

# FILLING THE OVERSIGHT GAP: THE CASE FOR LOCAL INTELLIGENCE OVERSIGHT

BENJAMIN S. MISHKIN\*

*Since the September 11th attacks, local law enforcement agencies in major metropolitan areas have become increasingly involved in counterterrorism and intelligence activities. Unfortunately, this development has not yet spurred a comparable increase in intelligence oversight. Indeed, at the local level, intelligence activities are conducted largely in a “formal governance vacuum.” This situation is unsustainable. Local formal oversight mechanisms are desperately needed. Whether local actors are actually up to the intelligence oversight task is another question. And it is a question that has yet to be answered in a satisfactory manner. Skeptics have written off local overseers with little explanation, while advocates of local intelligence oversight have endorsed local overseers without apparent consideration of their viability. This Note seeks to provide a comprehensive answer. Drawing upon lessons from oversight of the federal intelligence community, this Note demonstrates that the federal intelligence oversight apparatus is a workable model for the local context.*

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INTRODUCTION

Counterterrorism. Intelligence gathering. National security. These matters traditionally have been considered endeavors of the federal government, within the province of, among others, the Central Intelligence Agency (CIA), the Department of Defense, and the Federal Bureau of Investigation (FBI). While federal agencies no doubt remain preeminent in this arena, local law enforcement agencies (LEAs)<sup>1</sup> in major metropolitan areas<sup>2</sup> have become increasingly engaged in these activities in the wake of the September 11th attacks.<sup>3</sup> And there is good reason to think that these local LEAs will remain involved for the foreseeable future.<sup>4</sup>

Notably, this expanded role for local LEAs has not been accompanied by a parallel increase in intelligence oversight. At the federal level, we expect and demand robust oversight of national security agencies’ intelligence activities.<sup>5</sup> Accordingly, various institutions and

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<sup>1</sup> For the purposes of this Note, the term “local law enforcement agencies” describes city-level police departments.

<sup>2</sup> This Note contemplates major cities in its evaluation of the viability of local intelligence oversight. Given their size, smaller cities may encounter more significant challenges in adapting federal oversight mechanisms. At the same time, we should also expect these cities to have LEAs less engaged in intelligence and counterterrorism activities and, consequently, a less pressing need for enhanced intelligence oversight.

<sup>3</sup> See *infra* Part I.A. There are, of course, numerous local LEAs that have resisted and will continue to resist greater participation in these areas. The decentralized and localized nature of law enforcement in the United States encourages differences in policing and policymaking attuned to the needs of particular cities and regions. This Note, however, recognizes the general trend toward increased intelligence and counterterrorism efforts at the local level—especially in major cities across the country—and is focused on the consequences of that phenomenon. For more on local resistance to taking on an expanded national security role, see David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 30–44 (2006); Susan N. Herman, *Introduction*, 69 BROOK. L. REV. 1201, 1212–16 (2004).

<sup>4</sup> See *infra* notes 27–35 and accompanying text (explaining why local LEAs’ involvement in intelligence and counterterrorism activities is likely to persist).

<sup>5</sup> See, e.g., Christopher M. Ford, *Intelligence Demands in a Democratic State: Congressional Intelligence Oversight*, 81 TUL. L. REV. 721, 761 (2007) (“The American public is much more willing to permit unfettered and robust [federal] intelligence operations when they know institutional checks are in place to ensure operations are conducted in accordance with applicable laws . . . [W]hen this assumption of legality and morality is corrupted, the public reaction has proven formidable.”).

mechanisms are in place to oversee the federal intelligence community.<sup>6</sup> Ideally, effective intelligence oversight helps ensure that policies and practices stay within legal boundaries, identifies shortcomings and inefficiencies in current national security practices, provides strategic guidance to intelligence agencies, and fosters public support and trust.<sup>7</sup> At the local level, however, intelligence activities are conducted largely in a “formal governance vacuum.”<sup>8</sup> This situation is unsustainable. Local formal oversight mechanisms are desperately needed.<sup>9</sup>

Whether local actors are actually up to the intelligence oversight task is another question. And it is a question that has yet to be answered in a satisfactory manner. Current scholarship has focused on first-order issues, such as the strengths and weaknesses of local LEAs in the national security sphere,<sup>10</sup> and federal-local coordination in counterterrorism efforts.<sup>11</sup> Few scholars have even contemplated the second-order issue of oversight,<sup>12</sup> and none has thoroughly addressed the capacity for local intelligence oversight. Relatedly, in the broader policy debate, skeptics have written off local overseers with little explanation, while advocates of local intelligence oversight have endorsed local overseers without apparent consideration of their viability.<sup>13</sup> This Note seeks to provide a comprehensive answer. Drawing upon lessons from oversight of the federal intelligence community, this Note demonstrates that the federal intelligence oversight apparatus is a workable model for the local context.

Part I explores the rise of local intelligence and the formal governance vacuum. It proceeds to consider the importance of oversight and argues that local LEAs’ involvement in intelligence activities calls

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<sup>6</sup> See *infra* Part II (exploring these institutions and mechanisms).

<sup>7</sup> See *infra* notes 59–62 and accompanying text (outlining the objectives of intelligence oversight).

<sup>8</sup> Samuel J. Rascoff, *The Law of Homegrown (Counter)Terrorism*, 88 TEX. L. REV. 1715, 1742 (2010).

<sup>9</sup> See *infra* Part I.C (describing the need for oversight mechanisms that are both local and formal).

<sup>10</sup> See, e.g., Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289, 301–07 (2012) (assessing the domestic intelligence and counterterrorism roles for local LEAs).

<sup>11</sup> See, e.g., Susan N. Herman, *Collapsing Spheres: Joint Terrorism Task Forces, Federalism, and the War on Terror*, 41 WILLAMETTE L. REV. 941, 950–55 (2005) (analyzing the rise of Joint Terrorism Task Forces and the federalism implications of these entities).

<sup>12</sup> See K. JACK RILEY ET AL., STATE AND LOCAL INTELLIGENCE IN THE WAR ON TERRORISM 34, 49 (2005) (examining the oversight question); Rascoff, *supra* note 8, at 1740–42 (same); Matthew C. Waxman, *Police and National Security: American Local Law Enforcement and Counterterrorism After 9/11*, 3 J. NAT’L SECURITY L. & POL’Y 377, 397–99 (2009) (same).

<sup>13</sup> See *infra* notes 76–77 and accompanying text.

for oversight that is both local and formal. Part II then turns to oversight of the federal intelligence community for guidance. By analyzing three oversight institutions (Congress, inspectors general, and civilian oversight boards) and examining the challenges they have encountered, this Part lays the groundwork for evaluating the capacity for local intelligence oversight. Finally, Part III assesses the adaptability of federal intelligence oversight mechanisms and concludes that they can and should be embraced at the local level.

## I

### LOCAL INTELLIGENCE ACTIVITIES AND THE NEED FOR OVERSIGHT REFORM

#### A. *The Growing Intelligence Role for Local Law Enforcement Agencies Post-9/11*

The federal government has, in many ways, driven the push for local LEAs to take on an expanded role in intelligence and counterterrorism efforts. It has provided “resources and training to state and local police forces to help them establish intelligence units, build databases, and develop standards for intelligence gathering.”<sup>14</sup> The FBI has bolstered Joint Terrorism Task Forces (JTTFs), which enlist local, state, and federal agents to work together to “chase down leads, gather evidence, make arrests, provide security for special events, conduct training, collect and share intelligence, and respond to threats and incidents at a moment’s notice.”<sup>15</sup> From thirty-five JTTFs before September 11th,<sup>16</sup> there are now over 100 JTTFs with more than 4400 members from approximately 600 state and local agencies and fifty federal agencies.<sup>17</sup> In addition, the federal government has cultivated state and major urban area “fusion centers,” which “receiv[e] threat information from the federal government; analyz[e] that information in the context of their local environment; disseminat[e] that information to local agencies; and gather[ ] tips, leads, and suspicious activity reporting (SAR) from local agencies and the public.”<sup>18</sup>

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<sup>14</sup> Waxman, *supra* note 10, at 307.

<sup>15</sup> *Protecting America from Terrorist Attack: Our Joint Terrorism Task Forces*, FED. BUREAU OF INVESTIGATION, [http://www.fbi.gov/about-us/investigate/terrorism/terrorism\\_jttfs](http://www.fbi.gov/about-us/investigate/terrorism/terrorism_jttfs) (last visited Aug. 8, 2013).

<sup>16</sup> *Protecting America: National Task Force Wages War on Terror*, FED. BUREAU OF INVESTIGATION (Aug. 19, 2008), [http://www.fbi.gov/news/stories/2008/august/njttf\\_081908](http://www.fbi.gov/news/stories/2008/august/njttf_081908).

<sup>17</sup> *Protecting America from Terrorist Attack*, *supra* note 15.

<sup>18</sup> *National Network of Fusion Centers Fact Sheet*, U.S. DEP’T OF HOMELAND SEC., <http://www.dhs.gov/national-network-fusion-centers-fact-sheet> (last visited Aug. 8, 2013).

At the same time, local LEAs have also stepped up their intelligence and counterterrorism operations independent of federal arrangements. Recognizing the gravity of the terrorist threat,<sup>19</sup> many local LEAs expanded their intelligence and counterterrorism units and developed intelligence analyst positions following the September 11th attacks.<sup>20</sup> Unsurprisingly, the New York City Police Department (NYPD) has led this charge. Facing unique threats<sup>21</sup> and hesitant to rely solely on federal efforts,<sup>22</sup> the NYPD created a Counterterrorism Bureau and staffed it with 1000 police officers,<sup>23</sup> built up an unparalleled intelligence operation headed by the CIA's former Director for Operations and Deputy Director for the Directorate of Intelligence,<sup>24</sup> and, arguably, pushed legal boundaries in support of its counterterrorism mission.<sup>25</sup> Other local LEAs in major metropolitan areas

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<sup>19</sup> See, e.g., *Police as First Preventers: Hearing Before the Subcomm. on Prevention of Nuclear & Biological Attack of the H. Comm. on Homeland Sec.*, 109th Cong. 4, 5 (2006) (statement of John F. Timoney, Chief of Police, Miami, Fla.) ("It was often the feeling at local law enforcement prior to 9/11 that intelligence gathering was a Federal responsibility, but the events in Madrid and London and some events recently here in the United States are highlights that local law enforcement can have a very important role.").

<sup>20</sup> Waxman, *supra* note 10, at 385.

<sup>21</sup> See *Counterterrorism Units*, N.Y. POLICE DEP'T, [http://www.nyc.gov/html/nypd/html/administration/counterterrorism\\_units.shtml](http://www.nyc.gov/html/nypd/html/administration/counterterrorism_units.shtml) (last visited Aug. 8, 2013) ("New York City has experienced first-hand the threat of international terrorism and remains number one on al-Qaeda's target list.").

<sup>22</sup> The lesson of 9/11 to the NYPD was we can't sit back and just let the federal government tell us . . . how to keep us safe or what intelligence we need to know or who might be after us. We have to take responsibility for this ourselves, and we're going to go to wherever we need to go to get this information.

Interview by David Greene, Guest Host, NPR's *Morning Edition*, with Matt Apuzzo, Investigative Reporter, Associated Press, in Wash., D.C. (Aug. 24, 2011), available at <http://www.npr.org/2011/08/24/139890556/nypd-intelligence-unit-seen-pushing-rights-limits>. In 2011 and 2012, Matt Apuzzo, along with Adam Goldman, published a series of investigative pieces for the Associated Press on the NYPD's intelligence operations. These pieces can be read at *AP's Probe Into NYPD Intelligence Operations*, ASSOCIATED PRESS, <http://www.ap.org/index/AP-In-The-News/NYPD> (last visited Aug. 8, 2013).

<sup>23</sup> Raymond W. Kelly, *The 2006 Paul Miller Distinguished Lecture: Safeguarding Citizens and Civil Liberties*, 59 RUTGERS L. REV. 555, 563 (2007).

<sup>24</sup> Press Release, City of New York Office of the Mayor, Mayor Michael R. Bloomberg and Police Commissioner Raymond W. Kelly Announce Appointment of David Cohen in Newly-Created Post of Deputy Commissioner of Intelligence (Jan. 24, 2002), available at [http://www.nyc.gov/portal/site/nycgov/menuitem.b270a4a1d51bb3017bce0ed101c789a0/index.jsp?pageID=nyc\\_blue\\_room&catID=1194&doc\\_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2002a%2Fpr020-02.html&cc=unused1978&rc=1194&ndi=1?](http://www.nyc.gov/portal/site/nycgov/menuitem.b270a4a1d51bb3017bce0ed101c789a0/index.jsp?pageID=nyc_blue_room&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2002a%2Fpr020-02.html&cc=unused1978&rc=1194&ndi=1?); see also *NYPD Intelligence Division & Counter-Terrorism Bureau*, N.Y. POLICE DEP'T, <http://www.nypdintelligence.com> (last visited Aug. 8, 2013) ("No other municipal law enforcement agency in the country approaches the scope and sophistication of the NYPD Intelligence Division & Counter-Terrorism Bureau.").

<sup>25</sup> See *infra* note 68 (providing examples of controversial NYPD counterterrorism tactics).

across the country—including, among others, the Chicago Police Department, the Los Angeles Police Department, and the Philadelphia Police Department—have followed suit.<sup>26</sup>

The growing intelligence role for local LEAs is not only a practical reality, but also, in the eyes of intelligence practitioners and scholars alike, a national security necessity.<sup>27</sup> This idea is rooted in notions about the comparative strengths of local LEAs over federal actors as well as the nature of the terrorist threat. First, the sheer number of police officers nationwide makes them an invaluable resource that dramatically enhances domestic intelligence gathering capacity. With more than 700,000 local police officers across the country, as compared to approximately 12,000 FBI agents,<sup>28</sup> local law enforcement officers are, with good reason, heralded as the “eyes and ears” of the nation in the drive to combat terrorist threats.<sup>29</sup> Second, by virtue of their proximity to the ground and because effective

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<sup>26</sup> See David Lapeska, *Preparing for 2012, Police Create Counterterrorism Unit*, N.Y. TIMES, Sept. 9, 2011, at A23A (noting the Chicago Police Department’s creation of a counterterrorism unit that seeks to “incorporate lessons from . . . New York City’s counterterrorism tactics”); *Counter-Terrorism and Special Operations Bureau (CTSOB)*, L.A. POLICE DEP’T, [http://www.lapdonline.org/inside\\_the\\_lapd/content\\_basic\\_view/6502](http://www.lapdonline.org/inside_the_lapd/content_basic_view/6502) (last visited Aug. 8, 2013) (describing the LAPD’s Counter-Terrorism and Special Operations Bureau, Intelligence Investigations and Surveillance Sections, and the Bureau’s mission to “[p]revent terrorism” and “[p]ursue terrorists”); Walt Smith, Commanding Officer, Phila. Police Dep’t, Homeland Sec. Unit, Presentation at the 2010 Defense Industrial Base Critical Infrastructure Protection Conference 2 (Apr. 28, 2010), *available at* <http://www.dtic.mil/ndia/2010DIBCIP/WednesdaySmith.pdf> (explaining that the Philadelphia Police Department’s Homeland Security Unit “was established in the spring of 2002 as a proactive response to the elevated threat of terrorism following the attacks of September 11, 2001” and that it focuses on terrorism prevention); *see also* LOIS M. DAVIS ET AL., LONG-TERM EFFECTS OF LAW ENFORCEMENT’S POST-9/11 FOCUS ON COUNTERTERRORISM AND HOMELAND SECURITY xv–xviii (2010) (drawing upon “in-depth case studies” of the Boston Police Department, the Houston Police Department, the Las Vegas Metropolitan Police Department, the Los Angeles County Sheriff’s Department, and the Miami-Dade Police Department to evaluate the impact of heightened involvement in counterterrorism and national security activities on local LEAs).

<sup>27</sup> See, e.g., William Finnegan, *The Terrorism Beat: How Is the N.Y.P.D. Defending the City?*, NEW YORKER, July 25, 2005, at 58, 61 (“As [international terrorism] metastasizes, cops are it. We’re going to win this at the local level.” (quoting Brian Michael Jenkins, Senior Adviser, RAND Corp.)); John D. Negroponete, Dir. of Nat’l Intelligence, Remarks to the FBI National Academy 2 (Oct. 3, 2006), *available at* <http://www.utexas.edu/law/journals/tlr/sources/Issue%2088.7/Rascoff/fn017.speechofnegroponete.pdf> (“[C]ritical terrorism information can be developed by engaged police officers who patrol the streets of our nation. In fact, without engaged police officers, we may not stop the next threat. . . . We rely mightily on the more than 13,000 state and local police departments in the United States.”).

<sup>28</sup> Waxman, *supra* note 10, at 306.

<sup>29</sup> Negroponete, *supra* note 27.

policing demands close relationships with local communities,<sup>30</sup> local LEAs can “see” things that federal actors may not.<sup>31</sup> Along the same line, the linguistic and cultural diversity of local officers in certain cities gives them access to key communities that are often beyond the reach of federal actors and in which radical ideologies may fester.<sup>32</sup> Third, experts believe that the threat of “homegrown” terrorism, or “the phenomenon whereby individuals and groups carry out attacks (or attempt to) within their native or adopted country or society,” is on the rise and that local LEAs are well-suited for handling this threat.<sup>33</sup> Specifically, given their connection to the communities they serve, local LEAs are in the best position to identify indicators of potential terrorist activities and work with local actors to address the factors that give rise to radicalization.<sup>34</sup> Overall, it is clear that local involvement in intelligence gathering, counterterrorism, and national security is not going away any time soon.<sup>35</sup>

### B. *The Formal Governance Vacuum*

The rise of local LEAs in the intelligence arena, however, has not been matched by a parallel rise in oversight of their activities. Indeed,

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<sup>30</sup> See Waxman, *supra* note 10, at 304 (“Modern policing strategy trends . . . call for wide and deep engagement within the community.”).

<sup>31</sup> See Waxman, *supra* note 12, at 386–87 (explaining how local LEAs’ relationships with local communities allow them to “better cultivate informants and detect suspicious irregularities” than federal actors); Daniel Richman, *The Right Fight*, Bos. REV., Dec. 1, 2004, at 6, 11, available at <http://www.bostonreview.net/forum/right-fight> (“Simply put, no federal outreach effort can substitute for the quality and quantity of contacts that local police officers have within the neighborhoods they serve.”).

<sup>32</sup> See Rascoff, *supra* note 8, at 1729 (“While federal intelligence agencies struggle to find individuals who speak Arabic, Persian, or Urdu, the NYPD has no shortage of individuals who speak these languages and can reach out to, or immerse themselves in, ethnic and religious communities.”).

<sup>33</sup> *E.g.*, *id.* at 1716–18.

<sup>34</sup> [B]ecause local police are better versed in the activities of their communities and often have better networks of relationships with other local institutions and actors than do federal agents, some purely domestic threats are more likely to be uncovered through observations by local law enforcement agents and programs . . . .  
 . . . [T]o the extent that counterterrorism strategies adapt to include addressing social alienation and other factors that may give rise to violent extremism, responsibility naturally fits more comfortably at the local level of governance, which has significant responsibility for social policy and, therefore, the instruments for managing it.

Waxman, *supra* note 10, at 321–22.

<sup>35</sup> See, *e.g.*, Harris, *supra* note 3, at 44 (“[T]he question is not *whether* local police will participate in anti-terrorism efforts, but *how* they should do this.”). A detailed discussion of the ideal role for local LEAs in the broader intelligence community and national security efforts is beyond the scope of this Note. For such an analysis, see generally Rascoff, *supra* note 8; Waxman, *supra* note 12.

a dearth of oversight mechanisms allows local intelligence to operate in what Samuel Rascoff has termed “a formal governance vacuum.”<sup>36</sup>

A brief analysis of intelligence oversight developments at the federal and local levels prior to September 11th begins to shed light on this vacuum. While their effectiveness is often called into question, numerous mechanisms exist to oversee federal intelligence efforts.<sup>37</sup> Spurred on by comprehensive congressional and executive investigations into intelligence abuses in the 1970s,<sup>38</sup> Congress created permanent intelligence oversight committees—namely, the House Permanent Select Committee on Intelligence (HPSCI) and the Senate Select Committee on Intelligence (SSCI)—and passed the Foreign Intelligence Surveillance Act (FISA).<sup>39</sup> In addition, inspectors general were put in place at national security agencies and civilian oversight boards were established within the executive branch.<sup>40</sup> Simultaneously, and in contrast, many local LEAs either dismantled their intelligence operations during this period or became bound by judicial consent decrees that restricted their ability to engage in intelligence activities.<sup>41</sup> As Matthew Waxman aptly puts it, “[f]rom the 1970s until 2001, intelligence oversight reform at the federal level generally proceeded in parallel with intelligence atrophy at the local level.”<sup>42</sup>

Since September 11th, little has been done to bolster oversight of local intelligence activities. Local legislatures have been dismissed as ineffective<sup>43</sup> and judicial consent decrees have been rolled back to give local LEAs greater leeway to gather intelligence.<sup>44</sup> The lack of

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<sup>36</sup> Rascoff, *supra* note 8, at 1742.

<sup>37</sup> See *infra* Part II (analyzing the institutions and mechanisms that oversee the federal intelligence community).

<sup>38</sup> See generally RICHARD A. BEST, JR., CONG. RESEARCH SERV., RL32500, PROPOSALS FOR INTELLIGENCE REORGANIZATION, 1949-2004, at 19–25 (2004) (describing the work of the Rockefeller Commission (Commission on CIA Activities within the United States), Church Committee (Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities), and Pike Committee (House Select Committee on Intelligence) in the mid-1970s).

<sup>39</sup> Waxman, *supra* note 10, at 299–300.

<sup>40</sup> *Id.* at 300.

<sup>41</sup> *Id.* at 300–01.

<sup>42</sup> *Id.* at 301.

<sup>43</sup> See, e.g., Rascoff, *supra* note 8, at 1741 (“[L]egislative checks on executive [intelligence] action[s] [do not] generally have teeth at the local level.”).

<sup>44</sup> See, e.g., *Alliance to End Repression v. City of Chicago*, 237 F.3d 799, 799, 802 (7th Cir. 2001) (granting the City of Chicago’s request to modify a twenty-year-old consent decree to make the restrictions placed on the City “less onerous”); *Handschu v. Special Servs. Div.*, 273 F. Supp. 2d 327, 335, 349 (S.D.N.Y. 2003) (finding that “changed circumstances” brought about by the September 11th attacks justified approving the NYPD’s request to modify the terms of the consent decree to which it is bound).



oversight of the NYPD highlights this trend. As discussed above, the NYPD has developed the largest and most sophisticated local intelligence operation in the country.<sup>45</sup> It has done so, however, in the absence of robust independent<sup>46</sup> oversight.<sup>47</sup> Although a judicial consent decree originally designed to limit the Department's intelligence activities technically still binds the NYPD, it was relaxed significantly after September 11th. This consent decree, which was implemented in 1985 after a settlement in *Handschu v. Special Services Division*, placed the NYPD under federal supervision and barred the Department from engaging in intelligence gathering on "political activity" without "specific information" about criminal conduct and institutionalized internal processes for ex ante review of these activities.<sup>48</sup> In 2003, however, the NYPD successfully petitioned for modifications to the consent decree that eliminated the criminal activity prerequisite, dismantled the ex ante review mechanisms, and, instead, simply affirmed a general commitment to respecting constitutional rights.<sup>49</sup>

The city legislature, the New York City Council, has also failed to provide meaningful oversight. In the decade following the September 11th attacks, the New York City Council Public Safety Committee never held a hearing about the oversight component of the NYPD Intelligence Division.<sup>50</sup> Only in October 2011, following a series of Associated Press investigative pieces on the NYPD's intelligence operations that exposed controversial practices,<sup>51</sup> did the Public Safety Committee begin to question whether more oversight was

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<sup>45</sup> See *supra* notes 21–25 and accompanying text.

<sup>46</sup> I use the term "independent" to cover both external actors and internal actors with independent characteristics, such as inspectors general.

<sup>47</sup> The NYPD does have internal mechanisms in place that guide its intelligence activities. See Kelly, *supra* note 23, at 557–58 (highlighting the "vetting of counterterrorism investigations," the assignment of "a senior lawyer and constitutional expert [in] the intelligence division" to ensure that civil liberties are not infringed upon, and a "legal advisory board" as safeguards the NYPD has implemented). Although internal mechanisms are important, this Note takes the position that these mechanisms alone do not provide the level of intelligence oversight that expanded local intelligence operations demand.

<sup>48</sup> *Handschu v. Special Servs. Div.*, 605 F. Supp. 1384, 1420–22 (S.D.N.Y. 1985), *aff'd*, 787 F.2d 828 (2d Cir. 1986).

<sup>49</sup> *Handschu*, 273 F. Supp. 2d at 349–51 (describing the NYPD's proposed modified guidelines). Regardless, as Professor Rascoff points out, even at its zenith, the *Handschu* consent decree "arguably never provided meaningful day-to-day governance, in part because enforcement depended on the vigilance of resource-constrained private plaintiffs." Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. CALIF. L. REV. 575, 594 (2010).

<sup>50</sup> Rascoff, *supra* note 8, at 1741 n.119.

<sup>51</sup> See *supra* note 22 (providing more information about these investigative pieces).

warranted.<sup>52</sup> The Committee's chairman, however, insists that the City Council does not have the expertise needed to conduct oversight.<sup>53</sup>

Finally, in contrast to federal national security agencies, there is no independent inspector general at the NYPD.<sup>54</sup> And unlike other major city agencies, the NYPD falls outside the jurisdiction of the city's Department of Investigation,<sup>55</sup> which "investigates City employees, those doing or seeking to do business with the City, as well as members of the public who engage in corrupt, fraudulent or unethical activities involving the City."<sup>56</sup>

### C. *The Need for Local Formal Oversight Mechanisms*

This lack of oversight is unsustainable.<sup>57</sup> If local LEAs are going to engage in extensive intelligence operations, they must also be subject to robust intelligence oversight. This proposition should not be controversial. We demand strong independent oversight of federal intelligence activities.<sup>58</sup> The same ought to hold true with respect to local intelligence activities.

Ideally, intelligence oversight advances two core objectives: making sure that intelligence activities stay within legal boundaries and promoting smart intelligence practices to most effectively accomplish the mission (in this case, preventing terrorist attacks). In accordance with these objectives, one scholar proposes that intelligence oversight ought to: ensure "that intelligence policies and activities fall within the bounds of the law," set "strategic guidance and ensur[e] that resources are matched against priorities," "[c]ontinuously examin[e] and improv[e] current programs and practices," and generate "public trust and support for the vital functions that secret

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<sup>52</sup> See Samantha Gross & Matt Apuzzo, *Questioned on Spying, Kelly Denies NYPD Profiles*, ASSOCIATED PRESS (Oct. 6, 2011), [http://www.boston.com/news/nation/articles/2011/10/06/questioned\\_on\\_spying\\_kelly\\_denies\\_nypd\\_profiles](http://www.boston.com/news/nation/articles/2011/10/06/questioned_on_spying_kelly_denies_nypd_profiles) (reporting on Commissioner Kelly's testimony at the hearing).

<sup>53</sup> *Id.*

<sup>54</sup> See Faiza Patel & Elizabeth Goitein, Op-Ed., *It's Time to Police the NYPD*, N.Y. TIMES, Jan. 30, 2012, at A23 (arguing that there should be an independent inspector general for the NYPD).

<sup>55</sup> *Id.*

<sup>56</sup> *Our Mission*, N.Y.C. DEP'T OF INVESTIGATION, <http://www.nyc.gov/html/doi/html/about/mission.shtml> (last visited Aug. 8, 2013).

<sup>57</sup> See Brian Fishman, Op-Ed., *NYPD Oversight Will Keep Us Safe*, N.Y. DAILY NEWS (Apr. 2, 2012), <http://www.nydailynews.com/opinion/nypd-oversight-safe-article-1.1053675> ("The terrorist threat . . . is not going away, which means the NYPD's counterterrorism programs must be sustainable. And to be sustainable, the people of New York must be confident th[e] NYPD's work advances national security in accordance with American freedoms. The only way to reassure them is with healthy oversight.")

<sup>58</sup> See *supra* note 5 and accompanying text (noting the American public's expectation that national security agencies' intelligence activities will be subject to oversight).

intelligence [activities] play in U.S. national security.”<sup>59</sup> The absence of intelligence oversight, on the other hand, opens the door to potential abuses of rights,<sup>60</sup> sows distrust among the public,<sup>61</sup> and threatens security as ineffective policies remain in place.<sup>62</sup>

It is also crucial that *formal* mechanisms are implemented to oversee local intelligence activities.<sup>63</sup> While some scholars have touted the power of informal oversight mechanisms to constrain police behavior,<sup>64</sup> informality is insufficient in the intelligence context. As Rascoff notes, “the secrecy that intelligence entails tends to impede the ability of civil-society organizations to provide the sort of robust, informal oversight that the police might be subjected to in a more traditional area of law enforcement activity.”<sup>65</sup> Unaware that local LEAs are conducting intelligence and counterterrorism operations, civil rights groups, journalists, and the general public can hardly provide a meaningful check. The clandestine nature of intelligence also undermines the argument that local LEAs are inherently more respectful of rights due to their proximity to, and close relationships with, the communities they serve.<sup>66</sup> These relationships may restrain local LEAs from engaging in more intrusive and overt tactics,<sup>67</sup> but it

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<sup>59</sup> AMY B. ZEGART, *EYES ON SPIES: CONGRESS AND THE UNITED STATES INTELLIGENCE COMMUNITY* 31 (2011).

<sup>60</sup> *See, e.g.*, FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755, at III (1976) available at <http://archive.org/stream/finalreportofsel01unit#page/n3/mode/2up> (explaining that the Church Committee’s investigation arose “out of allegations of abuse and improper activities by the intelligence agencies of the United States, and great public concern that the Congress take action to bring the intelligence agencies under the constitutional framework”).

<sup>61</sup> *Cf.* Ford, *supra* note 5, at 761 (describing how formal intelligence oversight promotes an “assumption of legality and morality” and the consequences when this assumption “is corrupted”).

<sup>62</sup> *See id.* at 760 (“[O]versight offers a broader perspective on the development and execution of intelligence operations. That is to say, the inclusion of a neutral party offers a check on the dangers of organizational group-think.”).

<sup>63</sup> By formal mechanisms, I am referring to mechanisms comparable to those at the federal level. I have in mind institutions explicitly tasked with conducting intelligence oversight: e.g., legislatures, inspectors general, and civilian oversight bodies. *See infra* Part II (examining federal intelligence oversight mechanisms).

<sup>64</sup> *See, e.g.*, Jerome H. Skolnick, *Democratic Policing Confronts Terror and Protest*, 33 SYRACUSE J. INT’L L. & COM. 191, 211 (emphasizing that “a civil liberties and civil rights bar, free and honest elections, and a free press” are essential “institutions of accountability” for ensuring that local LEAs stay within legal boundaries).

<sup>65</sup> Rascoff, *supra* note 8, at 1737–38 (internal citations omitted); *see also* Waxman, *supra* note 10, at 330 (“With respect to secretive activities, it is impossible to rely on standard mechanisms of direct political accountability that assume an informed citizenry.”).

<sup>66</sup> *See* Rascoff, *supra* note 8, at 1738 (pointing out the existence of this argument in scholarly literature).

<sup>67</sup> *See, e.g.*, David Thacher, *The Local Role in Homeland Security*, 39 LAW & SOC’Y REV. 635, 655–62 (2005) (documenting how the Dearborn Police Department’s role in the

is not clear that they do the same for the secretive activities that may, in fact, be a greater threat to civil liberties.<sup>68</sup> Finally, as noted at the beginning of this Section, protecting civil liberties is not the sole objective of intelligence oversight. Promoting strategic intelligence practices and garnering confidence from the public are also key goals toward which oversight should strive. Informal mechanisms alone cannot advance these goals. Comprehensive oversight can only be achieved with formal mechanisms in place.<sup>69</sup>

The proposition that federal overseers are the answer to the governance vacuum<sup>70</sup> is also unavailing. Local oversight and local accountability are hallmarks of the United States's decentralized system of policing.<sup>71</sup> The participation of local LEAs in novel areas (i.e., intelligence and counterterrorism) should not be cause for a drastic overhaul of accountability structures. From a practical standpoint, it is also questionable whether local LEAs would willingly

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Department of Justice-led interviews of certain temporary visa-holders in the months following the September 11th attacks “was shaped by the interest local police had in establishing legitimate boundaries around the use of new surveillance and information-gathering efforts, which could otherwise undermine the trust and support they had worked so hard to develop in the Arab community”).

<sup>68</sup> See Rascoff, *supra* note 8, at 1739 (“[I]t is hard to know whether this logic dictates local restraint in the more elusive (and less overt) aspects of intelligence collection that, at least in theory, are likely to remain unknown to community members.”). The NYPD’s recent efforts to monitor mosques, Muslim-owned businesses, and Muslim student groups arguably provide the clearest illustration of the limits of this informal mechanism. See generally Chris Hawley, *NYPD Monitored Muslim Students All over Northeast*, ASSOCIATED PRESS (Feb. 18, 2012), <http://www.ap.org/Content/AP-In-The-News/2012/NYPD-monitored-Muslim-students-all-over-Northeast> (providing details about this monitoring); Matt Apuzzo & Adam Goldman, *Documents Show NY Police Watched Devout Muslims*, ASSOCIATED PRESS (Sept. 6, 2011), <http://www.ap.org/Content/AP-In-The-News/2011/Documents-show-NY-police-watched-devout-Muslims> (same). This Note does not take a position on the legality or constitutionality of the NYPD’s intelligence and counterterrorism tactics.

<sup>69</sup> This Note assumes that informal mechanisms, such as a “civil liberties and civil rights bar, free and honest elections, and a free press,” cannot provide the sort of systematized, ex ante review that is integral to effective intelligence oversight. See Skolnick, *supra* note 64, at 211 (identifying these informal mechanisms); see also *supra* note 59 and accompanying text (describing the fundamental objectives of intelligence oversight).

<sup>70</sup> See, e.g., Rascoff, *supra* note 8, at 1748 (proposing a “federal overseer (potentially housed within ODNI or DHS) . . . [to] help calibrate the degree to which specific local intelligence agencies could undertake certain programs of intelligence gathering and help define their scope”); Waxman, *supra* note 10, at 338 (suggesting that the intelligence oversight gap could be filled by “concentrating oversight in existing mechanisms at the federal level . . . or promoting adherence to federal oversight standards through reporting and federal auditing”).

<sup>71</sup> See Adam Serwer, *NY City Councilman Says Feds Should Provide NYPD Counterterrorism Oversight*, MOTHER JONES (Oct. 11, 2011), <http://www.motherjones.com/mojo/2011/10/ny-city-councilman-says-feds-should-provide-nypd-counterterrorism-oversight> (“The U.S. has a decentralized system of policing where local police are accountable to local populations. [T]hat’s the way our system works.” (quoting Faiza Patel)).

submit to federal oversight.<sup>72</sup> In particular, local LEAs facing the greatest threat of a terrorist attack in their own cities are especially unlikely to do so, being hesitant to put decisions about how to conduct intelligence and counterterrorism operations in the hands of the federal government.<sup>73</sup>

In addition, as will be discussed below, federal actors already face significant challenges in overseeing the federal intelligence community.<sup>74</sup> Adding local intelligence activities to their plate would hardly seem to be a recipe for effective oversight. Many local intelligence activities are also “context-specific, subject to diverse laws and guidelines, and difficult to oversee from afar because they do not produce metrics that are easy to assess or compare across jurisdictions,” making them poorly suited for federal oversight.<sup>75</sup> Ultimately, the notion that federal actors alone can remedy the governance vacuum is unconvincing. Local actors must be part of the equation.

## II

### FEDERAL OVERSIGHT OF FEDERAL INTELLIGENCE ACTIVITIES

Before moving forward, it is worth reiterating a few points that should now be evident. First, local LEAs are increasingly involved in intelligence and counterterrorism activities and there is no reason to think they will abandon this course. Second, the rise of local intelligence activities has not been accompanied by a comparable increase in oversight. Instead, local LEAs carry out intelligence operations in a formal governance vacuum. Third, this lack of oversight is both problematic and unsustainable. And fourth, we cannot rely solely on informal oversight mechanisms to provide the necessary level of oversight. Local formal mechanisms are needed to fill the oversight gap.

Doubts have been raised, however, about whether local actors are up to the oversight task.<sup>76</sup> At the same time, advocates for

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<sup>72</sup> See Gary Cordner & Kathryn Scarborough, *Connecting Police Intelligence with Military and National Intelligence*, in *HOMELAND SECURITY AND INTELLIGENCE* 110, 116 (Keith Gregory Logan ed., 2010) (“Local agencies answer to local authorities . . . . No police chief, and certainly no sheriff, considers any state or federal law enforcement official to be his or her boss or superior.”).

<sup>73</sup> See *supra* note 22 and accompanying text (describing the NYPD’s reluctance to rely on the federal government).

<sup>74</sup> See *infra* Part II.

<sup>75</sup> Waxman, *supra* note 10, at 338.

<sup>76</sup> See, e.g., Rascoff, *supra* note 8, at 1741–42 (dismissing local legislatures and courts as ineffective overseers of intelligence activities); Waxman, *supra* note 10, at 336 (“[M]any state and local governments lack sophisticated internal controls, and legislatures and courts at those levels generally lack expertise and resources to conduct rigorous investigation or monitoring.”).

heightened local intelligence oversight have put forward reform proposals without apparent consideration of their feasibility.<sup>77</sup> These doubts and calls for reform both warrant closer examination. Are local actors really as ill-suited for the oversight task as skeptics suggest? Is there something about intelligence oversight that puts it beyond the grasp of local actors? Or are they just as capable as (if not more capable than) their federal counterparts? And, more broadly, what would effective intelligence oversight even look like at the local level?

This Part will lay the groundwork for answering these questions by turning to the most logical source for guidance: the institutions and mechanisms that oversee the federal intelligence community. Specifically, this Part will consider three institutions: 1) Congress, 2) inspectors general, and 3) civilian oversight boards.<sup>78</sup> With each institution, this Part will examine the oversight mechanisms in place, their intended oversight role, challenges they have faced in practice, and the reasons for these challenges. Part III will then consider the adaptability of these mechanisms to the local context—which appear to be viable and which are likely to face obstacles—and potential

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<sup>77</sup> See, e.g., *Councilmember Lander Calls for Oversight of NYPD Intelligence Division*, BRADLANDER.COM (Aug. 25, 2011), <http://bradlander.com/news/updates/councilmember-lander-calls-for-oversight-of-nypd-intelligence-division> (“Because the NYPD has correctly decided New York City requires an intelligence gathering division on par with federal intelligence agencies, the City also needs a framework for appropriate legislative oversight that is on par with the federal level. I believe the Council can create [this] framework . . . .”); Faiza Patel & Michael Price, Opinion, *Surveillance of American Muslims: A Tale of Three Cities*, AL JAZEERA (Apr. 12, 2012), <http://www.aljazeera.com/indepth/opinion/2012/04/201241061612704789.html> (“[U]nlike the FBI, which is overseen by an Inspector General reporting to Congress, the NYPD’s intelligence operation is conducted without any meaningful oversight. If the NYPD insists on modelling itself as a mini-FBI, then it should be subject to the same level of oversight—an independent Inspector General.”).

<sup>78</sup> Although courts can also provide some measure of intelligence oversight, this Note takes the position that they cannot offer the type of proactive oversight with which this Note is particularly concerned. Indeed, the only area in which courts perform *ex ante* intelligence oversight is the collection of “foreign intelligence information” within the United States. 50 U.S.C. § 1804(a)(6) (2006). Under the Foreign Intelligence Surveillance Act (FISA), law enforcement officers must seek a warrant (modified from the traditional Fourth Amendment warrant) before conducting electronic surveillance or a physical search of the premises or property of a “foreign power” or “agent of a foreign power” in order to acquire foreign intelligence information. *Id.* §§ 1804(a)(3), 1823(a)(3). Notably, this regime explicitly excludes “United States person[s]” as intelligence targets. *Id.* §§ 1802(a)(1)(B), 1822(a)(1)(A)(ii). In the domestic intelligence context, the clandestine nature of many intelligence activities, standing hurdles, and the government’s ability to invoke the “state secrets” privilege have rendered the courts ineffective overseers. See Rascoff, *supra* note 49, at 596 (identifying these obstacles to judicial intelligence oversight). Accordingly, this Note does not include the courts in its analysis of oversight institutions.

opportunities for local actors to overcome the intelligence oversight challenges that federal actors have encountered.

### A. Legislative Oversight

In theory, Congress has in its power all the right ingredients for comprehensive oversight of the federal intelligence community. In practice, however, Congress has not always performed its oversight role to the fullest extent. The House Permanent Select Committee on Intelligence (HPSCI) and the Senate Select Committee on Intelligence (SSCI) are the central committees that conduct federal intelligence oversight. In total, though, there are seventeen committees that oversee at least some part of the federal intelligence community.<sup>79</sup>

Congress possesses a number of mechanisms to carry out its oversight role. One of the core tools that it can wield is its budgetary authority. In accordance with constitutional requirements,<sup>80</sup> Congress must approve all of the intelligence agencies' budget requests. In doing so, Congress has the opportunity to review and approve specific programs, examine how agencies plan to use funds, and, consequently, exact significant leverage over the intelligence community.<sup>81</sup> The budgetary power consists of two primary functions: authorization and appropriation. Whereas authorization entails the approval of specific activities and programs, appropriation entails the actual allocation of specific sums to authorized programs.<sup>82</sup> These functions can come into tension when appropriators fail to provide sufficient funds for an authorized program or, conversely, when appropriators provide funds for programs that have not been authorized.<sup>83</sup> Ultimately, though, Congress must authorize appropriated funds before an agency can spend the money.<sup>84</sup> The HPSCI and SSCI are the main budget

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<sup>79</sup> In the House of Representatives, these committees are: the House Appropriations, Armed Services, Budget, Energy and Commerce, Government Reform, Homeland Security, International Relations, and Judiciary Standing Committees, as well as the HPSCI. Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1662 (2006). In the Senate, these committees are: the Senate Appropriations, Armed Services, Budget, Energy and Natural Resources, Foreign Relations, Homeland Security and Governmental Affairs, and Judiciary Standing Committees, as well as the SSCI. *Id.*

<sup>80</sup> See U.S. CONST. art. I, § 9 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.").

<sup>81</sup> MARK M. LOWENTHAL, INTELLIGENCE: FROM SECRETS TO POLICY 205 (4th ed. 2009) (explaining the oversight significance of Congress's power over the budget).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 206.

<sup>84</sup> *Id.*

authorizers for the intelligence community, while the defense subcommittees of the House and Senate Appropriations Committees are the appropriators, as the intelligence budget falls within the larger defense appropriations bill.<sup>85</sup>

In addition, Congress has mechanisms to gather information from the intelligence community. The intelligence committees can conduct hearings in which they call, among others, agency officials to testify about intelligence policies or outside experts to bolster committee members' knowledge.<sup>86</sup> These hearings, and congressional oversight generally, can serve as a deterrent against executive misconduct.<sup>87</sup> Congress may also legislate reporting requirements as a way to institutionalize its access to intelligence information.<sup>88</sup>

Finally, Congress can conduct investigations into perceived shortcomings or alleged intelligence abuses.<sup>89</sup> The HPSCI and SSCI issue regular public reports on matters that they have recently considered.<sup>90</sup> And while not all information can be made public due to classification, the mere fact that Congress is launching investigations helps to assure the public that intelligence oversight is occurring. These information-gathering tools equip Congress with the capacity to provide broad oversight. In practice, however, significant obstacles have prevented Congress from wielding its oversight authority to the fullest extent.

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<sup>85</sup> *Id.*; see also ZEGART, *supra* note 59, at 104–06 (examining the budget workloads of the defense subcommittees).

<sup>86</sup> LOWENTHAL, *supra* note 81, at 208.

<sup>87</sup> As former Director of Central Intelligence and former Secretary of Defense Robert Gates recounted: “I sat in the Situation Room in secret meetings for nearly twenty years under five Presidents, and all I can say is that some awfully crazy schemes might well have been approved had everyone present not known and expected hard questions, debate, and criticism from the Hill.” ROBERT M. GATES, *FROM THE SHADOWS* 559 (1996).

<sup>88</sup> For example, the general congressional intelligence oversight statute requires that the “President shall ensure that the congressional intelligence committees are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity as required by this subchapter.” 50 U.S.C. § 413(a)(1) (2006). Along the same line, the Director of National Intelligence is “responsible for ensuring that national intelligence is provided . . . to the Senate and House of Representatives and the committees thereof” in a “timely” manner. 50 U.S.C. § 403-1(a)(1)–(2) (2006).

<sup>89</sup> LOWENTHAL, *supra* note 81, at 211.

<sup>90</sup> The HPSCI issues these reports semiannually and the SSCI issues them biennially. *E.g.*, SEMI-ANNUAL REPORT ON THE ACTIVITY OF THE HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE FOR THE ONE HUNDRED TWELFTH CONGRESS, H.R. REP. NO. 112-733 (2012), available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt733/pdf/CRPT-112hrpt733.pdf>; REPORT OF THE SELECT COMMITTEE ON INTELLIGENCE COVERING THE PERIOD JANUARY 3, 2009 TO JANUARY 4, 2011, S. REP. NO. 112-3 (2011), available at <http://www.intelligence.senate.gov/pdfs/1123.pdf>.



Critics have identified a number of specific challenges and offered proposals for reform. First, they have suggested that the fragmentation of oversight responsibilities among seventeen different committees naturally diminishes Congress's ability to provide effective oversight.<sup>91</sup> Relatedly, they have decried the intelligence budgetary process. The division of authorization and appropriation authority between the intelligence committees and the defense subcommittees of the appropriations committees undermines the HPSCI and SSCI's leverage over the intelligence community.<sup>92</sup> The intelligence committees, as authorizers, can threaten to cut funding, but it is the defense subcommittees, as appropriators, that ultimately make these decisions. Due to secrecy rules and the classified nature of many intelligence matters, however, appropriators often lack or find it difficult to obtain the requisite information to make fully informed funding decisions.<sup>93</sup> Furthermore, the placement of the intelligence budget within the defense appropriations bill hinders oversight, given the considerable size and complexity of the overall defense budget and limited staff capabilities.<sup>94</sup> Accordingly, the 9/11 Commission and others have called for intelligence committees with both authorization and appropriation authority.<sup>95</sup> Congress has yet to act on this proposal.<sup>96</sup>

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<sup>91</sup> See, e.g., Rascoff, *supra* note 49, at 598 ("Although substantive overlap may have certain benefits, it tends to sap the vitality of the oversight function by diffusing responsibility.").

<sup>92</sup> "The single most important step to strengthen the power of the intelligence committees is to give them the power of the purse. Without it, they will be marginalized. The intelligence community will not ignore you, but they will work around you." 155 Cong. Rec. S5951 (daily ed. June 2, 2009) (statement of Sen. Russ Feingold) (quoting the Vice Chairman of the 9/11 Commission in his 2007 testimony before the Senate Intelligence Committee).

<sup>93</sup> See ZEGART, *supra* note 59, at 101–04 (detailing the challenges that secrecy and the unavailability of information present for Congress's power over the intelligence budget).

<sup>94</sup> As former Senator and SSCI Vice Chairman Kit Bond explained regarding the defense subcommittee of the Senate Appropriations Committee: "That committee is consumed with defense matters. . . . [It] is wrapped up in nearly half-trillion-dollar appropriations bills with less than one-tenth of it comprising the national intelligence program that we in the SSCI oversee. . . . [The subcommittee] can't give intelligence the attention it deserves." *Congressional Oversight of Intelligence Activities: Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. 7–8 (2007) (statement of Christopher S. Bond, Vice Chairman, S. Select Comm. on Intelligence).

<sup>95</sup> NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 420 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>; see also, e.g., John Riley & Mary Kate Schneider, Congressional Oversight of U.S. Intelligence, in *HOMELAND SECURITY AND INTELLIGENCE*, *supra* note 72, at 172, 180 (proposing this reform); ZEGART, *supra* note 59, at 121 (same).

<sup>96</sup> The House, however, has recognized the need for reform. While it did not vest the HPSCI with appropriation authority, the House created a Select Intelligence Oversight Panel comprised of both appropriators and HPSCI members in 2007. In March 2011, the

The secret nature of many intelligence activities and classification also take their toll on congressional oversight beyond the budgetary process. First, only those with the highest level of clearance are granted access to much intelligence work. Thus, committee staffers, whose assistance is essential to the ability of committees to perform robust oversight, are often barred from key intelligence briefings for lacking the requisite clearance.<sup>97</sup> Critics also contend that the intelligence community overuses classification, keeping information out of the intelligence committees' reach and, consequently, impeding oversight.<sup>98</sup> In addition, secrecy and classification limit the capacity of interest groups and other interested individuals to raise red flags and encourage Congress to hold hearings or launch investigations. Outside of the intelligence context, congressional overseers count on these non-congressional actors to "ring the alarm" about alleged agency misconduct or shortcomings that demand further investigation.<sup>99</sup> In the intelligence context, however, secrecy and classification impair the ability to "detect any smoke."<sup>100</sup>

Finally, disincentives inherent in the intelligence oversight task have encumbered congressional oversight. Intelligence is a complex policy area that requires a high degree of time and effort to master. On top of that, as the 9/11 Commission found, "few members of Congress have the broad knowledge of intelligence activities or the know-how about the technologies employed."<sup>101</sup> There is a steep learning curve for developing the necessary expertise, which many members, juggling a wide range of other responsibilities, find prohibitive.

Furthermore, the electoral incentives that motivate members of Congress in other policy areas are diminished in the intelligence oversight context. It is an uncontroversial proposition that reelection

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House abandoned this new oversight panel in favor of a system permitting three appropriators to attend HPSCI hearings and briefings. ZEGART, *supra* note 59, at 110.

<sup>97</sup> See Rascoff, *supra* note 49, at 598 (noting that intelligence committee staff is "frequently denied access to the most classified briefings").

<sup>98</sup> See S. SELECT COMM. ON INTELLIGENCE & H. PERMANENT SELECT COMM. ON INTELLIGENCE, REPORT OF THE JOINT INQUIRY INTO THE TERRORIST ATTACKS OF SEPTEMBER 11, 2001, H.R. REP. NO. 107-792, S. REP. NO. 107-351, Additional Views Congressman Tim Roemer, at 1 ("One of my great frustrations during my service on the [HPSCI] has been the degree to which access to information is restricted . . . . Many times, these restrictions have the effect of impairing the ability of members of the committee to make fully informed decisions on important budgetary or policy matters.").

<sup>99</sup> See Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984) (describing this model of so-called "fire-alarm oversight").

<sup>100</sup> ZEGART, *supra* note 59, at 64–65.

<sup>101</sup> THE 9/11 COMMISSION REPORT, *supra* note 95, at 420.

concerns drive the actions of members of Congress. While a sense of moral duty and desire to perform one's job to the fullest certainly factor into the calculus of congressional behavior, self-preservation is perhaps the chief influence. Conducting robust intelligence oversight does little to advance this objective since it occurs largely behind closed doors and rarely provides concrete benefits for constituents.<sup>102</sup> Moreover, due to secrecy and classification concerns, legislators typically cannot trumpet intelligence oversight successes to voters. And, regardless, intelligence matters are unlikely to factor highly into constituents' voting decisions.<sup>103</sup> Taken together, this lack of electoral incentives undermines congressional intelligence oversight.

### B. *Inspectors General*

Like Congress, inspectors general at national security agencies can launch investigations and conduct proactive intelligence oversight. All of the major national security agencies have statutory inspectors general pursuant to the Inspector General Act of 1978 and its subsequent amendments.<sup>104</sup> The broad mission of inspectors general, as detailed in the Act, is to conduct audits and investigations of agency activities, to recommend policies that promote "economy, efficiency, and effectiveness" and that prevent "fraud and abuse," and to keep agency heads and Congress "fully and currently informed about problems and deficiencies . . . and the necessity for and progress of corrective action."<sup>105</sup> At the very minimum, inspectors general must provide both agency heads and Congress with a semiannual report summarizing in detail the activities, findings, and recommendations from the immediately preceding six-month period.<sup>106</sup>

To accomplish this mission, inspectors general have an arsenal of tools at their disposal. They are authorized to conduct investigations

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<sup>102</sup> Riley & Schneider, *supra* note 95, at 179.

<sup>103</sup> See ZEGART, *supra* note 59, at 89–91 (explaining the lack of voter interest in and attention to intelligence matters).

<sup>104</sup> See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (amending the Inspector General Act to include the Department of Homeland Security); Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2515 (including the Department of Justice); Department of Defense Authorization Act, 1983, Pub. L. No. 97-252, 96 Stat. 718 (1982) (including the Department of Defense); Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978) (codified as amended at 5 U.S.C. app. 3 (2006)); see also Intelligence Authorization Act for Fiscal Year 2010, Pub. L. No. 111-259, 124 Stat. 2654 (establishing a statutory inspector general for the intelligence community within the Office of the Director of National Intelligence); Intelligence Authorization Act, Fiscal Year 1989, Pub. L. No. 100-453, 102 Stat. 1904 (1988) (establishing a statutory inspector general at the CIA).

<sup>105</sup> 5 U.S.C. app. 3 § 2 (2006).

<sup>106</sup> *Id.* §§ 4(a)(5), 5.

that the inspector general deems “necessary or desirable,” access any federal agency documents to assist their investigations, and subpoena information outside federal agencies.<sup>107</sup> And although housed within the agencies they monitor, inspectors general are not merely another mechanism in the internal apparatus. Indeed, they are in many ways independent entities.<sup>108</sup> Grounded in statute and with responsibilities to Congress, inspectors general more closely approximate external overseers than internal ones.

The statutory mandate, broad investigative authority, and insider vantage point of inspectors general uniquely position them to provide robust oversight. Singularly focused on one agency and one mission, inspectors general can carry out the investigations that Congress often lacks the time, resources, or expertise to conduct. Inspectors general also need not wait for justiciable challenges or legal abuses to arise to perform the oversight function. They instead have a wider statutory duty to report on “significant problems.”<sup>109</sup> And, with some degree of insider status, inspectors general may encounter less resistance than truly external overseers.<sup>110</sup>

Nonetheless, inspectors general have fundamental limitations as intelligence overseers. Despite the general prohibition on agency interference with the work of inspectors general, the Departments of Defense, Justice, and Homeland Security may block inspector general audits, investigations, and the issuance of subpoenas concerning intelligence and counterterrorism matters in the name of national

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<sup>107</sup> *Id.* § 6(a).

<sup>108</sup> For example, the Act specifically instructs agency leadership to not interfere with and to accommodate inspector general requests to the greatest extent possible. *See id.* § 3(a) (“Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena [sic] during the course of any audit or investigation.”); *id.* § 6(b) (detailing the responsibilities of agency heads to inspectors general). Furthermore, the President is to appoint, and the Senate is to confirm, inspectors general “without regard to political affiliation and solely on the basis of integrity and demonstrated ability.” The President retains the authority to remove inspectors general, but must inform Congress of the reason for doing so at least thirty days before removal. *Id.* § 3(b). In making budget submissions to Congress, the President must also include a statement from any inspector general who concludes that the budget would “substantially inhibit the Inspector General from performing the duties of the office.” *Id.* § 6(f)(3)(E). In addition, the Act provides inspectors general with independent legal counsel, freeing them from reliance on agency counsel for legal advice. *Id.* § 3(g).

<sup>109</sup> *Id.* § 5(a)(1).

<sup>110</sup> *Cf.* Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 440 (2009) (“[P]olicy recommendations generated through internal checks may face less resistance than those offered externally because the latter frequently arise after executive officials have already decided upon a policy and are more likely to take an adversarial form.”).

security.<sup>111</sup> The CIA and other national security agencies possess similar authority.<sup>112</sup> Although these agencies have rarely invoked this power, its mere existence may constrain inspectors general to stay within certain limits.<sup>113</sup> Relatedly, both inside and outside the intelligence context, the structural position of inspectors general within the executive branch and subject to removal by the President presents a challenge to their independence and willingness to delve into politically controversial areas. Their position within the agencies would seem to leave them susceptible to capture (or, at least, prone to err toward preserving professional relationships) and to view issues from a more agency-friendly, internal perspective. The inability of inspectors general to enforce their recommendations further limits their oversight capacity. They can launch investigations, report findings, and propose recommendations, but it is up to Congress, the President, or agency heads to implement proposed reforms—which often is a lost cause.<sup>114</sup> Although inspectors general can effectively shed light on abuses and shortcomings, they alone cannot alter agency practices and procedures.

### C. *Civilian Oversight Boards*

Boards of civilians appointed by the President provide yet another layer of federal intelligence oversight. The President's Intelligence Advisory Board (PIAB) and the Privacy and Civil Liberties Oversight Board (PCLOB) possess unique oversight strengths, but like the other institutions reviewed thus far, also face significant challenges to accomplishing their objectives.

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<sup>111</sup> See 5 U.S.C. app. 3 § 8(b) (Department of Defense); *id.* § 8E(a) (Department of Justice); *id.* § 8I(a) (Department of Homeland Security); see also *supra* note 108 (noting the general prohibition on agency interference).

<sup>112</sup> See 5 U.S.C. app. 3 § 8G(d)(2)(A)–(D) (Defense Intelligence Agency, National Geospatial-Intelligence Agency, National Reconnaissance Office, National Security Agency); 50 U.S.C. § 403-3h(f) (2006) (Office of the Director of National Intelligence); *id.* § 403q(b)(3)–(4) (CIA).

<sup>113</sup> Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1036 (2013).

<sup>114</sup> See *id.* at 1077 (“Even the strongest IG reviews [at national security agencies post-9/11] did not lead to accountability for high-level agency officials or to significant constraints on agency discretion.”). Presumably, the same disincentives that have hindered congressional intelligence oversight and are a natural resistance to self-reform within the executive explain this pattern of inaction.

### 1. *The President's Intelligence Advisory Board (PIAB)*

Developed nearly sixty years ago as the President's Board of Consultants on Foreign Intelligence Activities,<sup>115</sup> the PIAB sits within the Executive Office of the President and "exists exclusively to assist the President by providing [him] with an independent source of advice on the effectiveness with which the Intelligence Community is meeting the nation's intelligence needs, and the vigor and insight with which the community plans for the future."<sup>116</sup> Its members are citizens not otherwise employed by the federal government and selected from the national security, political, academic, and private sectors.<sup>117</sup> With "full access to the complete range of intelligence-related information," the PIAB considers issues related to the "[q]uality, quantity, and adequacy of intelligence activities; [e]ffectiveness of organizational structure, management, and personnel; and [p]erformance of all agencies of the Federal Government engaged in the collection, evaluation, or production of intelligence or the execution of intelligence policy."<sup>118</sup> The PIAB reports its findings to the President "as necessary, but not less than twice each year."<sup>119</sup>

The PIAB also features an Intelligence Oversight Board (IOB)<sup>120</sup> on which four out of the fourteen present members of the PIAB currently serve.<sup>121</sup> The IOB's objective is to review the legality and propriety of federal intelligence operations, advising the President on activities it believes "[m]ay be unlawful or contrary to Executive Order or presidential directive; [a]re not being adequately addressed by the Attorney General, the Director of National Intelligence, or the head of the department or agency concerned; or [s]hould be immediately brought to his attention."<sup>122</sup> Taken together, the PIAB and its IOB have the capacity to advance core aims of intelligence oversight.

The effectiveness of the PIAB in practice, however, is difficult to evaluate. The Board conducts its work in secret, faces no public disclosure or reporting requirements, and has been the subject of little

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<sup>115</sup> See *History*, THE WHITE HOUSE, <http://www.whitehouse.gov/administration/eop/piab/history> (last visited Aug. 8, 2013).

<sup>116</sup> *The President's Intelligence Advisory Board*, THE WHITE HOUSE, <http://www.whitehouse.gov/administration/eop/piab> (last visited Aug. 8, 2013).

<sup>117</sup> *About the PIAB*, THE WHITE HOUSE, <http://www.whitehouse.gov/administration/eop/piab/about> (last visited Aug. 8, 2013).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *The President's Intelligence Advisory Board*, *supra* note 116.

<sup>121</sup> See *Members*, THE WHITE HOUSE, <http://www.whitehouse.gov/administration/eop/piab/members> (last visited Aug. 8, 2013).

<sup>122</sup> *About the PIAB*, *supra* note 117.

scholarship critically examining it.<sup>123</sup> What is known about the PIAB, though, raises questions about its ability to provide robust oversight. First, PIAB members serve at the pleasure of the President. Thus, although independent from the intelligence and national security agencies, the PIAB is not a truly independent entity. Nestled within the Executive Office of the President and without limits on the President's removal power, the PIAB only performs its oversight function to the extent the President desires. Furthermore, while the PIAB must report its findings to the President at least twice per year, there is no requirement that the PIAB meet regularly, or at all.<sup>124</sup> Members of the PIAB are also not compensated for their work on the Board.<sup>125</sup> Accordingly, the PIAB has limited incentives to proactively perform the oversight function. It is merely the President's initiative and a sense of duty among its members that determine the scope of the PIAB's oversight, which opens the door to inadequate oversight.<sup>126</sup> Finally, as the PIAB's name suggests, its recommendations are only advisory. As such, it lacks the teeth to fully accomplish the objectives of intelligence oversight. The PIAB can flag intelligence shortcomings and potential misconduct, but it is up to the President or Attorney General to take further investigative action.<sup>127</sup>

## 2. *The Privacy and Civil Liberties Oversight Board (PCLOB)*

The PCLOB, on the other hand, is a truly independent overseer. Congress created the PCLOB in 2004 to "ensure that concerns with respect to privacy and civil liberties are appropriately considered in the implementation of laws, regulations, and executive branch policies related to efforts to protect the Nation against terrorism."<sup>128</sup> Nearly three years later, in the face of concerns about the independence and

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<sup>123</sup> For a recent comprehensive study of the PIAB, see generally KENNETH MICHAEL ABSHER ET AL., *PRIVILEGED AND CONFIDENTIAL: THE SECRET HISTORY OF THE PRESIDENT'S INTELLIGENCE ADVISORY BOARD* (2012).

<sup>124</sup> See Christine E. Hinrichs, Essay, *Flying Under the Radar or an Unnecessary Intelligence Watchdog: A Review of the President's Foreign Intelligence Advisory Board*, 35 WM. MITCHELL L. REV. 5109, 5113 (2009) (including the lack of a regular meeting requirement among the shortcomings of the Board).

<sup>125</sup> Exec. Order No. 13,462, § 3(d)(i), 3 C.F.R. 184 (2008).

<sup>126</sup> During the first five-and-a-half years of the George W. Bush Administration, for example, the IOB did not send a single report of potential legal violations to the Attorney General despite learning about hundreds of such violations from the FBI. John Solomon, *In Intelligence World, a Mute Watchdog*, WASH. POST, July 15, 2007, at A3.

<sup>127</sup> See Charlie Savage, *Obama Order Strengthens Spy Oversight*, N.Y. TIMES, Oct. 30, 2009, at A16 (noting the PIAB's obligation "to forward to the [A]ttorney [G]eneral information about intelligence activities that may violate federal laws or presidential orders, setting in motion a possible criminal investigation").

<sup>128</sup> Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1061(c)(3), 118 Stat. 3638, 3685 (2004).

effectiveness of the PCLOB, Congress made modifications to the Board's authority and its position within the executive branch.<sup>129</sup> As presently structured, the PCLOB enjoys independent agency status and, in accordance with its enabling statute, "shall be composed of a full-time chairman and 4 additional members, who shall . . . be selected solely on the basis of their professional qualifications, achievements, public stature, expertise in civil liberties and privacy, and relevant experience."<sup>130</sup> The President appoints and the Senate confirms the PCLOB's members.<sup>131</sup>

Broadly speaking, the PCLOB is tasked with providing advice and counsel on policy development and implementation, continually reviewing terrorism-related policies and practices, building relationships with privacy and civil liberties officers, and testifying before Congress "upon request."<sup>132</sup> The Board must also submit periodic reports at least twice a year to the relevant congressional committees and the President regarding its activities, findings, conclusions, and recommendations.<sup>133</sup> And, to the greatest extent possible, the PCLOB should make its reports available to the public.<sup>134</sup> To accomplish its mission, the PCLOB is authorized to have access "from any department, agency, or element of the executive branch . . . to all relevant records, reports, audits, reviews, documents, papers, recommendations, or other relevant material, including classified information consistent with applicable law."<sup>135</sup> The Board's power to subpoena persons to produce these materials bolsters its access.<sup>136</sup> The Attorney General may modify or deny a PCLOB subpoena request, but, in doing so, she must notify the House and Senate Judiciary Committees.<sup>137</sup>

This statutory framework equips the PCLOB with the potential to achieve key intelligence oversight goals. And, in theory, the

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<sup>129</sup> Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, sec. 801, 121 Stat. 266, 352. Prior to these modifications, the PCLOB was located in the Executive Office of the President, "[o]nly two of its five members were subject to Senate approval, and all five served at the pleasure of the President. Its advice was to be 'to the President or to the head of any department or agency of the executive branch.'" GARRET HATCH, CONG. RESEARCH SERV., RL34385, PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD: NEW INDEPENDENT AGENCY STATUS 5 (2012) (quoting Intelligence Reform and Terrorism Prevention Act § 1061(c)(1)).

<sup>130</sup> Implementing Recommendations of the 9/11 Commission Act sec. 801, § 1061(h)(1)–(2).

<sup>131</sup> *Id.* sec. 801, § 1061(h)(1).

<sup>132</sup> *Id.* sec. 801, § 1061(d)(4).

<sup>133</sup> *Id.* sec. 801, § 1061(e).

<sup>134</sup> *Id.* sec. 801, § 1061(f)(1).

<sup>135</sup> *Id.* sec. 801, § 1061(g)(1)(A).

<sup>136</sup> *Id.* sec. 801, § 1061(g)(1)(D).

<sup>137</sup> *Id.* sec. 801, § 1061(g)(2).



PCLOB's narrow mission, independence, and duty to report all promote robust, proactive intelligence oversight with regard to privacy and civil liberties issues. Unlike members of the congressional intelligence committees who juggle many responsibilities, members of the PCLOB have a singular oversight task. Moreover, because of the confirmation process, PCLOB members are more likely to possess and develop the requisite level of expertise. They are less susceptible to political pressures and electoral concerns, as they are appointed for six-year terms, and they must regularly provide updates regarding their activities and findings. In other words, the PCLOB appears to not be prone to some of the challenges that hinder congressional oversight of the federal intelligence community. These factors, along with the fact that members of the PCLOB are compensated for their work,<sup>138</sup> also make the PCLOB better positioned than the PIAB to effectively oversee the federal intelligence community.

In practice, however, the PCLOB has not yet lived up to its potential. This claim is not surprising considering that, until recently, the Board consisted of exactly zero members.<sup>139</sup> Finally, in December 2011, President Obama nominated the last of a full slate of five members to the Board.<sup>140</sup> The Senate confirmed four members in August 2012, but neglected to confirm David Medine, the President's nominee for PCLOB Chairman.<sup>141</sup> In accordance with the enabling statute, the Chairman represents the only full-time position<sup>142</sup> and is the one who appoints staff "as may be necessary to enable the Board to carry out its functions."<sup>143</sup> Fortunately, the Senate confirmed Medine in May 2013.<sup>144</sup> Nevertheless, a comprehensive assessment of the PCLOB's track record as an intelligence overseer remains out of reach.

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<sup>138</sup> *Id.* sec. 801, § 1061(j)(1).

<sup>139</sup> See Scott Shane, *The Troubled Life of the Privacy and Civil Liberties Oversight Board*, THE CAUCUS (Aug. 9, 2012, 9:49 AM), <http://thecaucus.blogs.nytimes.com/2012/08/09/the-troubled-life-of-the-privacy-and-civil-liberties-oversight-board> ("Neglected by the Bush and Obama administrations and hampered by political squabbles, [the PCLOB] has been out of business altogether for five years.").

<sup>140</sup> *Privacy and Civil Liberties Oversight Board*, U.S. SENATE COMM. ON THE JUDICIARY, <http://www.judiciary.senate.gov/nominations/112thCongressExecutiveNominations/PrivacyAndCivilLibertiesOversightBoard.cfm> (last visited Aug. 8, 2013).

<sup>141</sup> *Id.*

<sup>142</sup> Implementing Recommendations of the 9/11 Commission Act sec. 801, § 1061(h)(1).

<sup>143</sup> *Id.* sec. 801, § 1061(j)(1).

<sup>144</sup> *Privacy and Civil Liberties Oversight Board*, *supra* note 140.

### III TOWARD LOCAL INTELLIGENCE OVERSIGHT

In considering the development of a local intelligence oversight regime, the institutions and mechanisms that oversee the federal intelligence community represent a logical source of guidance. These institutions may not be perfect, but they nonetheless possess the tools for providing robust intelligence oversight. In addition, as will be discussed below, it may be the case that local actors would (or could) avoid the challenges that have impeded federal oversight. This Note further submits that advocates of local intelligence oversight should not let the perfect be the enemy of the good—the potential consequences of permitting local LEAs to continue to operate in a formal governance vacuum are simply too steep.<sup>145</sup> Unlike some hypothetical alternative model, the federal intelligence oversight apparatus is a known entity that has been tested in practice. Accordingly, it makes sense to at least assess the suitability of the wheel before reinventing it.

The question remains, though, whether local actors are even capable of wielding the oversight tools examined in Part II. And, if so, would local actors encounter the same obstacles? Or would these challenges be of a different degree? This Part will consider these questions, among others, to evaluate the capacity for local intelligence oversight.

#### A. *Adapting Oversight Mechanisms*

The first step in analyzing the capacity for local intelligence oversight is to weigh the adaptability of federal intelligence oversight mechanisms to the local context. Because of the present dearth of intelligence oversight at the local level, however, this analysis inherently requires speculation. That being said, this speculation is not wholly uninformed. Local institutions and mechanisms exist to oversee local LEAs and their traditional law enforcement activities. And although oversight of local intelligence activities poses a distinct set of challenges, it still entails overseeing the activities of local LEAs. As such, when applicable, the existence of local police oversight mechanisms outside of the intelligence context can lend support to speculation about local actors' intelligence oversight abilities.

A brief review of the federal intelligence oversight mechanisms explored in Part II helps inform this inquiry. Consider the tools Congress wields to perform its intelligence oversight function: It can

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<sup>145</sup> See *supra* notes 60–62 and accompanying text (describing the costs of a lack of intelligence oversight).

exercise its budgetary authority to review and approve particular activities, hold hearings to gather information from agency officials and policy experts, implement reporting requirements, conduct investigations, and, of course, pass legislation constraining agency behavior.<sup>146</sup> There is nothing uniquely federal about any of these mechanisms. Local legislatures can and do wield these oversight tools.<sup>147</sup> And while designated intelligence committees may not currently exist in local legislatures, there is no reason to think that such a committee or subcommittee could not, theoretically, be established.

There is also little to suggest that inspectors general could not flourish at the local level. Launching audits and investigations into local intelligence operations, making policy recommendations, and keeping agency heads and local legislatures informed of abuses and shortcomings<sup>148</sup> are all well within the abilities of local actors. Many New York City agencies, for example, have an independent inspector general.<sup>149</sup> And while there is no inspector general at the NYPD, other cities have established such a position. For instance, there is an inspector general for the Los Angeles Police Department (LAPD), independent of the Department's internal affairs division, with the authority to "subpoena witnesses, administer oaths or affirmations, take testimony and compel the production of such books, papers, records and documents as may be deemed relevant to any audit, inquiry or investigation undertaken."<sup>150</sup> With few restrictions, the inspector general may "initiate and conduct investigations of the Department, without limitations as to the type of activity of the Department, including ongoing and in-progress matters."<sup>151</sup>

In the same vein, civilian oversight boards and their mechanisms appear adaptable to the local arena. The PIAB and PCLOB are essentially tasked with reviewing policies, providing advice, flagging potential problems, and issuing reports with findings and recommendations.<sup>152</sup> These responsibilities are not beyond the reach

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<sup>146</sup> See *supra* Part II.A (examining congressional oversight of the federal intelligence community).

<sup>147</sup> See Mary M. Cheh, *Legislative Oversight of Police: Lessons Learned from an Investigation of Police Handling of Demonstrations in Washington, D.C.*, 32 J. LEGIS. 1 (2005) (detailing how local legislatures oversee local LEAs through the budgetary process, investigations, public hearings, and passing legislation).

<sup>148</sup> See *supra* Part II.B (describing the general functions of federal inspectors general).

<sup>149</sup> See *List of DOI Inspectors General*, N.Y.C. DEP'T OF INVESTIGATION, <http://www.nyc.gov/html/doi/html/contact/inspectors.shtml> (last visited Aug. 8, 2013).

<sup>150</sup> L.A. BD. OF POLICE COMM'RS, POLICIES AND AUTHORITY RELATIVE TO THE INSPECTOR GENERAL 3 (2000), available at <http://www.oiglapd.lacity.org/documents/policies&authority.pdf>.

<sup>151</sup> *Id.* at 4.

<sup>152</sup> See *supra* Part II.C (detailing the federal civilian oversight boards' responsibilities).

of local civilians. Indeed, cities across the United States count on boards of civilians to enhance oversight of local LEAs.<sup>153</sup> In Philadelphia, for example, the Police Advisory Commission—a civilian oversight body composed of former law enforcement professionals as well as citizens with relevant academic expertise or a background in civil rights, community and business leadership, or other pertinent areas<sup>154</sup>—has “full discretion to select appropriate individual incidents to review and broader issues to study which may be of concern to the community.”<sup>155</sup> The Commission is authorized to conduct investigations and hold public hearings to facilitate its oversight mission and is granted “full access” to relevant personnel and documents.<sup>156</sup> And, at least once each year, the Commission must provide the mayor and members of the City Council with a report summarizing its activities and recommendations.<sup>157</sup> The work of local civilian oversight boards may not presently focus on intelligence activities, but the tools they employ parallel those of their federal intelligence counterparts.

Ultimately, there is little reason to think that federal intelligence oversight mechanisms are intrinsically unsuitable for local use. While practical obstacles may stand in the way of implementing certain mechanisms, as will be discussed below, these obstacles do not demonstrate an inability to conduct local intelligence oversight. The capacity for intelligence oversight exists.

### *B. Managing Oversight Challenges*

Drawing once again upon the lessons from Part II, the intelligence oversight challenges that federal actors have encountered inform the inquiry into the viability of local intelligence oversight as well. If these challenges are likely to be substantially more pronounced at the local level, then the fact that local actors are capable of wielding intelligence oversight tools in theory is merely academic. Alternatively, if these challenges are likely to be less pronounced at the local level, it further undermines the argument that local actors are ill-suited for the intelligence oversight task.

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<sup>153</sup> See SAMUEL WALKER, *POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT* 6 (2001) (“Over 100 different [citizen oversight] agencies exist, covering law enforcement agencies that serve nearly one-third of the American population, and they are found in about 80 percent of the big cities of this country.”).

<sup>154</sup> Exec. Order No. 8-93, § 2(a)–(b) (1994), available at <http://www.phila.gov/pac/>.

<sup>155</sup> *Id.* § 4(b).

<sup>156</sup> *Id.* § 4(d), (f).

<sup>157</sup> *Id.* § 4(e).

In some ways, though, the challenges to effective intelligence oversight are likely to persist in the same manner at the local level. In particular, the obstacles that civilian oversight boards and inspectors general face in overseeing the federal intelligence community are likely to remain consistent. A “Mayoral Intelligence Oversight Board” modeled on the PIAB would likely possess comparable shortcomings.<sup>158</sup> While providing some measure of intelligence oversight, it too would likely only function to the extent the mayor desired and would need to rely on others within the executive to enforce its recommendations. And if its members were not compensated or required to meet regularly, such a board would also lack the incentives to perform robust oversight. As such, local actors ought to consider providing compensation and requiring regular meetings in the development of local civilian intelligence oversight boards.

Given an equivalent institutional structure, local inspectors general are also likely to feel the same executive pressure to stay within certain boundaries and be prone to view issues from an agency-friendly perspective. And their inability to implement recommendations may similarly limit the extent of their oversight capabilities. However, it is worth noting that, depending on how enabling provisions are crafted, local inspectors general may not face one of the key challenges that dogs their federal counterparts. Recall that federal agencies may block inspector general audits, investigations, and subpoenas that require access to sensitive national security information.<sup>159</sup> By simply not authorizing such interference, local actors have an opportunity to remove this barrier.

Reviewing the challenges that have hampered congressional intelligence oversight reveals additional areas in which local actors may find fewer obstacles than their federal counterparts. First, remember that the fragmentation of intelligence oversight responsibilities among seventeen different committees has arguably diluted Congress’s oversight authority.<sup>160</sup> At the local level, less fragmentation should be expected. The absence of bicameralism in city legislative bodies supports this proposition.<sup>161</sup> The mere fact that both House and Senate committees exist naturally increases fragmentation.

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<sup>158</sup> This Section does not assess how the challenges of the PCLOB would translate to the local arena, as the PCLOB only recently became fully constituted. Thus, it is too soon to know the challenges encountered by the PCLOB in practice. *See supra* notes 139–44 and accompanying text.

<sup>159</sup> *See supra* notes 111–12 and accompanying text.

<sup>160</sup> *See supra* note 91 and accompanying text.

<sup>161</sup> In November 2011, Everett, MA, which had the last bicameral city council in the United States, voted to reform its structure to a unitary legislative body. Steven A. Rosenberg, *Time to Downsize*, BOS. GLOBE, Dec. 8, 2011, at GN1. Waterville, ME, which

In addition, as presently structured, there are fewer city council committees under which matters of intelligence oversight would possibly fall. City councils simply do not have Armed Services, Homeland Security, Foreign Relations, or Judiciary Committees.<sup>162</sup> Instead, relevant committees are generally limited to a Public Safety Committee and a Budget and/or Finance Committee.<sup>163</sup> Thus, where Congress diffuses intelligence oversight responsibility, local legislative bodies could more effectively centralize it.

Budgetary challenges may also be less pronounced at the local level. The authorization and appropriation dilemma that hinders federal intelligence oversight would not be an issue as city councils typically lack the same formalized division of labor with regard to the budgetary process. Relatedly, whereas the federal intelligence budget is often lost within the larger defense appropriations bill, local intelligence budgets could potentially receive greater care and attention. Such increased care, however, requires councilmembers and staff designated to the intelligence oversight task. It also assumes that the size and complexity of a budget is inversely proportional to the ability to conduct effective oversight through the budgetary power.

Unsurprisingly, local intelligence budgets are, or would likely be, smaller and less complex than the federal intelligence budget. The federal intelligence budget covers multiple agencies; local intelligence budgets focus on one: the local police department. The President's proposed federal intelligence budget for Fiscal Year (FY) 2013 was \$52.6 billion.<sup>164</sup> By comparison, the New York City Mayor's proposed FY 2013 budget for the NYPD's intelligence and counterterrorism programs was approximately \$111.5 million.<sup>165</sup> In other words, the

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had the second-to-last bicameral city council in the United States, abolished this structure in 1968. *Id.*

<sup>162</sup> See, e.g., *City Council Committee Assignments*, LACITYCLERK, <http://cityclerk.lacity.org/cps/pdf/clkasgn.pdf> (last visited Aug. 8, 2013); *City Council Committees*, CITY OF HOUS., <http://www.houstontx.gov/citysec/committee> (last visited Aug. 8, 2013); *Committees*, N.Y.C. COUNCIL, <http://legistar.council.nyc.gov/Departments.aspx> (last visited Aug. 8, 2013); *Legislative Bodies*, CITY OF CHI. OFFICE OF THE CITY CLERK, <http://chicago.legistar.com/Departments.aspx> (last visited Aug. 8, 2013); *Standing Committees*, PHILA. CITY COUNCIL, <http://philadelphiacitycouncil.net/standing-committees> (last visited Aug. 8, 2013).

<sup>163</sup> See *supra* note 162.

<sup>164</sup> See OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2013 BUDGET OF THE U.S. GOVERNMENT 85 (2012), available at <http://www.gpo.gov/fdsys/pkg/BUDGET-2013-BUD/pdf/BUDGET-2013-BUD.pdf> (detailing the proposed National Intelligence Program budget for FY 2013).

<sup>165</sup> See REGINA POREDA RYAN ET AL., HEARING ON THE MAYOR'S FISCAL 2013 PRELIMINARY BUDGET & THE FISCAL 2012 PRELIMINARY MAYOR'S MANAGEMENT REPORT 7 (2012), available at <http://council.nyc.gov/downloads/pdf/budget/2013/056%20Police%20Department.pdf>.

budget for the nation's largest local intelligence and counterterrorism operation is approximately 500 times smaller than the federal intelligence budget. On these metrics, effectively wielding the budgetary authority as an intelligence oversight tool would seem to be less of a challenge at the local level, even with the diminished staff capabilities to be expected in local legislative bodies. At the same time, funding for intelligence and counterterrorism programs represents only 2.4% of the total proposed NYPD budget.<sup>166</sup> Thus, just as the House and Senate defense subcommittees "can't give intelligence the attention it deserves," in part because it represents less than one-tenth of the defense appropriations bill,<sup>167</sup> local legislators might similarly give intelligence short shrift in the budgetary process.

Although secrecy challenges would likely encumber local legislative intelligence overseers, there is reason to think that these challenges would be less significant than those that federal overseers face. Information is central to the oversight task. The secret nature of many intelligence activities, however, naturally impedes the flow of information to overseers—from both the agencies that are wary of perceived legislative interference and the interest groups and individuals that legislators rely on to "ring the alarm."<sup>168</sup> Intelligence oversight, regardless of whether it is federal or local, will encounter this obstacle. The difference at the local level, though, is the lack of formal mechanisms for designating and maintaining classified information.<sup>169</sup> Without a formal classification system, more information necessarily remains in the public domain.<sup>170</sup> And where classification-based restrictions on access limit participation in oversight at the federal level, the absence of such restrictions at the local level could permit greater engagement and, consequently, more robust oversight.

The lack of a formal classification system could also work to limit the disincentives to conducting legislative intelligence oversight. Just as reelection concerns drive the actions of members of Congress, the same no doubt holds true for local legislators. Self-preservation is the name of the game, whether at the federal or local level. Recall that this motivator curtails federal intelligence oversight in part because the oversight task happens largely behind closed doors and because

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<sup>166</sup> See *id.* (noting a proposed total budget for NYPD of approximately \$4.6 billion).

<sup>167</sup> ZEGART, *supra* note 59, at 106–07 (internal quotation marks omitted).

<sup>168</sup> See *supra* notes 97–100 and accompanying text (describing the secrecy challenges to congressional intelligence oversight).

<sup>169</sup> Waxman, *supra* note 12, at 398.

<sup>170</sup> That is not to say that confidential information is free-flowing at the local level, but rather that, without a formal classification system, local LEAs lack one of the key means by which their federal counterparts keep information beyond the public's reach.

classification restricts the ability of members of Congress to share their successes with voters.<sup>171</sup> Although secrecy would persist at the local level, the absence of formal classification mechanisms may leave legislators freer to communicate with their constituents about intelligence oversight and allow for greater public access to and awareness of legislators' oversight work.<sup>172</sup> However, intelligence oversight benefits would remain intangible, and voters in local elections arguably are just as unlikely as voters in federal elections to factor intelligence matters into their voting decisions.<sup>173</sup> Thus, electoral disincentives would still present a challenge for local legislative intelligence oversight.

The need for legislators to develop the requisite expertise, which has hindered federal legislative intelligence oversight,<sup>174</sup> may also obstruct local legislative intelligence oversight. Whether federal or local actors are carrying out the activities, intelligence is a complex policy area that takes time and effort to master. But, as suggested with regard to the budgetary process, the local intelligence oversight task is in some ways less complex than the federal intelligence oversight task. For one, legislative intelligence oversight at the local level involves oversight of one agency rather than many. Relatedly, the intelligence activities conducted at the local level, on the whole, are (and will likely continue to be) less wide-ranging and less sophisticated than those at the federal level. Local LEAs' core intelligence strength is in drawing upon close relationships with local communities to monitor and identify potential terrorist threats.<sup>175</sup> And while intelligence-gathering techniques might be distinct, the tools that local LEAs employ are largely identical to the ones used for traditional law enforcement. As such, and given their experience overseeing traditional law enforcement activities, the learning curve for local legislative intelligence overseers may be less steep than that facing their federal counterparts.<sup>176</sup>

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<sup>171</sup> See *supra* notes 102–03 and accompanying text.

<sup>172</sup> Then again, enhanced local legislative intelligence oversight may ultimately require the development of a formal classification system or some other mechanism to limit the release of information to the public due to the inherently sensitive nature of intelligence efforts and in order to garner the cooperation of local LEAs in the oversight task.

<sup>173</sup> See *supra* notes 102–03 and accompanying text (explaining the limited impact that intelligence oversight has on the outcomes of federal elections).

<sup>174</sup> See *supra* note 101 and accompanying text.

<sup>175</sup> See *supra* Part I.A (describing local LEAs' growing intelligence role).

<sup>176</sup> It should be noted that critics have pointed to a lack of expertise as an obstacle to local legislative oversight of traditional law enforcement activities. See, e.g., SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 8 (2005) (“The unhappy fact is that most elected officials do not understand the details of police administration and have been unable—and often unwilling—to provide guidance to law enforcement executives.”);



### C. *Confronting Additional Obstacles*

Thus far, this Part has shown that local actors are capable of wielding intelligence oversight mechanisms and that the challenges that have hindered federal intelligence oversight would either remain constant or be less pronounced at the local level. Nothing about the federal intelligence oversight tools places them beyond the grasp of local actors. There is also reason to think that local actors would not encounter or could overcome the problems that have undermined federal intelligence oversight. In other words, local actors appear well-positioned to conduct intelligence oversight—and may, in fact, be able to do so more effectively than their federal counterparts. These findings, however, do not end the inquiry into the capacity for local intelligence oversight. Practical obstacles in the local context must be considered as well. This Section will explore these potential hurdles.

The most significant among these obstacles is cost. Establishing civilian oversight boards, inspector general offices, and intelligence committees or subcommittees all require expending financial resources. Particularly in an economic climate where local governments are seeking to cut budgets,<sup>177</sup> the prospect of expanding the bureaucracy is dubious. And the cost of bolstering local intelligence oversight not only entails financial expenditures, but also finding qualified individuals to serve in oversight positions, enhancing staff capabilities, and developing the requisite level of expertise. That is not to say that local actors cannot garner the knowledge necessary for the oversight task, but that in starting from scratch the cost of doing so will inevitably be steep.

With regard to legislative oversight, whether city councils have the sheer manpower needed for effective intelligence oversight is an open question and, accordingly, another potential obstacle. At the federal level, the intelligence committees alone have thirty-five members—with twenty members in the House and fifteen in the Senate.<sup>178</sup>

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Cheh, *supra* note 147, at 20 (noting that local legislators “may feel that they lack the needed expertise” to conduct oversight of the police). In light of this criticism, perhaps the fact that local intelligence activities approximate traditional law enforcement activities provides less-cogent support for the argument that local actors would be on better footing than their federal counterparts with regard to the expertise needed for the intelligence oversight task.

<sup>177</sup> See, e.g., Michael Cooper, *States Pass Budget Pain to Cities*, N.Y. TIMES, Mar. 24, 2011, at A20 (detailing budget constraints in states and cities across the country).

<sup>178</sup> See *HPSCI Majority Members*, PERMANENT SELECT COMMITTEE ON INTELLIGENCE, <http://intelligence.house.gov/about/hpsci-majority-members> (last visited Aug. 8, 2013); *HPSCI Minority Members*, PERMANENT SELECT COMMITTEE ON INTELLIGENCE, <http://intelligence.house.vg.gov/about/hpsci-minority-members> (last visited Aug. 8, 2013); *Members: 112th Congress (2011-2012)*, U.S. SENATE SELECT COMMITTEE ON

By contrast, the New York City Council has fifty-one members in total, the Los Angeles City Council has fifteen, the Chicago City Council has fifty, the Houston City Council has sixteen, and the Philadelphia City Council has seventeen.<sup>179</sup> Their Public Safety Committees have eight, five, nineteen, twelve, and seven members, respectively.<sup>180</sup> The intelligence oversight task at the local level may be narrower and less complex than at the federal level, but it remains to be seen whether these sorts of numbers are sufficient for performing robust intelligence oversight.<sup>181</sup>

Finally, comprehensive local intelligence oversight reform requires political will. It is necessary for local actors to concentrate on the intelligence oversight task, create intelligence-focused committees, establish civilian oversight boards, and put in place inspectors general focused on intelligence matters. Beyond these initial reforms, as we have seen with federal intelligence oversight, political will is also essential to ensure the robustness of legislative oversight and the diligence of civilian overseers and inspectors general.<sup>182</sup> While legislators and mayors in some cities will certainly possess the requisite political will, others invariably will not.<sup>183</sup>

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INTELLIGENCE, <http://www.intelligence.senate.gov/members112thcongress.html> (last visited Aug. 8, 2013).

<sup>179</sup> See *City Council*, CITY OF HOUS., <http://www.houstontx.gov/council> (last visited Aug. 8, 2013); *Council Directory*, CITY OF L.A., <http://www.lacity.org/government/ElectedOfficialOffices/CityCouncil/CouncilDirectory/index.htm> (last visited Aug. 8, 2013); *Council Members*, CITY OF CHI.: OFFICE OF THE CITY CLERK, <http://chicago.legistar.com/People.aspx> (last visited Aug. 8, 2013); *Council Members*, N.Y.C. COUNCIL, <http://council.nyc.gov/html/members/members.shtml> (last visited Aug. 8, 2013); *Council Members*, PHILA. CITY COUNCIL, <http://philadelphiacitycouncil.net/council-members> (last visited Aug. 8, 2013).

<sup>180</sup> See *City Council Committee Assignments*, *supra* note 162; *Committee on Public Safety*, CITY OF CHI.: OFFICE OF THE CITY CLERK, <http://chicago.legistar.com/DepartmentDetail.aspx?ID=13659&GUID=5882CCBD-E899-4A9B-B20D-22693640D685> (last visited Aug. 8, 2013); *City Council Committees*, *supra* note 162; *Committee on Public Safety*, N.Y.C. COUNCIL, <http://legistar.council.nyc.gov/DepartmentDetail.aspx?ID=6913&GUID=BCE87221-FD8F-40B5-94D4-66C5F4F643E7> (last visited Aug. 8, 2013); *Committee on Public Safety*, PHILA. CITY COUNCIL, <http://philadelphiacitycouncil.net/standing-committees/committee-on-public-safety> (last visited Aug. 8, 2013).

<sup>181</sup> If anything, this concern underscores the need for independent inspectors general and civilian oversight boards to support and supplement local legislative intelligence oversight efforts.

<sup>182</sup> See *supra* notes 103, 113–14, 123–27 and accompanying text (describing how political will affects federal intelligence oversight).

<sup>183</sup> For example, in New York City, where oversight is most needed, the Mayor opposes efforts to increase intelligence oversight. See Sally Goldenberg, *Mike Hits NYPD Eye*, N.Y. POST (June 14, 2012), [http://www.nypost.com/p/news/local/mike\\_hits\\_nypd\\_eye\\_ZhrNkFRkPY5blXk9k8l2nI](http://www.nypost.com/p/news/local/mike_hits_nypd_eye_ZhrNkFRkPY5blXk9k8l2nI) (reporting on Mayor Bloomberg's rejection of proposals to increase oversight of the NYPD). And although the City Council recently passed a bill establishing an inspector general for the NYPD, Mayor Bloomberg insists that he will ultimately veto the legislation. See Erin Durkin, *Update: Defying Mayor Bloomberg, NYC Council Majorities Back NYPD Oversight Bills*, N.Y. DAILY NEWS DAILY POLITICS (JUNE 27, 2013,

## CONCLUSION

There is a pressing need for enhanced intelligence oversight at the local level. Over the past decade, local LEAs in major metropolitan areas have become increasingly involved in counterterrorism and intelligence activities. Unfortunately, this development has not yet spurred a comparable increase in intelligence oversight. The nature of the terrorist threat and the inherent strengths of local LEAs suggest that they are not getting out of this business any time soon. As such, intelligence oversight reform is all the more important. The absence of formal intelligence oversight opens the door to rights abuses, diminishes public trust, and threatens security as ineffective policies and practices persist.

However, the question of whether local actors are up to the oversight task has, until this point, gone largely unanswered. By turning to federal intelligence oversight institutions and mechanisms for guidance, this Note has sought to provide a response. For all of its shortcomings, the federal intelligence oversight apparatus nonetheless represents a model for evaluating both the potential structure of and capacity for local intelligence oversight. Taken together, the federal intelligence oversight institutions and mechanisms, in theory, advance all of the core intelligence oversight objectives. And, as has been shown, there is nothing special about these mechanisms that render them unsuitable for the local arena. Accordingly, local actors would be wise to draw upon these mechanisms in crafting their own oversight apparatus.

This Note has also highlighted that, in practice, federal intelligence overseers have encountered key obstacles. There is reason to think, though, that these challenges would be of a similar or lesser degree at the local level—suggesting that, in some ways, local actors may actually be better positioned to offer effective intelligence oversight. Even so, local intelligence oversight faces its own hurdles. Cost, manpower, and political will are all potential roadblocks to bolstering local intelligence oversight. But these hurdles are by no means insurmountable. Particularly in cities where local LEAs are most engaged in intelligence and counterterrorism activities, local actors ought to rise to the task, recognize that intelligence oversight is not beyond their reach, and craft an intelligence oversight structure on par with that which we demand at the federal level.

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2:43 AM), <http://www.nydailynews.com/blogs/dailypolitics/2013/06/city-council-passes-inspector-general-and-racial-profiling-bills-with-veto-pro>.