Strengthening Intelligence Through Administrative Law

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Date : April 4, 2011

Samuel J. Rascoff, *Domesticating Intelligence*, 83 **S. Cal. L. Rev.** 575 (2010).

Having taught some version of "separation of powers law" since 1982, I think I can say with some certainty that few problems of democratic accountability are more vexing than the general subject of "intelligence oversight." For half a century, scandal after scandal has exposed an intelligence apparatus that is too often unreliable and susceptible to gross abuse.

Against this background, one might be forgiven a certain amount of pessimism for the future of reform. But it is not as if we are lacking for ideas. Samuel Rascoff's article, *Domesticating Intelligence*, 83 S. Cal. L. Rev. 575 (2010), takes an especially thoughtful and creative approach with regard to domestic intelligence gathering, basically urging the application of familiar administrative law principles to achieve both "full compliance with the law, but also intelligence that is accurate, efficient, and useful to policymakers." Professor Rascoff's core argument is that "an expansive approach to cost-benefit analysis that [he refers] to as rationality review, judicial review, and public participation made possible by increased transparency ought to play significant roles in reconfiguring the governance of domestic intelligence." Taking administrative law into this unaccustomed domain is an important scholarly contribution.

Professor Rascoff's article begins by showing how the structures currently in place for preventing intelligence abuse are poorly positioned to do so, and how intelligence gathering operates with little prospect for either judicial review or meaningful day-to-day operational oversight. But, in a move that ought to be taken as a significant conceptual breakthrough, Professor Rascoff argues that the business of intelligence oversight has also been afflicted by a critical conceptual misdirection. That is, intelligence gathering has been thought of as something akin to criminal law enforcement, and reform efforts have focused on "on the prevention of illegality and the politicization of" the process. What Professor Rascoff urges is that domestic intelligence gathering be viewed as a form of quintessential administrative activity – namely, risk assessment – and that a governance regime ought to be developed for this administrative activity that aims not just to prevent abuse, but actually to produce good administration, i.e., good intelligence.

Insofar as Professor Rascoff's governance regime relies on processes internal to the intelligence community, there is a real kinship between his approach and the "bureaucratic justice" framework within which Professor Mashaw urged us in the 1980s to understand and reform the activity of social security adjudication. Having myself deployed the Mashaw framework in recommending reforms for one familiar aspect of domestic intelligence – namely, the use of antiterrorist watch lists – I can only applaud Professor Rascoff's essential insight (beautifully captured in his title). That is, we may not need to create exotic approaches to intelligence reform if we understand intelligence as part and parcel of the administrative state and apply, to its governance, carefully tailored tools of the sort we use to maintain the legality and effectiveness of other administrative activity.

Although it is impossible in a few words to do justice to Professor Rascoff's multifaceted argument, I can highlight the core of his approach to each of the three key tools he recommends. First, he would have the Office of the Director of National Intelligence subject programs of domestic surveillance to a kind of

rigorous cost-benefit analysis he calls "rationality review." According to Professor Rascoff, "[R]ationality review would help promote more accurate and cost-effective intelligence. Second, and somewhat more controversially, … rationality review may actually prove to be a more effective tool for the protection of basic rights than the current governance regime. Third, … rationality review will help supply the methodological foundations of a centralized regulatory review process in the intelligence sphere akin to the role that OIRA has come to play in the regulatory state."

Second, he would have internal rationality review policed by the courts: "At some regular interval after an agency has implemented a particular intelligence program (following successful rationality review), a court should review the agency's program for fidelity to the agency's own stated (and previously approved) objectives. In focusing on how the agency has implemented the intelligence program in practice, a court could determine whether, in view of empirical evidence, the actual costs and benefits of the program are roughly in line with those that were anticipated prior to the program's implementation. Even more basically, the court could determine whether the agency was remaining true to the stated goals and limitations of the program's mandate."

Third, he would subject the regulation of intelligence gathering to some form of increased public input. Professor Rascoff mentions both the interest group vetting of the 2008 Attorney General's Guidelines for Domestic FBI Operations and the prospect of external expert peer review of intelligence as suggesting possible directions. The core idea would be to subject the regulation of intelligence to something like the kind of pluralistic evaluation that is made possible in principle by the requirement of a public comment period for most agency regulations.

Serious questions obviously loom about all of this. I have previously been critical of what I think may already be our overreliance on cost-benefit analysis in more conventional contexts. Although Professor Rascoff offers many useful insights into how it might be designed in the intelligence context, his framework does not purport to offer a completely clear blueprint. Likewise, with regard to public input, the endorsement in principle falls short of a precise operational prescription. His discussion of judicial review does not address questions of standing and whether review of the kind he recommends is consistent with the role of Article III courts. And then, looming over all these recommendations is the obvious question: would they actually make a difference in improving agency performance and reducing actual abuse?

Nonetheless, Professor Rascoff's article frames beautifully what ought to be a productive new discussion about the future of intelligence governance. Agency efficacy, accountability and fidelity to law are foundational themes in administrative law. Deploying administrative law insights to help strengthen intelligence gathering and keep it within legal confines is a compelling project that Professor Rascoff has launched with real – I have to say it – intelligence.

Cite as: Peter Shane, *Strengthening Intelligence Through Administrative Law*, JOTWELL (April 4, 2011) (reviewing Samuel J. Rascoff, *Domesticating Intelligence*, 83 **S. Cal. L. Rev.** 575 (2010)), https://adlaw.jotwell.com/strengthening-intelligence-through-administrative-law/.