

## Accountability Mechanisms and National Security Secrecy

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

- overlapping jurisdiction among departments (e.g., State and Defense Department) which may cause them to have competing conceptions of proper policy;
- requirements that the executive branch report particular information to Congress;
- civil service protection for most employees, insulating them from partisan political control; and
- a dissent channel for State Department employees who disagree with current policy.<sup>2</sup>

The first three of these mechanisms have their origin in Congress, not the in the executive branch. Congress set out in statute the jurisdiction of each of the cabinet departments, so jurisdictional overlap is the result of Congressional action. Congress also created civil service protection and the reporting requirements, which usually require that the information be delivered straight to Congress. So while these three mechanisms are located (at least partially) in the executive branch, they are by no means purely internal to the executive branch. Only the State Department’s dissent channel is purely internal to the executive branch, established by Department regulations rather than by statute and with reports staying within the Department.<sup>3</sup> Nonetheless, Katyal’s essay raises an important question: to what extent have we embedded in the executive branch mechanisms that check executive branch power? His essay makes a first pass at answering that question, but it is far from a complete answer.

This article takes up the challenge of identifying domestic U.S. accountability mechanisms that help ensure that the executive branch complies with the law.<sup>4</sup> It categorizes the mechanisms according to their origin and their location in or outside of government; shows how they help ensure that the federal government’s executive branch acts within the constraints of the law; and discusses how claims of national security secrecy undermine the effectiveness of these accountability mechanisms.

Part I of this article defines accountability. Part II sets out a typology of the various mechanisms – those entirely internal to the executive branch, those that are based on actions by Congress, those that are partially internal and partially external to government, and those that are entirely external. These dozens of mechanisms sometimes compliment each other in holding the executive branch accountable. At other times they may work in opposition to each other. They make up a complex network of institutions and mechanisms that can hold the executive branch accountable. In thinking about government accountability, one must keep in mind the entire network of mechanisms, not just whether a single mechanism works in isolation.

There are several legal doctrines and practices that can undermine these accountability mechanisms, such as qualified or absolute immunities (undermining civil suits), presidential pardons (undermining criminal prosecutions), and evidentiary privileges (undermining the ability of courts and Congress to compel the production of information). Part III of this article focuses on one type undermining practice: executive branch claims of national security secrecy. These secrecy claims arise in various guises, including investigations of employees suspected of leaking information, exemptions to the Freedom of Information Act, the state secrets privilege, and denying security clearances to personnel who would otherwise investigate executive branch activities. The executive branch has used these claims of national security secrecy to prevent accountability mechanisms from operating. While others have noted the Bush Administration’s penchant for secrecy, this article shows that this secrecy should not be seen as

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<sup>2</sup> Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

<sup>3</sup> See 2 Foreign Affairs Manual 070. The dissent channel is limited to dissent on substantive foreign policy issues, and is not for concerns about alleged violations of law. *Id.* at 071.2.

<sup>4</sup> This article does not address international mechanisms that attempt to hold the executive branch accountable.

an end in itself, but as a means of preventing other institutions – governmental and non-governmental -- from holding the executive branch accountable for complying with the Constitution and laws of the United States.

## I. “Accountability”

In general, “accountability” refers to the requirement that one account for one’s actions to someone else.<sup>5</sup> The subject of this accounting might be one’s compliance with legal norms, an employer’s norms, social norms or moral norms.<sup>6</sup> The focus of this article is legal accountability: whether the federal government’s executive branch acts within the constraints of the law.

Accountability processes have several different phases. The first phase is answerability, which in turn consists of two parts: providing information to someone else about one’s conduct and explaining the justification for that conduct.<sup>7</sup> A second phase of accountability is enforcement, which requires that one suffer a penalty where one refuses to provide information about one’s conduct or where the recipient of the information is dissatisfied with one’s proffered justification.<sup>8</sup> This idea of accountability is easily illustrated in the criminal procedural realm. The police are *answerable* to courts for their searches during prosecutions when a criminal defendant files a motion to suppress, and the police must provide information about how they handled the search and the legal justification for it. Courts *enforce* legal norms on the police by granting motions to suppress and excluding evidence where they disbelieve police testimony as to the facts surrounding the search or find inadequate the legal arguments supporting the search.

## II. Typology of Accountability Mechanisms for the Executive Branch

This section identifies the range of mechanisms that hold the executive branch accountable for complying with the law. It sets out a typology of these mechanisms, ranging from those that are:

- entirely internal to the executive branch (e.g., the internal dissent channel in the state department and most criminal investigations);
- based on Congressional action (e.g., Congressional committee investigations and statute-based causes of action against the executive branch);
- partly internal and partly external to the federal government (e.g., leaks from executive branch employees to the media);
- entirely external to the federal government (e.g., non-government organizations and the media).

These accountability mechanisms can be thought of as a network of accountability nodes that are sometimes overlapping (such as when a Congressional committee, a criminal investigation and a civil lawsuit all focus on the same incident) and sometimes interdependent (such as when investigative journalists’ stories and the leak of a controversial Justice Department memo lead to more intensive Congressional scrutiny of executive branch treatment of prisoners).<sup>9</sup>

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<sup>5</sup> Rob Jenkins, *The Role of Political Institutions in Promoting Accountability*, in PERFORMANCE ACCOUNTABILITY & COMBATING CORRUPTION 136 (Anwar Shah, ed. 2007).

<sup>6</sup> Compare Jerry Louis Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 119 (Michael Dowdle, ed., 2006) (discussing legal, market-based and social accountability regimes).

<sup>7</sup> *Id.* at 138-39.

<sup>8</sup> *Id.* at 138.

<sup>9</sup> See Seth F. Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, U. PENN. J. CON. L. (forthcoming 2008).

A. Accountability mechanisms that are purely internal executive branch

Employment-based discipline

- o DOJ Office of Professional Responsibility (OPR)

Legal Opinions

- o Office of Legal Counsel
  - o Professional Responsibility Advisory Office
- ISOO - Information Security Oversight Office

B. Congress-based accountability mechanisms

Congress-based accountability mechanisms come in two different forms: those that were created by Congress but which do not otherwise involve Congress, and those in which Congress is actively involved.

1. Created by Congress but otherwise Congress is passive

Procedural mechanisms:

- Requirements that certain executive branch actions take place in public
- Requirements that executive branch make information available upon FOIA request
- Civil Service Protection
  - o preventing Presidential retaliation against most executive branch employees
  - o Civil service discipline
- Hatch Act
- Whistleblower Protection

Criminal investigations

- Ordinary – public integrity section
- Special counsel

Statutory causes of action against executive branch or its officials

Availability of attorneys fees for plaintiffs

Advisory Committees established by Congress with Presidentially- & Congressionally-appointed members

e.g., Public Interest Declassification Board; 9/11 Commission

Ombudsmen / Citizens' Advocates

e.g., Citizenship and Immigration Services Ombudsman

Independent Counsel

2. Congress is actively involved

Congress members' intervention on behalf of constituents

Congressional Committee oversight investigations (ad hoc)

- Growth of Congressional staff
- Ability of committees to obtain executive branch information

Budget Process

- Authorization
- Appropriations

GAO:

- Investigations (growth of GAO staff)
- Comptroller General opinions

Procedural mechanisms:

- Requirements that executive branch issue reports to public / Congress
  - Lloyd-LaFollette Act
- Senate confirmation of Presidential appointees  
Inspectors General – insulation from Presidential control  
Impeachment

C. Accountability mechanisms initiated by federal courts

*Bivens* claims against executive branch officials  
Federal courts' sanctioning executive branch lawyers

D. Partly internal – partly external accountability mechanisms

State law-based claims against executive branch officials  
Professional standards applicable to executive branch officials (e.g., lawyers, psychologists, etc.)  
Leaks by executive branch employees

- Leaking info in secret
- Resignation in protest
  - Threat of resignation
  - Concerted action (e.g., Saturday Night Massacre / Ashcroft hospital room)

E. Accountability mechanisms that are external to the government

Elections  
Public outcry (e.g., telegrams after Saturday Night Massacre)  
union processes for executive branch employees  
NGOs  
Press

- o Institutional press
- o blogs

Professional discipline by state licensing agencies

III. National security secrecy claims that undermine accountability

One might expect that the multiplicity of these accountability mechanisms would hold the executive branch in check. But the executive branch can use claims of national security secrecy to undermine or defeat many of the mechanisms: internal, Congress-based, court-based, partly internal and partly external, and even those mechanisms that completely external to government.

This section provides examples of accountability mechanisms from each of the categories described above, and shows how the Bush Administration has systematically used claims of national security secrecy in order to undermine accountability mechanisms in each.

A. Accountability mechanisms that are purely internal executive branch

The Attorney General created the Justice Department's Office of Professional Responsibility (OPR) in 1975 in response to the many "ethical abuses and misconduct by Department of Justice officials in the Watergate scandal."<sup>10</sup> The office investigates allegations relating to the professional ethics, competence and integrity of Justice Department attorneys. If OPR finds misconduct, it recommends that

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<sup>10</sup> U.S. Department of Justice Office of Professional Responsibility Policies and Procedures (March 7, 2006) (available at <http://www.usdoj.gov/opr/polandproc.htm>).

the lawyer's supervisor impose some sort of discipline, and it can advise state bar disciplinary authorities of its finding. Most of OPR's work is secret, but the Attorney General can disclose in summary form findings of misconduct.<sup>11</sup>

After the New York Times disclosed the NSA domestic spying program in December of 2005, four Democratic members of Congress raised the questions about whether Bush Administration lawyers had acted properly in approving the program, and requested that the Justice Department's Office of Professional Responsibility (OPR) open an investigation.<sup>12</sup> OPR did so, and planned to interview Justice Department lawyers who had been involved in the approval process. The Bush Administration considered all of this information to be classified, and so in order to pursue the investigation, OPR officials would need security clearances. Such clearances had been granted to Civil Division lawyers defending the program in court and to criminal division lawyers investigating the leak to the New York Times.<sup>13</sup> H. Marshall Jarrett, the head of OPR requested that he and six OPR employees be given a security clearance so that they could begin the investigation, but apparently on the advice of then Attorney General Alberto Gonzales, President Bush denied the clearances, blocking the OPR investigation.<sup>14</sup> This was the first time in its history that OPR shut down an investigation because it was denied security clearances.<sup>15</sup> Jarrett notified the members of Congress who had requested the probe, and they responded by writing the President and requesting that the clearances be granted.<sup>16</sup> More than a year later, when Michael Mukasey replaced Gonzales as Attorney General, the Bush Administration granted OPR the clearances and the investigation began.<sup>17</sup>

## B. Congress-based accountability mechanisms

### 1. Created by Congress but otherwise Congress is passive

When Congress passed the Foreign Intelligence Surveillance Act in 1978, it clarified that electronic surveillance is legal only if it is authorized by statute. To enforce this new regime, Congress enacted a criminal prohibition on any electronic surveillance not authorized by statute,<sup>18</sup> and provided a private cause of action to anyone aggrieved by such illegal surveillance.<sup>19</sup> The NSA domestic spying program appears to violate the FISA prohibition, and after the New York Times disclosed its existence, several lawsuits have been filed by people who believe that they were subject to the illegal surveillance. In at least four of these lawsuits, the federal government asked courts to dismiss the suits on grounds of

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<sup>11</sup> Id.

<sup>12</sup> Letter from Maurice Hinchey, Henry Waxman, John Lewis and Lynn Woolsey to George W. Bush, July 18, 2006 ([http://www.house.gov/hinchey/newsroom/press\\_2006/071806nsalettertobush.html](http://www.house.gov/hinchey/newsroom/press_2006/071806nsalettertobush.html)).

<sup>13</sup> Jason Ryan, *White House Blocked Spy Program Probe*, ABCNEWS (July 18, 2006) (<http://abcnews.go.com/Politics/Story?id=2208888&page=1>).

<sup>14</sup> Murray Waas, *Aborted DOJ Probe Probably Would Have Targeted Gonzales*, NATL. J. (March 15, 2007) (<http://news.nationaljournal.com/articles/0315nj1.htm>); Jason Ryan, *White House Blocked Spy Program Probe*, ABCNEWS (July 18, 2006) (<http://abcnews.go.com/Politics/Story?id=2208888&page=1>).

<sup>15</sup> Shane Harris and Murray Waas, *Justice Depart Probe Foiled*, NATL. J. (May 25, 2006) (<http://news.nationaljournal.com/articles/0525nj2.htm>).

<sup>16</sup> Murray Waas, *Aborted DOJ Probe Probably Would Have Targeted Gonzales*, NATL. J. (March 15, 2007) (<http://news.nationaljournal.com/articles/0315nj1.htm>); Letter from Maurice Hinchey, Henry Waxman, John Lewis and Lynn Woolsey to George W. Bush, July 18, 2006 ([http://www.house.gov/hinchey/newsroom/press\\_2006/071806nsalettertobush.html](http://www.house.gov/hinchey/newsroom/press_2006/071806nsalettertobush.html)).

<sup>17</sup> Terry Frieden, *Justice Department to re-open no-warrant wiretap probe*, CNN (Nov. 15, 2007) (<http://www.cnn.com/2007/POLITICS/11/13/domestic.spying/index.html>).

<sup>18</sup> 50 U.S.C. § 1809.

<sup>19</sup> 50 U.S.C. § 1810.

national security secrecy, asserting that the state secrets privilege bars courts from considering plaintiffs claims.<sup>20</sup>

## 2. Congress is actively involved

Prior to the New York Times' disclosure of the NSA domestic spying program, the executive branch used a claim of national security secrecy to prevent the Congressional Intelligence Committees from effectively exercising any oversight regarding the program. It accomplished this emasculation of the committees by providing information only to the Chair and Ranking Member of the Committees (along with the Democratic and Republican leaders of the House and Senate).<sup>21</sup> Furthermore, the Bush Administration forbade even those members from discussing this issue with other members of the Committees or even their staffs. The powerlessness of these legislators is illustrated by the handwritten note that Sen. Jay Rockefeller sent to Vice-President Cheney, noting that Rockefeller is "neither a technician nor an attorney," and decrying his "inability to consult staff or counsel" in order to evaluate the legality of the program.<sup>22</sup>

### C. Accountability mechanisms initiated by federal courts

In *Bivens v. Six Unknown Fed. Narcotics Agents*,<sup>23</sup> the Supreme Court established that when a federal employee violates an individual's constitutional rights, that individual has a right to recover damages against the employee even if there is no statute conferring such a right.<sup>24</sup> In a *Bivens* action by Maher Arar, a Canadian citizen whom the federal government rendered to Syria (where Arar was brutally interrogated and tortured), the executive branch convinced the court that the need for secrecy in matters relating to foreign relations required dismissal of this *Bivens* claim.<sup>25</sup>

### D. Partly internal – partly external accountability mechanisms

Unauthorized leaks of information have been critically important in attempts to hold the executive branch accountable for violations of the law, both before and after September 11, 2001. Daniel Ellsberg's unauthorized leak of the Pentagon Papers played an important role in the evolving public understanding of the government's prior deceptions regarding our war in Vietnam. Unauthorized leaks of the Abu Ghraib photos and the August 1, 2002 Justice Department torture memorandum helped stir public and Congressional opposition to Bush Administration's cruel treatment of CIA and military prisoners, leading to Congressional hearings and legislation aimed at ensuring better treatment for these prisoners.

The executive branch fights back against these leaks in a variety of ways, including criminal and administrative investigations to discover the source of the leak, firing employees suspected of leaking the information,<sup>26</sup> and even prosecuting such leaks under the theft and espionage statutes.<sup>27</sup>

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<sup>20</sup> *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190 (9<sup>th</sup> Cir. 2007); *Hepting v. AT&T Corp.*, 508 F.3d 898 (9<sup>th</sup> Cir. 2007); *ACLU v. Nat'l Sec. Agency*, 493 F.3d 644 (6<sup>th</sup> Cir. 2007); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006). 441 F. Supp. 2d 899.

<sup>21</sup> Heidi Kitrosser, "Macro-Transparency" as *Structural Directive: A Look at the NSA Surveillance Controversy*, 91 MINN. L. REV. 1163, 1204 (2007).

<sup>22</sup> Letter from Sen. Jay Rockefeller to Vice President Cheney, July 17, 2003 (available at <http://www.globalsecurity.org/intell/library/news/2005/intell-051219-rockefeller01.pdf>).

<sup>23</sup> 403 U.S. 388 (1971).

<sup>24</sup> *Carlson v. Green*, 446 U.S. 14 (1980).

<sup>25</sup> *Arar v. Ashcroft*, 414 F.Supp. 2d 250, 281 (E.D.N.Y. 2006) (rejecting a state secrets approach as insufficiently protective of government's secrecy needs in its relations with foreign countries).

<sup>26</sup> David Johnston & Scott Shane, *CIA Fires Senior Officer Over Leaks*, N.Y. TIMES, April 22, 2006.

<sup>27</sup> *US v. Morison*, 844 F.2d 1057 (4<sup>th</sup> Cir. 1988)