was the Wrong Battle*, WASH. POST, Oct. 30, 2005, at B7.

weapons but “[w]e cannot confirm” that it has.¹⁰⁴ A year later, based on the same source, a report pronounced “that Iraq continues to produce at least . . . three BW agents.”¹⁰⁵ In 2002, the CIA Director told Congress, “we know Iraq has developed a . . . capability to produce biological warfare agents,”¹⁰⁶ and the 2002 NIE reported with “high confidence” that Iraq not only had biological weapons but a program, “all key aspects” of which were active and that most elements were larger and more advanced than they were before the Gulf War.¹⁰⁷ Although this example does not implicate policymaker pressure, it illustrates the importance of subtle evolutions in the inferences drawn from ambiguous evidence on the same topic. Self-inflicted subservience can be offset only by training in a culture and ethic of independence instilled in the analyst from the start of her career and in a strictly enforced requirement that the analyst state clearly all the evidence and assumptions underlying her conclusion.

On the other hand, some policymakers are not above pursuing more powerful kinds of pressures. As the Bolton hearings were being held, Robert Hutching, a former Chairman of the National Intelligence Council, suggested that pressuring technique is part of the “pattern and practice” of some policymakers.

This is not just about the behavior of a few individuals but about a culture that permitted them to continue trying to skew the intelligence to suit their policy agenda -- even after it became clear that we as a government had so badly missed the call on Iraq W.M.D. . . . When policy officials come back day after day with the same complaint and the same instruction to dig deeper for evidence to support their preformed conclusions, that is politicization. . . . When those officials seek to remove from office analysts whose views they do not like, that is politicization. The mere effort, even when it is successfully resisted, creates a climate of intimidation¹⁰⁸

The Commission insisted, however:

[T]he *customer should challenge the analyst's* assumptions and reasoning. Because they are “keepers of the facts,” analysts can play a decisive role in policy debates, a role that has temptations for analysts with strong policy views of their

104. WMD Report, *supra* note 2, at 83 (quoting CENTRAL INTELLIGENCE AGENCY, DCI NONPROLIFERATION CENTER, NEW EVIDENCE OF IRAQI BIOLOGICAL WARFARE PROGRAM (SIR 2000-003X) (Dec. 14, 2000)).

105. *Id.* (quoting CENTRAL INTELLIGENCE AGENCY, DCI CENTER FOR WEAPONS, INTELLIGENCE, NONPROLIFERATION, AND ARMS CONTROL, IRAQ: MOBILE BIOLOGICAL WARFARE AGENT PRODUCTION CAPABILITY (WINPAC IA 2001-050X) (Oct. 10, 2001) at 1, 7).

106. *Id.* at 84 (quoting interviews with CIA Iraq WMD Review Group analysts (Aug. 3, 2004 and Sept. 20, 2004)).

107. *Id.* at 90 (quoting NAT'L INTELLIGENCE COUNCIL, NATIONAL INTELLIGENCE ESTIMATE, IRAQ'S CONTINUING PROGRAMS FOR WEAPONS OF MASS DESTRUCTION 5, 35 (Oct. 2002)).

108. Douglas Jehl, *Tug of War: Intelligence vs. Politics*, N.Y. TIMES, May 8, 2005, at A12.

own. A searching examination of the underlying evidence for the analysts' factual assertions is the best way to reassure policymakers that the analysts' assertions are well-grounded. We reject any contention that such engagement is in itself inappropriate or that the risk of "politicizing" intelligence cannot be overcome by clear statements to analysts as to the purpose of the dialogue.¹⁰⁹

Vigorous—even acrimonious—exchanges are not unusual in Washington among politicians, Congressmen and witnesses, in Cabinet meetings and bureaucratic deliberations, even occasionally in courtrooms. But should there be limits to how far ardent policymakers can go in trying to bring analysts into their camp? The policymakers are usually more powerful politically than the analysts so it is not an even playing field.

Even so, there are strategic advantages on both sides that can affect the relationship. The important question for our purposes is whether the analyst's stakes need shoring up to ensure she can hold her ground without fear of draconian consequences.

Policymakers often need intelligence to further their cause. The policymaker has options to be sure, but they are limited. The policymaker is, at bottom, not required to seek intelligence at all in his policymaking if he chooses not to, or he is entitled to reject what he gets and seek other bases on which to act. Of course the realpolitik is that his policy judgments are likely to be more persuasive if he can explicitly assert they are backed by the IC or implicitly create that impression (as Colin Powell did by having George Tenet, the DCI, sit alongside him at the notorious U.N. speech on Iraq). Though sometimes the policymaker does not refer directly to an intelligence base, he strongly suggests it by using such phrases as "we do know that" or "there's no question that . . ."¹¹⁰ It is also an option for policymakers who do not like or trust the intelligence they are receiving to seek alternate sources inside the IC; indeed, an inquiry into alternative views should ordinarily be encouraged when reasonable doubts are raised by a policymaker about one analyst's work. (This is of course quite different from a search for alternative views outside of regular IC channels which leads to stovepipe operations such as the Office of Special Plans in the Defense Department, which reportedly provided a channel for Iraqi defectors to reach policymakers directly without going through the normal intelligence processes.) A clear line for policymakers to draw is that they not create the impression of relying on the IC as the source of their facts or conclusions when it does not support them.

Thus, there is a premium on the policymaker's securing the imprimatur of the IC as to the intelligence on which he bases his policy decision. To this end, the policymaker may legitimately press the analyst within reasonable limits to pursue all leads, or even argue with her on the inferences she draws from available evidence. The policymaker may even look for another analyst to see

109. WMD REPORT, *supra* note 2, at 418 (emphasis added).

110. See Editorial, *They lied*, WASH. POST, Sept. 22, 2005, at A6 (quoting Rumsfeld, Rice and Bush on WMD in 2000-02).

if he can get a different opinion, not in itself always a bad thing. But there seems to be agreement that to try to have the resistant analyst herself transferred or removed is considered out of range.

Former Reagan official Morton Abramowitz said he knew of policymakers who sought another analyst when they were unhappy with the one they had, but it was “somewhat unusual” to try to transfer or remove the offending analyst.¹¹¹ Abramowitz added that intelligence is by its nature so uncertain it is easy for policymakers “to pick the intelligence they like.”¹¹² Former Deputy CIA Director McLaughlin agreed: “it’s perfectly all right” for a policymaker to disagree with an analyst and challenge his work vigorously, but it is something different to ask for the analyst’s transfer because of disagreements “unless there is malfeasance involved.”¹¹³

The current consensus thus seems to be that a policymaker crosses the line in retaliating against an analyst by seeking her transfer because of disagreement about what inferences or conclusions the intelligence will bear. When that occurs, the analyst’s superior should refuse the policymaker’s request, as was apparently done in the alleged Bolton incident. Indeed, Secretary of State Powell reportedly visited the beleaguered analysts after one such incident to reassure them of the Department’s support.

There is at least one other area in which policymakers cannot tread, and that is in altering analysts’ reports themselves. That is in marked contrast to other Executive Branch agencies where a lively dispute is ongoing as to whether and how much political appointees may edit and revise work that emerges from the “scientific” fact-finders. Thus, a recent controversy centered on changes made by a White House Council on Environmental Quality official to estimates by the scientific staff on the link between emissions and global warming, thereby producing what *The New York Times* called “an air of doubt about findings that most climate experts say are robust.”¹¹⁴ The White House responded that the “changes . . . were part of the normal interagency review that takes place on all documents related to global environmental change.”¹¹⁵ But others said the White House reviewers were not scientists and so were not entitled to make those changes. The National Academy of Science warned that “the administration’s procedures for vetting reports on climate could result in excessive political interference with science.”¹¹⁶

111. Kessler, *supra* note 96, at A5.

112. *Id.*

113. *Id.*

114. Andrew Revkin, *Bush Aide Edited Climate Reports*, N.Y. TIMES, June 8, 2005, at A1.

115. *Id.*

116. *Id.*; see also Marc Kaufman, *Review of ‘Plan B’ is Faulted*, WASH. POST, Nov. 15, 2005, at A1 (Government Accountability Office calls FDA rejection of over-the-counter sale of “morning after” pill before staff conducted scientific study “unusual”); Daniel Smith, *Political Science*, N.Y. TIMES, Sept. 4, 2005, § 6 (Magazine), at 37; Editorial, *Strange*

Although the IC is not a “science agency” like the National Institutes of Health or the National Science Foundation, there appears to be a strong if not absolute presumption that policymakers may not unilaterally change or alter the formal conclusions or findings of the intelligence agencies to suit their purposes. Thus, the policymakers could not take an IC report concluding there was no WMD in Iraq and change it to a conclusion that there was. This is not true of all agencies, where the top level of political appointees apparently can and do make changes to inferences drawn from the facts and even as to the sources of the “facts” themselves.

But sometimes the policymaker does not try to change the underlying intelligence judgment itself but insists either on drawing his own inferences from the data provided or, more egregiously, misstates what the intelligence consensus is. A Powell aide said during the Bolton hearings that special vetting instructions were given for the Deputy Secretary of State to review personally all of the nominee’s speeches before they were given to assure that the IC’s positions were not misstated.¹¹⁷ The Chairman of the National Intelligence Council said: “I wouldn’t say he was making up facts. . . . Let’s say that he took isolated facts and made much more of them to build a case than I thought the intelligence warranted. It was a sort of cherry-picking of little factoids and little isolated bits that were drawn out to present the starkest-possible case.”¹¹⁸

Bolton on the other hand argued that a policymaker had a right to state “his own reading of the intelligence” even when it differed from that of the intelligence agencies so long as he does not purport to speak for the community.¹¹⁹ In Bolton’s case, it was asserted that he had (unsuccessfully) tried to limit internal review of his speeches solely to ensure that no secret sources or methods were revealed, and not to permit critiquing of his conclusions about what the intelligence showed. He wanted analysts to be instructed not to refute what he said but only to offer additional evidence in support of his views.

Bolton was correct to the extent that a policymaker may express his own conclusions about what data mean so long as he makes it clear they are his and not the IC’s. But, if a policymaker decides to take a different or stronger stand than the analyst’s based on the underlying data in an IC report, must he disclose that difference in his public utterances? Obviously, ordinary listeners to a policymaker’s pronouncements that “we know,” “we believe,” or “there is no question that” country X has WMD will assume official intelligence estimates back up his statements. Thus, the State Department’s intelligence bureau reportedly complained on one occasion that Mr. Bolton’s proposed

Behavior at the FDA, N.Y. TIMES, Nov. 15, 2005, at A26.

117. Douglas Jehl, *No. 2 at State Dept. Was Said to Put Restrictions on Bolton*, N.Y. TIMES, May 10, 2005, at A9.

118. *Id.*; see also Douglas Jehl, *Report Warned Bush Team About Intelligence Doubts*, N.Y. TIMES, Nov. 6, 2005, at A1.

119. *Id.*

language in a speech on Cuba's possession of biological weapons and terrorism would be perceived as an official judgment even though it did not comport with the IC's evaluation.¹²⁰ It is currently not clear if the policymaker must announce her differences with the IC.

Is it too much of an infringement on his political speech that the policymaker be required to spell out any differences he has with the IC in public? This is a crucial but still unsettled tension for the IC. May he rely on a source the IC tells him is not credible?¹²¹ Does the IC have a right or duty to respond to a policymaker's misstatement, express or implied, of its position? In the Iraq WMD case, George Tenet, the CIA Director, was later asked by Congress if he did not feel compelled after the fact to correct misstatements in the President's or Vice President's public speeches about assertions that Iraq had sought to buy yellow cake for uranium enrichment from an African nation or that there were significant ties between Saddam Hussein and al Qaeda. Tenet replied that he did not think the IC had a duty to monitor policymakers' speeches for accuracy of intelligence but that in fact he had actually (albeit months later) informed officials of their mistakes. The WMD Commission took the view that intelligence agents who find out that policymaker actions or statements are inconsistent with existing intelligence should inform the policymakers but then let the officials decide what is appropriate to say in public.¹²²

But in the end, is there any ethical line to which policymakers should be held in their use of intelligence products? A policymaker can certainly disagree with the judgment an analyst makes so long as he does not explicitly or implicitly present it publicly as the official position. But when there is such a dispute, does he have to say so in public? He can go over the analyst's head to her superior in search of a different result from a different analyst. He can argue and disagree with the analyst and even send her back to look for more

120. Douglas Jehl, *Bolton Asserts Independence on Intelligence*, N.Y. TIMES, May 12, 2005, at A1.

121. See Douglas Jehl, *Report Warned Bush Team About Intelligence Doubts*, N.Y. TIMES, Nov. 6, 2005, at A6 (reporting that a top member of al Qaeda in American custody was identified as likely fabricator months before his statements were used by Administration officials to show how Iraq trained al Qaeda members in biological and chemical warfare).

122. WMD REPORT, *supra* note 2, at 419 ("Finally, analysts and Intelligence Community leaders have a responsibility to take note, whenever possible, of what their customers are doing and saying, and to tell those customers when actions or statements are inconsistent with existing intelligence. We do not mean to suggest that analysts should spend all of their waking hours monitoring policymakers, or that analysts should have a 'veto' over policymaker statements. Rather, when aware of upcoming speeches or decisions, analysts should make clear that they are available to vet intelligence-related matters, and analysts should—when necessary—tell policymakers how their statements diverge from existing intelligence. Having fulfilled this duty, analysts must then let politically-accountable policymakers determine whether or not a statement is appropriate in light of intelligence judgments.").

evidence or to pursue additional avenues of research—up to the point, that is, where repetition becomes intimidation or harassment. He can probably ask for the raw material from which the analyst works and draw his own conclusions, if he labels them such, although the interagency clearance process for speeches may rule that out as a realistic option in most circumstances. But unless the analyst is incompetent, he can't ask for her removal or transfer or change the underlying IC judgment.

Make no mistake: the analyst-policymaker relationship can be a complex one in which analysts—particularly junior ones—start out at a disadvantage from a power vantage point. Some kind of instruction, simulation, and role playing during their training would seem helpful. But the deeper issue is whether policymakers should be held to some ethical standards as well in their engagements with analysts and made aware in their often brief tours of duty of those standards. Right now, any standards are “cultural,” not well understood, and remedies are distinctly ad hoc. Indiscriminate labeling of intense interchanges between analysts and policymakers as “politicization” does not contribute much to the dilemma, but neither is it realistic to attach the “P” label only if intelligence is actually changed. According to the *New York Times*, “the [Bush] administration’s view has been that policy makers do not cross the line unless they force intelligence analysts to change their conclusions.”¹²³ Similarly, the Senate Intelligence Committee reported that even though the Administration officials had “pressed analysts to turn up evidence of a connection between Iraq and Al Qaeda” in roughly the same timeframe as the WMD inquiries, the analysts stood firm and so there was no breach of conduct.¹²⁴

This “outcome” test is not a satisfactory one since it depends on the analyst’s endurance rather than the policymaker’s ethic. And, as noted, the analyst’s endurance will often depend on the support she can expect from her own superiors in the agency. A critical factor for analysts is that they have an institutional assurance that when dialoguing is done, they will not be forced to change their analysis at the risk of suffering transfer, removal, or bad evaluations. An agency which operates completely outside public view needs high internal levels of monitoring. In this vein, agency ombudsmen should carefully evaluate transfers, firings, and also voluntary departures under protest where there are allegations that departures are due to resisting pressures to conform—inside or outside. Analysts need instruction on how to resist pressure from outside and inside: who to raise such concerns with, how to record them, and how to channel their dissents.

Most important, those inside and outside the IC should appreciate the ambivalence of the analyst-policymaker relationship: a co-dependent one, to be sure, but one in which the integrity of the intelligence gathering and analysis

123. See Jehl, *supra* note 108, at 12.

124. *Id.*

functions must be scrupulously respected despite its inclusion in a political branch of the government. The limits on policymakers' discretion in using the intelligence process and products urgently need discussion and clarification.

IV. SHOULD THERE BE ADDITIONAL CONTROLS—EXTERNAL AND INTERNAL—ON THE ANALYST-POLICYMAKER RELATIONSHIP?

The IC, as contrasted with most other Executive Branch agencies, operates almost entirely out of the public eye—even its budget numbers are secret—and its covert activities are not even disclosed to Congress at large, but only to the President and a select few on the House and Senate Intelligence Oversight Committees. Sanitized versions of the intelligence agencies' major reports, like the NIE on pre-war Iraq WMD, are sometimes made public, but these versions invariably omit classified material which is seen only by relevant policymakers. Moreover, the accountability mechanisms which govern other Executive Branch agencies—the Administrative Procedure Act (APA), the Freedom of Information Act (FOIA), the Federal Advisory Committee Act (FACA), and even judicial review—usually exempt the IC from their requirements. The results are no statutory standards and no transparency for the process by which intelligence reports are made. Furthermore, Supreme Court jurisprudence provides ballast for Executive Branch arguments that a deliberative or Presidential privilege protects analyst-policymaker communications from outside review even by the courts.¹²⁵ Congressional oversight committees on intelligence have generally been viewed as frustratingly lacking the capability and/or the will for sustained or detailed oversight of major intelligence programs, so it is highly unlikely that they would undertake serious review of the standards for policymaker-analyst interactions.¹²⁶

In sum, it is a cold legal climate in which to propose statutory guidelines for policymaker-analyst relations. That still does not prevent the IC itself—especially now that it is under some centralized supervision in the DNI—from adopting controls or ethical principles for its own people and from using its influence to safeguard them from exploitation by policymakers.

For instance, so far as I know, no record is now kept of the process or inputs by which an intelligence report (even one of substantial significance) is produced. The WMD Commission recommended that a report reference all prior reports or sources relied upon but not what outside contacts were made with the drafters and by whom. Obviously, such a record would be an internal document but could prove useful in discouraging untoward or excessive overtures from the policymaker as well as irresponsible complaints from the

125. See, e.g., *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004); *In re Cheney*, 406 F.3d 723 (D.C. Cir. 2005) (en banc).

126. WMD REPORT, *supra* note 2, at 337-40.

analyst. I repeat, as well, my prior suggestions that both analysts and newly-appointed policymakers be educated initially about responsibility and ethical line-drawing in their relationships, and that analysts are provided the proper channels in which to complain if they believe that limits have been transcended.

V. CONCLUSION

The WMD Commission recognized the centrality of the analysts' role in the reform of the intelligence process. It produced a great many recommendations that should enhance the recruitment, training, and working conditions of analysts, including rousing support for their freedom to dissent responsibly without fear of job diminution. The Commission stressed that analysts should be candid with policymakers about what they know, what they don't know, what they think, and on what evidence their opinion is based, as well as the level of certainty with which they state facts or findings. The recently installed NDI and his deputies have said they agree with and will follow the Commission recommendations, providing ample opportunity for alternative hypotheses and points of view. They accept the internal costs of such a policy about face—that policymakers will have to operate with “a higher tolerance for ambiguity.”¹²⁷

Some may indeed speculate what the effect of such a tolerance policy will be on decision-making, whether it will be slowed down as analysts wait for more accurate evidence or pepper their products with hedges and ambivalent conclusions. I believe the Commission's view—certainly my own—is that policymakers are constantly confronted with the need to make critical decisions on imperfect knowledge, and they are better served if they know which intelligence judgments are solidly grounded and which are reasonably informed guesses. We see little gain in confident but mistaken judgments such as those made about Iraq WMD in the NIE and other IC products. In the final analysis, policymakers cannot delegate hard decisions that simply lack the desirable amount of fact foundation.

The Commission dealt only briefly with the problem of “politicization” of the intelligence process through pressure on analysts to come to a preordained conclusion. It found no such outside pressure to control the Iraq NIE analysis although it acknowledged that analysts were affected by a gathering climate of impending war and by an internal atmosphere that discouraged and discounted views contrary to the community's assumption that because Saddam Hussein had once had and used WMD, he would reconstitute those programs as soon as inspectors left. Left unexplored were the deeper questions of whether there were or should be any specific policies or controls over how much policymakers can push their own views with analysts, when repeated demands

127. Jehl, *supra* note 43; Reynolds, *supra* note 97.

for more information or different modes of interpretation go over the line into harassment, and, if that point is reached, what recourse the analyst has. Conversely, the need for internal controls on the degree of pressure that the policymaker can bring to the “engagement” was left unanswered. The assertions and counter-assertions that characterized the Bolton nomination raised these questions starkly, but there seemed to be consensus only on the issue that a policymaker goes over the line if he seeks to transfer or remove an analyst because he does not like the substantive judgments of the analyst.

I suggest that the analyst’s position might be made more secure by some modest mechanisms drawn from administrative law, such as internal logs of all contacts made with the analyst during the engagement, ombudsman focus on the reasons for transfers, resignations and removals, an express recognition that the context in which intelligence reports are made may mandate higher thresholds of certainty when the predictable effect of the reports may be war or other national crises, and, finally, training of analysts in holding their own against politically powerful policymakers. These are modest suggestions, but they could strengthen the analyst’s position and, in that regard, make her better equipped to provide the policymaker with the highest level work of which she is capable. Minimally, I believe the subject of policymaker-analyst relationship deserves greater attention and if possible more disciplined guidance than the IC has provided so far.

We appear to be headed into a period when national crises will be ever more frequent and our dependence on the best intelligence we can get ever more necessary not only to crucial decision making but also to our credibility in the rest of the world. We do not need more “cook your own books” accusations. Giving the analyst greater protection in this relationship will cost little and profit us much.¹²⁸

128. In March 2006, while this essay was in galley, Paul R. Pillar, now retired, who served as CIA National Intelligence Officer for the Near East and senior analyst for the Middle East published an article, *Intelligence, Policy, and the War in Iraq*, calling the relationship between the intelligence community and the policymaking process “broken and badly [in need of] repair.” He alleged that, in the case of Iraq, policymakers ignored the import of intelligence reports which was “to avoid war.” “The policymakers,” Pillar said, used the intelligence not to inform their decisions, but to justify decisions already made; they “cherry-picked” data from reports and subtly, though not overtly, through insistent demands for more analysis, pressured analysts into producing the policymakers’ desired conclusions. He pointed out, as the WMD Commission had, that pro-WMD pieces were more hospitably received by superiors than skeptical ones. While finding no single clear fix to the problem, he recommends as desirable a forthright declaration by the government that intelligence must be insulated from policy, oversight by a nonpartisan office like the GAO for monitoring the relationship, and the restructuring, of the IC as a semiautonomous body overseen by governors with fixed terms. According to SSCI Chairman Pat Roberts, Pillar did not make similar criticisms when interviewed by the committee. See Paul R. Pillar, *Intelligence, Policy, and the War in Iraq*, FOREIGN AFFAIRS, March/April 2006, at 25.

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