

TOWARDS A DEMOCRATIC CONTROL OF ARGENTINA'S INTELLIGENCE COMMUNITY

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INTRODUCTION

The accountability of the executive branch to Congress is a fundamental principle in a democracy. Yet, in Argentina, the security and intelligence services remain today entirely exempt from this principle. In fact, there is no law regulating the powers or providing for accountability and control over the activities of the intelligence agencies.

For Argentina, the consolidation of democracy is still the main political challenge in the twenty-first century. And within this overdue task, one of the most problematic issues is the control of the intelligence apparatus. It is problematic not only because of its historical relationship with the military dictatorship, but also because it is a complicated issue in the most well established democracies.

The principal dilemma lies on the complicated balance between the evident need to maintain a proper level of intelligence capability to serve the agencies ends, which inevitably requires some discretion, and the level of control and oversight demanded to all governmental agencies in a democratic society.

The fact is that, compared to other institutions, intelligence agencies do pose specific difficulties when it comes to providing accountability. Intelligence agencies provide unique information for the protection of national interests both internally and abroad. To achieve these goals, they need not only an adequate capacity to collect information through non-conventional means, but also to maintain their activities in secrecy without the fear of disclosing their intentions to their targets.

As a result, intelligence agencies cannot be subjected to the same rigors of public or congressional debate or the same scrutiny by the media as other government agencies. In other words, their budgets, operations, and assessments should remain under a certain degree of secrecy and the disclosure of information should not nullify the special ends the intelligence services are designed to serve.

Intelligence agencies, however, are institutions within a democratic form of government, responsible not only to the President, but to the elected representatives of the people, and, ultimately, to the people themselves. The role of intelligence in a democratic society is too important to be left without any scrutiny or regulation.

Moreover, the intelligence agencies are vested with a wide array of powerfully intrusive mechanisms to investigate and collect information on citizens and organizations. These investigative techniques are subjected to tight judicial scrutiny when used by police force or other agencies. Yet, today, secret services in Argentina have no external oversight over their use, which remains totally discretionary and often bypasses constitutional protections on individual rights. After so many years of military governments and secrecy, of misuse of resources and abuse of power, today Argentina's consolidating democracy demands an appropriate degree of oversight of the intelligence activities.

This paper examines general issues of democratic control of the intelligence apparatus, and analyzes the intelligence community and oversight mechanisms in Argentina from an analytical and historical perspective. Rather than presenting an exhaustive legal assessment, my aim is to survey and scrutinize the current state of affairs in the intelligence community, taking into account their respective composition, evolution, and projected reforms.

The paper is divided into three parts. Part I examines general issues of parliamentary and judicial control, reviewing the experience of some older democracies. Part II presents an outline of the intelligence community in Argentina, and, whenever necessary, briefly

explaining the influence of the respective military dictatorships in this area. Part III will analyze the different controlling mechanisms.

PART I

ACCOUNTABILITY AND OVERSIGHT OF THE INTELLIGENCE COMMUNITY

I. DEMOCRATIC CONTROL OF INTELLIGENCE

All nations necessarily engage in intelligence activities. Intelligence is an important element within a State to preserve its strength and integrity both from its enemies and from new threats. Instead of negating its existence, democratic countries should develop oversight mechanisms to ensure a democratic control over the intelligence community. This is a very complex issue, and while the challenge is especially severe in new democracies, it is also a challenge in most democracies, requiring constant attention and adjustment.

The inherent dilemma is between democracy, which requires accountability, and intelligence, which requires secrecy. The dilemma can be reduced to the following question: How much secrecy is necessary to preserve the efficiency of intelligence? The most well established democracies are still struggling to find the correct answer to this question.

Most European countries and the United States have developed in the last thirty years different types of oversight mechanisms with more or less success.¹ Questions of secrecy

¹ See, e.g., Steven Aftergood, *Secrecy and Accountability in U.S. Intelligence*, Center for International Policy, Seminar on Intelligence Reform, October 9, 1996; Shlomo Shpiro, *Parliamentary and Administrative Reforms in the Control of Intelligence Services in the European Union*, 4 Colum.J.Eur.L. 545 (1998); Britt Snider, *Sharing Secrets With Lawmakers. Congress as a User of Intelligence*, Washington DC: Central Intelligence Agency, Center for the Study of Intelligence, CSI 97-10001, February 1997;

and accountability have figured significantly in the controversies involving intelligence agencies in the last years. However, the measures taken by these countries are important steps towards a more accountable intelligence system.

No matter the conflicts involved in such a system, it is a necessary and fundamental step in all those countries that have suffered the type of well-documented abuses that Argentina has suffered from its intelligence community.

The following section will examine the general issues of parliamentary, administrative and judicial control over intelligence, taking a look at other countries' institutions, experiences and practices.

II. DIFFERENT TYPES OF CONTROL

A common mechanism of control is the separation of the intelligence community into different agencies. Although this might reduce effectiveness, it eliminates the dangers of domination and monopoly by a single agency. The separation must be accompanied by a clear delimitation of responsibilities by each agency, trying not to overlap functions in a single one. A common way to do this is by dividing the faculties and jurisdiction into external and internal conflicts. In this sense, it is wise to exclude the military from interfering in domestic affairs, and limit its authority to foreign conflicts.

Of course, the separation into different agencies is not enough. A second mechanism is to have oversight bodies controlling intelligence activities. Although it is important that agencies have internal mechanisms of control, it is very dangerous to exclusively leave the oversight to them. In this sense, there are mainly two types of external control over intelligence, judicial and legislative. Both internal and external controls are necessary to ensure an effective oversight mechanism. In fact, each one of these types of control has

Glenn Hastedt, *Controlling Intelligence*, London: Frank Cass (1991); William Jackson, Jr., *Congressional Oversight of Intelligence: Search for a Framework*, *Intelligence and National Security* 5, no. 3 (1990).

its own limitations and deficiencies. Thus, the existence of both external and internal oversight mechanisms enables a complementary functioning of the oversight mechanisms.

It is important to note that the sole existence of these mechanisms does not guarantee a real degree of oversight unless there is public interest in it and government willingness to abide by it. In fact, if there is public apathy regarding the issue of intelligence, or if the intelligence services enjoy such a large degree of public support that they might become almost untouchable, little in the way of effective control can be achieved. Public opinion, and therefore the media, acts as an outside control element supporting the controlling bodies in controversial actions or limitations.²

Something similar can be said about the government willingness to cooperate with the oversight mechanisms. Due to the inherent secrecy of intelligence, the controlling bodies are often dependent on the readiness of the government to provide complete information about the activities of the intelligence community. In fact, the oversight mechanism, especially the judiciary and congressional commissions, are therefore futile if the government is not willing to cooperate with them.

1. PARLIAMENTARY CONTROLS:

In order for the parliament to exercise effective limitations on the activities over the intelligence services, two prerequisites must be established. In first place, specific and clear legislation must be enacted defining the type, power, authority, and procedure of the controlling body/bodies. Second, once legislation establishes a form of congressional control, it is up to the Congress itself to establish the controlling mechanism for actively exercising the task. This encompasses setting the regulations to govern the election of members, quorum, and other procedural issues not covered by the legislation. It also

² Shpiro, *Parliamentary and Administrative Reforms in the Control of Intelligence Services in the European Union*, id. at 549.

encompasses the allocation of resources, support staff, budgets, and other technical facilities to enable the controlling bodies to perform their assigned function effectively.³

Regarding the nature of control that Congress can perform, there are usually two different perspectives. One sees Congress as an advocate of the intelligence function. The type of control exercised is called Institutional Control and is based on a cooperative relationship between the Executive and Legislative branches. The main purpose of control is oriented to enhance the efficiency of intelligence, avoiding jurisdictional conflicts and operational differences. Although improving efficiency is an important task, the risk of such control is that it can evolve into a mere appendage of the intelligence agencies, turning itself into a “rubber stump” of the intelligence activities.

A second type of control sees Congress as an adversary of the intelligence community and is called Investigative Control. It is based on an adversarial relationship between both branches of government. Congressional mechanisms are meant to investigate known or suspected irregularities, uncover problems, and reveal abuses and mistakes. The main purpose of this type of control is to promote the checks and balances nature of the congressional-executive relationship. However, an inevitable amount of hostility and friction are inherent in Investigative Control. Adversity can be very problematic because, as mentioned before, ensuring an effective congressional oversight depends to some extent on the willingness of the intelligence agencies to submit to such control.

On the other hand, this type of relationship can encourage Congressional willingness to directly intervene in the President’s decision-making process concerning the conduct of foreign relationships. Some think that aggressive congressional control has become the “cat’s paw” of congressional ambitions to reduce executive powers.⁴

According to the Permanent Select Committee on Intelligence of the House of Representatives, “oversight, if carried out properly, should be a combination of these two

³ Id.

⁴ Daniel B. Silver, *The Uses and Misuses of Intelligence Oversight*, 11 Hous. J. Int’l L. 7, 12 (1988).

roles. An excessive concentration on either will damage the ability of the committee to handle its issues effectively and can undermine the credibility of that committee among its colleagues.”⁵

Regarding the type and composition of the oversight mechanism, a decision has to be made on whether there should be only one body or more, its composition, election of its members, and tenure. Two different models of parliamentary control can be seen in the United States and in Great Britain. The system in the U.S. is multilateral, with several bodies operating side by side, whereas in Britain it is unilateral.

In the United States, the two houses of Congress have independent oversight committees, the Select Committee of Intelligence in the Senate and the Permanent Select Committee on Intelligence in the House of Representatives⁶. Besides the Executive Branch, both committees provide the only routine oversight of intelligence activities. The committees have subpoena power and can authorize appropriations for intelligence activities. Besides, the President of the country is obligated by law to ensure “that the intelligence committees are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity.”⁷ In addition, the President “shall ensure that any illegal intelligence activity is reported promptly to the intelligence committees, as well as any corrective action that has been taken or is planned in connection with such illegal activity.”⁸

Further, the Director of Central Intelligence “shall keep the intelligence committees fully and currently informed of all covert actions which are the responsibility of, are engaged

⁵ Staff Study, *IC21: Intelligence Community in the 21st. Century*, US House of Representative, Permanent Select Committee on Intelligence, March 1996.

⁶ The Senate Select Committee on Intelligence was established by S. Res. 400, 94th Cong., 2nd. Sess., 122 CONG. REC. 4754 (1976). The resolution directed the committee to "oversee and make continuing studies of the intelligence activities and programs of the United States Government, and to submit to the Senate appropriate proposals for legislation concerning such intelligence activities and programs." *Id.* at § 1. The House of Representative’s Permanent Select Committee on Intelligence was established by H.R. Res. 658, 95th Cong., 1st. Sess., 123 CONG. REC. 22,932 (1977). The resolution set forth the duties of the Committee in nearly identical terms as those contained in Senate Resolution 400.

⁷ 50 U.S.C.A. § 413 (a) (1).

⁸ 50 U.S.C.A. § 413 (b).

in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, including significant failures;”⁹ and must furnish any information or material concerning covert actions “requested by either of the intelligence committees in order to carry out its authorized responsibilities.”¹⁰

In general, only the identity of sources and the details of technical operations are withheld from the intelligence committees in connection with their oversight responsibilities.¹¹ The Director’s reporting requirements are subject to two exceptions. First, 50 U.S.C. § 413 provides that his reporting shall be “consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods.”¹² The section on covert action reporting specifically allows notice to be limited if “the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States.”¹³ This provision addresses executive branch concerns that some intelligence information is too sensitive to share with all of the members of the two committees.

When confronted with the opinion that security would be further improved if the two oversight committees were combined into a single joint committee, the Commission of the Roles and Capabilities of the United States Intelligence Community stated the following:

[T]he Commission considered this idea but is not prepared to recommend it. Creating a single joint committee would not substantially reduce the number in Congress needing access to information, but would reduce the degree of oversight. It would also eliminate the checks and balances inherent in having committees in each body separately consider intelligence funding. A joint committee would no longer handle nominations received by the Senate.

⁹ 50 U.S.C.A. § 413b (b) (1).

¹⁰ Id. § 413b (b) (2).

¹¹ L. Britt Snider, *Remarks of L. Britt Snider*, 11 HOUS. J. INT’L L. 47, 49 (1988).

¹² 50 U.S.C. § 413 (1988). The Act explicitly states that this provision “shall [not] be construed as authority to withhold information from the intelligence committees on the grounds that providing the information . . . would constitute the unauthorized disclosure of classified information or information relating to intelligence sources or methods.” Id. § 413(e).

¹³ Id. § 413. In such circumstances, the President may restrict notification to the “the chairmen and ranking minority members of the intelligence committees, the Speaker and the minority leader of the House of Representatives, and the majority and minority leaders of the Senate.” Id.

Having separate committees has worked. The case for altering this arrangement has not been made.¹⁴

The Permanent Select Committee on Intelligence of the House of Representatives reached a similar conclusion. In a report released in June 1996, the Committee concluded that:

[T]here is no compelling reason to convert the current system to a joint committee. Congress's record regarding safeguarding highly classified information is not perfect, but does not warrant this step. Creating a joint committee would also require either the House or the Senate to alter its current arrangements for intelligence oversight, which has not had significant support in the past. Finally, and most importantly, creating a joint committee for intelligence would continue to heighten the view that intelligence is something other than an accepted function of government, which ends to increase rather than complement oversight issues and problems.¹⁵

Comparatively, in Great Britain a single parliamentary body, the Intelligence and Security Committee, carries out the controlling functions. The 1994 Intelligence Services Act established the committee.¹⁶ It comprises nine Members of Parliament who are Members either of the House of Commons or the House of Lords, but who may not hold a ministerial position. Five of the Members belong to the party in government. However, members are not elected by the Parliament but are appointed by the Prime Minister, after consultation with the Leader of the Opposition.¹⁷ The Intelligence and Security Committee holds regular weekly meetings while Parliament is in session to discuss issues pertaining to the work of the three intelligence services.

The Committee examines the following principal issues: the role, function and management of the services; their tasking and targets; their financial matters, staffing and structure; and the issue of parliamentary controls. It also examines the effectiveness of

¹⁴ Commission of the Roles and Capabilities of the U.S. Intelligence Community, *Preparing for the 21st. Century. An Appraisal of U.S. Intelligence*, 143 (1996). The document can be found in www.access.gpo.gov/intelligence/int/report.html

¹⁵ Staff Study, *IC21: Intelligence Community in the 21st. Century*, US House of Representative, Permanent Select Committee on Intelligence, supra note 5.

¹⁶ Intelligence Services Act, 1994, Chapter 13.

¹⁷ Id.

intelligence work by taking evidence from government departments that are “consumers” of intelligence information, thus viewing the work of the intelligence services from the perspective of those who use the information in the course of ordinary government work.¹⁸

However, the Intelligence Services Act does not make explicit the Committee's right to examine documents or question intelligence officers. The powers to obtain evidence are set out in Schedule 3 to the 1994 Act. In essence, they provide that the heads of the agencies shall disclose to the Committee any information requested unless the relevant Secretary of State forbids its disclosure or the information is both “sensitive” and unsafe to disclose.¹⁹ Information defined as sensitive can, therefore, be withheld from the Committee if the information may lead to the identification of sources, of operational information on any past, present, or future operations, or of information provided by any third country.²⁰ Additionally, the government does not have an obligation to disclose information to the Committee that was not asked for and the Committee has no express power to obtain information from anyone other than the heads of the Agencies.

The report released in 1999 by the Select Committee on Home Affairs,²¹ analyzed the performance of the Intelligence and Security Committee and the possible reforms it should be subjected to, and concluded that:

[W]e conclude that the present statutory arrangements for oversight of the intelligence and security agencies by the Intelligence and Security Committee should be replaced by a parliamentary select committee or committees. The

¹⁸ Shpiro, *Parliamentary and Administrative Reforms in the Control of Intelligence Services in the European Union*, supra note 1, at 566.

¹⁹ Supra note 9, at Chapter 13, Schedule 3, § 3 (1).

²⁰ Id., at Chapter 13, Schedule 3, § 4.

²¹ Select Committee on Home Affairs, *Accountability of the Intelligence Services*, Third Report. The report was ordered by the House of Commons to be printed 14 June 1999. The Home Affairs Committee is appointed under Standing Order No. 152 to examine the expenditure, administration and policy of the Home Office and associated public bodies; the policy, administration and expenditure of the Lord Chancellor's Department (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments); and the administration and expenditure of the Attorney-General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

new system would draw heavily on the achievement of the Intelligence and Security Committee, and in some detailed areas adaptations might be needed to present select committee practice, but the key feature must be that the scrutiny committee should be more clearly seen to be independent of the executive.

Both models have positive and negative aspects. A particularly interesting aspect that is common to both countries is the constant analysis and scrutiny of the performance of their controlling bodies. Two conclusions can be drawn from the experience of the U.S. and Britain. In first place, I think it is fair to say that the most effective parliamentary oversight of intelligence activities is still an unsettled issue in the most advanced democracies. The complexity and secrecy of intelligence makes it rather difficult for the congressional committees to effectively perform their tasks in a proactive way. Having controlling bodies by itself does not necessarily imply a strengthening of accountability over secrecy. There is still a long way to go in this area.

The second conclusion is that consideration of any particular model will have to include review of the particular circumstances of each country's political culture, security needs, historic experience, military –civil relationships, and political party rivalry. Ultimately, whatever the model chosen, it will eventually be affected and will adapt itself to the demands of both the national and international arenas.

2. JUDICIAL CONTROLS

Special judicial oversight over intelligence activities can be established in two different ways. First, laws should provide for the punishment of illegal intelligence activities. With minimal specific exceptions, Criminal statutes should be applicable to intelligence activities, punishing activities such as illegal seizures of communications or property or unlawful espionage of citizens. Thus, a principal step is to establish clear legal guidelines to govern intelligence activities and punish their violation.

Specials procedures can be designed to protect the handling of classified information by the courts. One such example is the United States' Classified Information Procedures Act,²² passed in 1980 to avoid an ad hoc treatment of sensitive issues by the courts and to establish detailed procedures for handling such information in criminal trials.²³

Under the Act, classified information can be reviewed under the regular criminal procedures for discovery and admissibility of evidence before the information is publicly disclosed. Judges are allowed to determine issues presented to them both *in camera* (non-publicly, in chambers) and *ex parte* (presented by only one side, without the presence of the other party). The defendant is allowed to discover classified information and to offer it as evidence to the extent it is necessary to a fair trial and allowed by normal criminal procedures. On the other hand, the government is allowed to minimize the classified information at risk of public disclosure by offering unclassified summaries or substitutions for the sensitive materials. Judges are called upon to balance the need of the government to protect intelligence information and the right of a defendant to a fair trial in order to preserve constitutional due process guarantees.

A second mechanism of judicial oversight is characterized by the establishment of a special tribunal to scrutinize, in a secure forum, intelligence activities in areas involving surveillance and interception of communications. A remarkable example is Germany's G-10 Law, enacted in 1968.²⁴ The law regulates the interception of post and communications by the intelligence services, without infringing any of the Basic Law's guaranteed freedoms. It established two bodies, the G-10 Gremium and the G-10 Kommission, to control intelligence activities in this field.

The G-10 Gremium meets every six months to examine the general regulations regarding G-10 activities, like the interception of different forms of communication. However, the Gremium is not normally informed of individual cases where such methods are used as

²² Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980); Codified as amended at 18 U.S.C. App. §§1-15 (1988).

²³ Frederic F. Manget, *Another System of Oversight: Intelligence and the Rise of Judicial Intervention*, Studies on Intelligence, Volume 39, No. 5 (1996).

²⁴ G-10 Gesetz, v. 15.8.1968, (BGBl. I S. 728).

part of an investigation or for the procurement of intelligence, but only on the overall guidelines that prevail at the time, and makes the political and strategic decisions regarding the type of operation that might use surveillance.

The G-10 Kommission meets once a month and is informed of individual G-10 operations, examining the legality of each case, and has the right to suspend a case if it believes the actions violate any law or regulation, or when it considers the evidence offered in a specific case too weak to warrant particular measures.²⁵ The main purpose of the Kommission is to compensate for the lack of proper judiciary controls over G-10 operations.

A different example can be seen in the U.S. Foreign Intelligence Surveillance Act²⁶ which establishes a special court to review in secret the applications filed by intelligence services to conduct electronic surveillance within the United States for foreign intelligence purpose. Applications are heard and either granted or denied by a special court composed of seven federal district court judges designated by the Chief Justice of the United States Supreme Court. The law also provides for a court of review to hear appeals of denials of applications. The Intelligence Authorization Act for Fiscal Year 1995 expanded the procedures to physical searches.

3. ADMINISTRATIVE CONTROLS:

Some believe that no external control possible can guarantee against misconduct within the intelligence system that is motivated by protecting the national security, regardless of how far-reaching the requirements of law may become. “It is equally unlikely that mere statutory enactments, even if coupled with a vast expansion of the resources external to the intelligence agencies devoted to detecting potential misconduct, will by themselves deter individuals within the intelligence agencies from pursuing courses that they

²⁵ G-10 Gesetz, v. 15.8.1968, (BGBl. I S. 728) § IX, 2.

²⁶ Foreign Intelligence Surveillance Act, Pub. L. No. 89-554, § 552, 80 Stat. 383 (1966); codified at 50 U.S.C. §§ 1801-1811 (1982).

consider to be in the national interest but which run counter to externally-imposed rules.”²⁷

The inherent difficulties that accompany the oversight of activities that, by definition, are considered secret, and the fact that external controls are many times left to the good will of the intelligence community, make the oversight bodies within the executive branch the principal mechanisms of effective control. In other words, internal controls have the potential to be the most effective inhibitors of misconducts within the intelligence services. The possibility to access first-hand information and the trust and confidence agents have in internal units, as they see them as part of the community, enables a more complete oversight. In fact, this is the most important level at which oversight should occur.

However, Internal oversight mechanisms have always the pitfall of becoming non-independent bodies or “rubber-stamps” of the activities conducted by the intelligence agencies. Generally, the public image of these bodies fails to inspire confidence as strong independent oversight organisms within the administration.

Thus, to be effective, this type of control has to reunite three important characteristics. First, independence of these units from the rest of the community is essential and very difficult to achieve. The units must have the institutional structure and support to operate freely and with authority. The heads of the internal control units have to be strong-minded and conceive of the office in a broader role than merely serving as legal counsels to the agencies.²⁸ It is not rare to members of the controlling units finding ways to legally justify misconducts instead of reprehending them.

Second, it is important to generate within the agencies a law-abiding culture. The head of the agency must show respect for the law and give importance and recognition to the internal units. This can be achieved by actively involving them in the planning stages of

²⁷ Silver, *The Uses and Misuses of Intelligence Oversight*, supra note 4, at 13

²⁸ Id.

significant operations, in decisions relating to the interpretation of legal requirements, and generally in all decisions raising sensitive issues.

In third place, internal control, as any type of control, has to achieve the appropriate balance between on one hand, being seen by the intelligence community as an impossible hurdle and, on the other hand, not falling into excessive complacency with its members. It is essential that the units carry out a role that is perceived as useful within the community. Thus, lawyers and inspectors must earn the trust and respect of their coworkers without losing the ability to be objective. “This is a difficult, but not impossible task.”²⁹

Administrative control can be established in many forms and they generally comprehend more than one body. In the United States there are several organisms that perform this function. Among others they include: the Offices of General Counsel and Inspector General³⁰ within the intelligence agencies; the Office of Intelligence Policy within the Department of Justice;³¹ the President’s Intelligence Oversight Board;³² and the system of internal regulations established under the President’s Executive Order on Intelligence and administered through implementing regulations of the intelligence agencies.³³

²⁹ Id.

³⁰ Each element of the U.S. intelligence community falls within the supervision of an Inspector General, who carries out inspections, investigations, and audits of the intelligence activities under his supervision. The Central Intelligence Agency is the only agency that its Inspector General is presidentially appointed and Senate- confirmed and who is required by law to make reports to the oversight committees in Congress. The other inspector generals are appointed by the head of the agency where they perform this task.

³¹ Under the President’s Executive Order on Intelligence, the Attorney General is required to be involved in the review of various aspects of intelligence, especially concerning the implementation by the agencies of the provisions of the E.O. intended to protect civil liberties. Within the Department of Justice the Office of Intelligence Policy assists the Attorney General in carrying out this review function.

³² Exec. Order No. 12.334, 46 Fed. Reg. 59.955 (1981). Currently, the Intelligence Oversight Board is constituted as a standing committee composed of four presidentially elected part-time members. The Board reviews activities of, and receives reports from the Inspector Generals and other oversight offices. Periodically, it reviews covert action programs and conducts inquiries regarding possible violations of law or Presidential directives upon direction of the President, the request of the Director of Central Intelligence, or upon its own motion. It reports to the President and refers apparent violations of law to the Attorney General.

³³ Exec. Order N0. 12.333, 46 Fed. Reg. 59.441 (1981). Executive Order 12.333 is the most recent of a series of executive orders governing U.S. intelligence activities. It set forth the duties and responsibilities of intelligence agencies and places numerous specific restrictions on their activities. Previous orders have been issued by President Carter in 1978 (E.O. 12.036) and by President Ford in 1975 (E.O. 11.905).

PART 2

ARGENTINA: THE STRUCTURE OF THE INTELLIGENCE COMMUNITY

HISTORICAL BACKGROUND

Argentina's intelligence community today must be understood within an historical context that includes a recent experience with state terrorism, in which the military-intelligence forces were the principal practitioners of state terror.³⁴ During the years of dictatorship, the main role of the Armed Forces in Argentina shifted from defending the country from external aggressions to defending it from its internal enemies. The Military justified the coup d'état as necessary to stop communism, restore public order and security, and rescue the economy. A paradigm of these years is the National Security Doctrine,³⁵ which defined the primary goal of the military: to defeat the internal enemy, who had infiltrated everywhere.

During the military dictatorship, the intelligence apparatus was closely linked to the authoritarian regimes. In fact, the military government relied on the intelligence agencies to maintain power and control the opposition, committing all types of well-known human rights violation to achieve this. Like in most of the areas of government, the intelligence community was monopolized by and subordinated to the military excluding any possibility of civilian participation. The military imposed their own rules, structure, discipline, and methods of operation, converting the intelligence apparatus into the most feared institution within government.

³⁴ In 1975 a military junta seized power overthrowing Isabel Peron's presidency. It immediately suspended the constitution, dissolved Congress, imposed strict censorship, and banned all political parties. In addition, it embarked on a campaign of terror against leftist elements in the country. Thousands of leftist opposition supporters were persecuted, illegally imprisoned, tortured and executed without trial. Many of them disappeared and were never again seen by their families. The military dictatorship lasted until 1983, when democratic elections designed Raul Alfonsín (UCR) as President of the country.

³⁵ For a description of the National Security Doctrine in Argentina, see generally J. Patrice McSherry, *National Security and Social Crisis in Argentina*, *Journal of Third World Studies*, Vo. 17, No. 1, 21-43, (2000).

Likewise, the intelligence apparatus grew in size and power, becoming somewhat autonomous even within the regimes. They became the repressive machinery of the dictatorships, keeping secret detention centers where “dissidents” were tortured, assassinated, and later disappeared leaving no trace what-so-ever.

With the return to democracy many steps were taken to dismantle the authoritarian legacy and the issue of the power and autonomy of the intelligence agencies came into public debate. The considerable autonomy it had from constitutional controls, either legislative or judicial, began to be questioned and gradually began to be reversed.

As soon as the civilian government assumed power, the members of the military Juntas were tried and convicted for the atrocities they committed during the years of dictatorship. However, lower ranks were granted immunity after the enactment by Congress of two laws: “Punto Final” (Final Point) and “Obediencia de Vida” (Justification Defense). Some other initiatives included the appointment of a civilian as head of the State Intelligence Agency and the functional delimitation of the different components of the intelligence community by the National Defense Law³⁶ and the Internal Security Law.³⁷

No matter the steps taken to consolidate democracy, intelligence is still a traumatic concept in Argentina to such an extent that some critiques would like the agencies to disappear.³⁸ In fact, many sectors began a campaign to promote the elimination of the intelligence community. Questions began to be raised over the efficiency, economy, and actual need for intelligence services.³⁹ The end of the Cold War meant that the militaries in these countries were left without a clearly defined enemy, the role formerly played by

³⁶ Law No. 23.554 -National Defense Law-, National Congress, April 13, 1988

³⁷ Law No. 24.059 -Internal Security Law-, National Congress, December 18, 1991.

³⁸ Sergio Moreno, *Soñar con un Mundo sin SIDE*, Pagina 12, November 9, 1999.

³⁹ In the U.S, this discussion led to the formation of several commissions within the National Congress to study the functions of the intelligence community and the need for its actual existence. Among others, these reports were produced by the commissions: *Staff Study, IC21: Intelligence Community in the 21st. Century*, US House of Representative, Permanent Select Committee on Intelligence (1996); *Preparing for the 21st. Century: An Appraisal of U.S. Intelligence*, Commission on the Roles and Capabilities of the US Intelligence Community (1996).

the war against communist subversion.⁴⁰ However, a new paradigm soon emerged finding new threats and functions for the intelligence community. Communism was replaced by stateless threats like narco-traffic and terrorism.

Nevertheless, the critiques were not fruitless. Soon the debate brought to light the idea that the intelligence community, as part of a democratic state, should be submitted to some kind of control and accountability. And the debate shifted from its existence to the need for mechanisms of control to regulate the activities of the intelligence services in order to prevent them from interfering in internal politics, carrying out illegal activities, or acting against the interests of the state.

In 1988, the National Defense Law commanded Congress to enact a law regulating the activities of the intelligence community as a whole,⁴¹ and established that “until the pertinent law is enacted, the intelligence agencies shall have the mission, structure, and functions determined by the Executive Branch.”⁴² This law has not yet been enacted and the intelligence services are still regulated by Presidential regulations. The vast majority of these regulations are contained in secret laws that remain unknown not only to the population, but also to politicians, members of Congress, and the judiciary. These laws define and regulate the functioning, organization, mission, faculties, composition and personnel of the intelligence agencies.⁴³

In 1992, the Internal Security Law created a Congressional Oversight Commission. However, until today Argentina is still waiting for the enactment of a law that would regulate the congressional commission’s powers and turn it into an efficient body. Nowadays, Congress is debating more than ten legislative proposals related to these matters and to others such as the penalization of illegal wiretapping.

⁴⁰ McSherry, *National Security and Social Crisis in Argentina*, supra note 35, at 4.

⁴¹ Art. 46 (e), National Defense Law.

⁴² Art. 47, National Defense Law.

⁴³ Among others, Secret Law No. 19.373 and Secret Law No. 20.195, both regulating the activities of the SIDE (State Intelligence Agency).

The enactment of these laws is seen as a necessary and over-due step towards exercising an effective control over the Executive Branch's intelligence activities. This lack of constitutional controls, coupled with its considerable ineffectiveness,⁴⁴ deficient coordination, autonomy, and significant "secret" budget, have been a constant issue of political concern in recent years and have created a wide consensus about the clear need of a legal reform.

The debates were even taken further with the recent scandals involving intelligence agencies. In the last months, the senate scandal⁴⁵ and the indictment of 15 military officers⁴⁶ for conducting illegal espionage on politicians and journalists, have brought into light once again the need for institutional controls of the intelligence services, and have reactivated the congressional debates.

The press, politicians, and the population in general are now pressing for this postponed legislation. Additionally, various cost-cutting measures implemented in defense and national security budgets forced the intelligence community to reduce expenditures and increase efficiency. All these events have made the actual political landscape most promising for the enactment of laws that limit, regulate and control the powers of the intelligence agencies in Argentina.

⁴⁴ During the 1990's Argentina experienced two of the biggest terrorist attacks in its history: the AMIA (Israeli Association) and the Israeli Embassy bombings, that left a total of more than one hundred people dead. Till today, the authors of the bombings are still unknown. The inefficiency of the intelligence services is seen as the principal reason of this institutional failure.

⁴⁵ In August 2000, the head of the State Intelligence Agency, Fernando de Santibañes, was accused of paying bribes to opposition senators in Congress in order to enact a labor law. The scandal created an institutional crisis within Argentina. The head of the agency and several senators resigned in the last month. Additionally, the vice president Carlos Alvarez also resigned as an act of protest because he believed that the Executive Branch was not actively condemning the episode. A Federal Judge is still investigating the case. See for example, Graciela Mochkofsky, *Una Estrategia Para no Aceptar Acusaciones Anticorrupción*, La Nación, October 21, 2000.

⁴⁶ In 1999 a federal judge discovered that an intelligence unit from the army was conducting illegal investigations of journalists, politicians, and journalists. Last September, several members of the army's intelligence services were indicted. This case represents the latest in a series of scandals involving illegal intelligence within the armed forces. See *Procesos por Espionaje*, La Nación, September 14, 2000.

NATIONAL INTELLIGENCE SYSTEM



The National Intelligence System comprises all the intelligence agencies of the country. It is a functional, non-hierarchical organization. This implies that the agencies forming the system are not linked by command relationships but by coordination and cooperation lines.

As noted before, there is no national law regulating the activities and functions of the National Intelligence System. The National Defense Law of 1988 mandated the

enactment of this law,⁴⁷ and stipulated that until the pertinent law is enacted, the intelligence agencies shall hold the mission, structure, and functions determined by the Executive Branch.⁴⁸ However, till today, the full chambers have not yet considered the different proposals.

The following organisms constitute the principal intelligence bodies in Argentina.

1. NATIONAL INTELLIGENCE CENTER (C.N.I.):

The National Intelligence Center is supposed to act as a coordination and analytical body centralizing the activities of Argentina's intelligence community, including the armed forces. It is presided over by the chief of the State Intelligence Agency (SIDE) and is composed by delegates of the ministries of Defense, Interior, Foreign Affairs and Economy, and the chiefs of the intelligence agencies of the Armed and Security Forces. The State Intelligence Secretary in his capacity as Chairman of the National Intelligence Center is responsible for management and coordination activities and reports directly to the President.

Formally, the National Intelligence Center is responsible for the national long –and medium- term strategic intelligence. However, it is important to note that it has not yet performed the prominent role it was originally assigned. It was established in 1966 by Law 16.970 and was modified by the National Defense Act of 1988. In the last ten years, there have been several legislative proposals aiming to reinforce the role of the National Intelligence Center as head of the intelligence community.

⁴⁷ Art. 46, Law No. 23.554 -National Defense Law-, National Congress, April 13, 1988.

⁴⁸ Id., Art. 47.

The National Defense Act also forbade the Armed Forces to conduct activities related to domestic political affairs.⁴⁹ This included intelligence activities linked to local and national political activities, political parties, and political representatives and activists.

As military intelligence members were incorporated to the C.N.I., many worried that the prohibition of military involvement in internal security would limit considerably the C.N.I. operational capacity, especially in relation to local illegal activities of some extreme political movements. Yet many others consider that this development was a positive step towards the depoliticization of the armed forces intelligence activities. The armed forces involvement in internal political intelligence operations was of central concern for the political community, particularly after so many years of military dictatorships and interruptions of democratic governments. This disposition, and the National Defense Act itself, was a result of a consensus reached between the major political parties

2. STATE INTELLIGENCE SECRETARY (SIDE):

The State Intelligence Secretary (SIDE) is responsible for the short-term strategic intelligence. Among other tasks, it handles the collection and production of international and domestic intelligence and counterintelligence. The SIDE is subordinated to the President and is ruled by secret laws and decrees. Born under a different name in 1946, it experienced several changes until 1956 when it adopted its present name. Nowadays, the Secret Law 20.195 and the Secret Presidential Decree 1792/73, both from 1973, regulate the SIDE's functions, mission, and personnel. It is considered to be the most important intelligence agency and has agents in numerous countries around the world.

As mentioned above, the head of SIDE holds the position of Chairman of the National Intelligence Center. Originally, a member of the military forces occupied this position. A

⁴⁹ According to Article 15 of the National Defense Act, "matters related to domestic policies of the country cannot be considered -in whatsoever manner- as conflict hypothesis or scenarios for any military intelligence agency."

primary goal of the democratic administration that took office in December of 1983 was the establishment of civilian control over the intelligence community, through the appointment of civilian officials coming from the political sector.

Indeed, the appointment of a civilian as head of the State Intelligence Secretary by President Alfonsín (1983-89) was one of the most important decisions undertaken in this area, being this the first time it happened in the country's history. Since then, this practice has become an unwritten rule now accepted by politicians. President Menem (1989-99) appointed two civilians in that post, first a journalist and, after his resignation, a lawyer. And the current president, President de la Rúa, first appointed Fernando de Santibañes, an economist, to cover that position and then Carlos Becerra, a politician of recognized trajectory.

Fernando de Santibañes was named head of SIDE in December 1999, when President de la Rúa took office. During his short term,⁵⁰ Santibañes made important reforms within the structure of the agency and its policy orientations, adjusting it to modern times.

The agency's former organization was divided principally into three units: Interior or Domestic Intelligence, Exterior or International Intelligence, and Administrative and Technical Support. The agency's activities were oriented almost exclusively to internal intelligence and political affairs, and special cases like the bombings of the A.M.I.A. –a Jewish organization- and the Israeli Embassy and the terrorists' connection to Ciudad del Este (Paraguay)-Middle East.

⁵⁰ De Santibañes resigned in October 20, 2000, after being accused by the press and several politicians of being involved in a corruption scandal in the Senate. Apparently, some Senators received bribes in order to support a labor law enacted by Congress. Although it is not known yet who paid the bribes, many think that the money came from the secret budget of the SIDE. Many, including De Santibañes, think that the accusations were part of a political campaign against him led by the former vice-president, Carlos Alvarez, who disagreed with De Santibañes political and economical ideas and with his active involvement in the conduction of Argentina's political and economical affairs. See, for example, Graciela Mochkofsky, *Una Estrategia para no Aceptar Acusaciones Anticorrupción*, La Nación, October 21, 2000; Santibañes, *Contra la Corporación Política*, La Nación, October 21, 2000; Fernando de Santibañes, *Es Extraña la Política*, La Nación, October 21, 2000.

The Menem Administration (1989-1999) incorporated numerous military officers and political personnel from the former military dictatorship into the intelligence structure.⁵¹ Administrative personnel and agents were recruited on the basis of political alliances or friendship and a great part of its considerable secret budget –around 380 million dollars a year- was used for political ends (campaigns, bribes, public polls, etc.).⁵²

However, since January 2000, SIDE has undergone several drastic changes.⁵³ In the first place, de Santibañes ordered the dismissal of more than one thousand employees, mainly from the administrative area. Many of the discharged agents were related to the military dictatorship of the seventies, with histories of extortion, kidnapping, torture, disappearances and assassinations.⁵⁴ The actual number of employees is three thousand. In the second place, the secret budget was reduced from \$310 million in 1999 to \$138 million in the year 2000.

Thirdly, the intelligence activities shifted to a more global and comprehensively oriented perspective. The new areas of interest are illicit trafficking, corruption, white-collar crime, terrorism, money laundering, organized crime, and the formulation of strategic policies in different areas for the President. In the fourth place, de Santibañes has opted for professionalism and operative efficiency when hiring agents and human resources, requiring qualification and expertise in the different areas involved in intelligence activities.

⁵¹ See J. Patrice McSherry, *Argentina: Dismantling an Authoritarian Legacy*, NACLA Report on the Americas, Vol. 33, No. 5, March 2000, at 1.

⁵² A 1998 intelligence bill proposed by the Radical Party stated that “the actual intelligence structure [referring to the SIDE] continues to possess characteristics, structure, functions, and faculties of a totalitarian country, making difficult in practice any possibility of control”. The bill went on to say that the great majority of SIDE’s officers devoted themselves to “internal security, including the internal politics of the country, from a fundamentally ideological point of view with a total lack of political, parliamentary and judicial control.” Sergio Moreno, *Soñar con un Mundo sin SIDE*, Página 12, November 9, 1999.

⁵³ See, Graciela Mochkofsky, *Cambios con Fondo Político en la SIDE. La Nueva Era de la SIDE*, La Nación, August 18, 2000; Gerardo Young, *De Santibañes Reformuló la Estructura Interna de la SIDE*, Clarín, June 3, 2000.

⁵⁴ See McSherry, *Argentina: Dismantling an Authoritarian Legacy*, supra note 51.

Lastly, the changes also imply a new reorganization of the agency. The former division in National and International units disappeared and the new structure of the organization is divided into eight general units:

1. Collection: Responsible for gathering all the information collected by the agents located in the provinces, by the representatives abroad, and the information appearing in the media.
2. Analysis: In charge of organizing the information assembled by the Collection unit into four different areas: domestic, international, transnational, and a special unit for terrorism and organized crime. The information is processed, evaluated and classified according to its importance, veracity, and reliance.
3. Strategic Planning: Responsible for formulating medium and long-term policies in different areas, including crime, economy, social and political issues, and international affairs.
4. Support: In charge of the administrative issues, human resources, logistics, and technical support. Its main task is to help other units with their different problems and necessities.
5. Finance: Responsible for the administration of the agencies budget.
6. Control and Oversight: In charge of investigating irregularities or illicit actions within the agency and, eventually, presenting charges in the courts.
7. Judicial Observations: Responsible for responding to the Judicial requests for telephonic interceptions.⁵⁵

⁵⁵ The privatization by President Menem of the national telephone company (ENTEL) had repercussions on the intelligence field. After the privatization took place, the interception of communications, which was originally done by the national company, was assigned to the SIDE in 1992 (Presidential Decree No. 1801). When judges need to order those interventions, they have to request it to the Direction of Judicial

8. Counterintelligence: In charge of protecting the State, and its secrets, against other states or organizations. Information is collected and analyzed, and activities are undertaken, to protect Argentina and its own intelligence-related activities, against the actions of hostile intelligence services.

With these reforms, the actual head of SIDE intends to reorient the agency to activities towards present and future dangers, to rationalize human resources and assets, and to search for a continuing operative efficiency.

The National School of Intelligence is a sub-unit of SIDE. According to Presidential decree No. 1536/91,⁵⁶ it is considered to be the highest academic institute of this nature in Argentina. The school organized annual conferences in themes related to intelligence and invites members of the three branches of government and participants from around the world to discuss reforms and innovations in this area. Also, since 1992 the school publishes an academic journal.

3. SECURITY FORCES: NATIONAL DIRECTION OF INTERNAL INTELLIGENCE:

The National Direction of Internal Intelligence constitutes a coordinating body for the intelligence activities related to internal security. The body was established by the Internal Security Law 24.059⁵⁷ and regulated by the Presidential decree 1.273,⁵⁸ both since 1992. This legislation designed a legal framework for planning, coordination, support, and control of the law enforcement efforts devoted to guarantee internal

Observations. See generally, Eduardo E. Estévez, *Argentina's Intelligence After Ten Years of Democracy: The Challenge of Reform and Congressional Oversight*; the document can be found in the following web site: www.fas.org/irp/world/argentina/estevez.htm, December 1993.

⁵⁶ Presidential Decree No. 1536, August 9, 1991; See also, Annual Report of the President to Congress, Congreso Nacional, May 1, 1993, at 437.

⁵⁷ Art. 16, Law No. 24.059 -Internal Security Law-, National Congress, December 18, 1991.

⁵⁸ Presidential Decree No. 1.273/92, July 21, 1992.

security.⁵⁹ Functionally it is located within the Ministry of Interior and it includes members of the so-called security forces: the Naval Prefecture, National Gendarmerie, Federal Police Force, and Local Police Forces.

The concept of “security forces” describes an intermediate force able to fill the gap between police forces -provincial and federal- and the armed forces. The National Gendarmerie and Argentinean Naval Prefecture were formerly within the structure of the Army and the Navy, respectively. This changed during the first year of Alfonsín’s administration when these security forces were put under direct responsibility of the Ministry of Defense and later, by the Internal Security Law, under the authority of the Ministry of Interior only in the matters related to internal security.

The security forces have an important role in three functional areas: national defense, internal security and federal policing, with capabilities to intervene all around of the country. Special forces, rapid deployment units, legal education, combat training, and intelligence elements, are among the capabilities and characteristics of these forces.⁶⁰

The Internal Security Law designated the Ministry of Interior as the main coordinator of the national police efforts, responsible both for its political command, as well as for the direction and coordination of the activities undertaken by the intelligence components of the federal police and the security forces.

For the purpose of advising the Minister of Interior, the Internal Security Law created an Internal Security Council,⁶¹ chaired by him and composed of the Minister of Justice, the Secretary for the Prevention of Drug Abuse and Drug-trafficking, the Undersecretary for Internal Security, the chiefs of the Federal Police, National Gendarmerie, and

⁵⁹ The concept of “internal security” is defined by the law as “the factual situation under the rule of law in which liberty, life, and property of the inhabitants, their rights and guarantees, and the authority of the representative, republican, and federal system established by the National Constitution are protected.” Art. 2, Internal Security Law.

⁶⁰ Estévez, *Argentina’s Intelligence After Ten Years of Democracy: The Challenge of Reform and Congressional Oversight*, supra note 55, at 7.

⁶¹ Art. 9, Internal Security Law.

Argentinean Naval Prefecture, and of a certain number of provincial police forces, all of them permanent members.

Additionally, to avoid uncertainty about the role of the intelligence components devoted to internal security matters, the Internal Security Law provides for a National Direction of Internal Intelligence, a body under the control of the Undersecretary of Internal Security. The Internal Security Law describes it as “the organ through which the Minister of Interior will exercise the functional direction and coordination of the activities of the intelligence elements of the Federal Police, as well as those of the National Gendarmerie and the Argentine Naval Prefecture, in these cases, exclusively for purposes of internal security...”⁶²

Among other activities, the National Direction of Internal Intelligence specializes in organized crime, drug trafficking, terrorism, social violence, illegal traffic of persons, and economic crimes.

4. MILITARY INTELLIGENCE:

During many years of Argentine history, the armed forces exercised absolute control over the civilian intelligence agencies, being the domestic sphere of their main interest. Hence, all intelligence activities were conducted fundamentally as support operations of the military’s internal security operations.

Among the military intelligence agencies, the Army Intelligence Battalion 601 was a paradigm of the military involvement in domestic intelligence. This suffered a significant enhancement during the period of the fight against subversion, the so-called "dirty war". The flagrant violation of human rights is an example of the activities conducted during this period of military government (1976-1983).

⁶² Art. 16, Internal Security Law.

With Argentina's return to democracy in 1983 there was general consensus about the need to rethink the role of the armed forces. The "military problem" was one of the major concerns related to the stability of the system. To some extent, the same happened with military intelligence. Consequently, the intention to establish clear limits over their activities, and, if possible, to terminate their involvement in domestic and political intelligence began to increase.

As a result of public discussion and debates and through consensus reached between the two major parties -Unión Cívica Radical and Partido Justicialista-, the National Defense Law⁶³ was finally approved in 1988, setting a legal framework and replacing former "national-security-doctrine" oriented legislation.

The National Defense Law included several aspects of innovation. The concept of National Defense was defined as follows: "National defense implies the integration and coordinated actions of all the forces of the nation for the solution of those conflicts which require the use of the Armed Forces, in a preventive or repressive way, to confront external aggression".⁶⁴ The Law explicitly distinguished between external defense and internal security,⁶⁵ and restricted the military to the former.⁶⁶ In fact, one of the most important and innovative aspects of the National Defense Law was the flat prohibition of the Armed Forces carrying out domestic intelligence work related to political affairs. The law stipulates, "Affairs related to domestic policies of the country cannot be considered, under any circumstance whatsoever, a valid assignment for the military intelligence organisms."⁶⁷

The National Defense Law also established an intelligence body within the armed forces, the J-2 Intelligence, formed by members of the intelligence units of the different forces under the authority of the Minister of Defense. This body was charged with the production of military strategic intelligence. Yet, the production of national defense

⁶³ Law No. 23.554 -National Defense Law-, National Congress, April 13, 1988.

⁶⁴ Art. 2, National Defense Law.

⁶⁵ Art. 4, National Defense Law.

⁶⁶ Art. 13 and accompanying chart, National Defense Law.

⁶⁷ Art. 15, National Defense Law.

intelligence was excluded from its functions and was assigned to the National Intelligence Center.

The Military Intelligence agencies are organized under a system called the Joint Military Intelligence System. The system reports to the President through the Ministry of Defense, whose main advisory organization is the Joint Military Intelligence Committee, chaired by the Minister and formed by armed forces representatives.

The structure of the Joint Military Intelligence System is based on functional relationships between its members. Its different components are the Joint Staff of the Armed Forces Chief of Intelligence, the Army General Staff, the Navy General Staff, and the Air Force General Staff. The Chief of Intelligence of the Joint Staff of the Armed Forces coordinates the whole system and provides the guidelines to obtain and produce military intelligence. However, each of the components of the system establishes its own organization, budget, and personnel.

After a political group attacked a military garrison at La Tablada in 1989, the issue of the involvement of the military forces in internal security was brought again into public discussion. Finally, the Internal Security Law of 1992 reiterated the prohibition of military involvement in internal security functions, except as a last resort, in exceptional circumstance, if so ordered by the President.⁶⁸

Despite the clear language of the law, the military intelligence bodies continued to operate in domestic affairs. During the Menem administration there were recurrent scandals involving intelligence forces that illegally spied on sectors of civil society, and

⁶⁸ In contrast to the flat prohibition of the Defense Law, the Internal Security Law specified the conditions under which the armed forces would engage in internal security functions. Article 31 stated, for example, "the Armed Forces will be used to reestablish order within the national territory in those exceptional cases in which the system of internal security is deemed insufficient by the president to carry out the stipulated aims." The law also eliminated Article 13 of the Defense Law and its accompanying chart, which had graphically illustrated that the armed forces were strictly forbidden to intervene in domestic crises. See generally, McSherry, *National Security and Social Crisis in Argentina*, supra note 35, at 21-43.

numerous cases of surveillance and harassment by unknown actors.⁶⁹ Several acts of terrorism also implicated personnel from military and security forces.⁷⁰

In May 1999 an explosive case of illegal military intelligence operations came to light. In Cordoba, a judge investigating crimes occurred during the “dirty war” and the trafficking of babies by military units during the 1970s received complaints from witnesses and lawyers of surveillance and death threats from unidentified men. The judge authorized wiretaps of military phones and the prosecutor discovered that the intelligence branch of the region's Army intelligence was carrying out the surveillance.

The investigation uncovered surveillance that was much broader than originally thought, targeting students, the media, judges, unionists, well-known political party leaders, and the governor-elect of the province. Reports by intelligence agents discussed internal conflicts in the Radical Party, the Peronist electoral campaign, and activities within the national university. Last September, eight members of the Army’s intelligence agency were indicted for the crime of abuse of power.⁷¹ Among them, the Chief of the mentioned intelligence agency, the Chief of Counterintelligence, and the Chief of the Military Intelligence Collection Center (CRIM).⁷²

This situation generated a general crisis within the Armed Forces. In January 2000, the President ordered the dismissal of 500 civilian agents from the Military Intelligence Collection Center (CRIM), almost 50 percent of its members and reduced the Defense

⁶⁹ In some cases, such as the "ideological persecution" scandal of 1993 (when teachers nation-wide were surveyed about the ideological tendencies of students and their political activities) and the surveillance of shanty-town dwellers and priests in 1996, Interior Ministry officials were found to be responsible; other cases were blamed on "out of control" gangs or unemployed dirty war operatives; still others were proven to be military or police operations, seemingly autonomous. For a detailed analysis of cases up to 1997, see J. Patrice McSherry, *Strategic Alliance: Menem and the Military-Security Forces in Argentina*, Latin American Perspectives, Issue 97, Vol. 24, No. 6, November 1997, at 63-92.

⁷⁰ After the murder of journalist Jose Luis Cabezas in 1997, former dirty war officers, employed in the private security force of a shadowy businessman with close ties to the Menem administration, and active-duty police were arrested and charged, although the case is still not solved. The 1994 terrorist bombing of the Jewish-Argentine Mutual Association (AMIA) implicated police, and some former military officers were also suspected of involvement

⁷¹ Art. 248, National Criminal Code.

⁷² *Procesos por Espionaje*, La Nación, September 14, 2000.

budget by \$150 million.⁷³ The Chief of the Army announced that he would dissolve the Military Intelligence Collection Center and promised that, under his command, the Army intelligence will focus exclusively on military intelligence, complying with the Defense and Internal Security laws restrictions.⁷⁴

PART III:

THE CONTROLLING MECHANISMS

1. THE NEWBORN CONGRASSIONAL OVERSIGHT:

One fundamental provision of the Internal Security Law was the creation of congressional oversight for the intelligence community.⁷⁵ Title VII incorporated five articles devoted to the parliamentary control of internal security and intelligence agencies activities.

For the first time in Argentina a permanent congressional committee was established which would exercise oversight over intelligence matters. Article 33 of the Internal Security Law creates a congressional Joint Committee of Oversight on Intelligence and Internal Security with the mission of supervising and controlling all internal security and intelligence agencies and organizations. Six senators and six members of the House of Representatives compose the congressional body.⁷⁶

Article 35 of the Internal Security Law specifies that: "The committee shall verify that the performance of the agencies and organizations referred to in article 33 is adjusted strictly to the constitutional, legal and regulating norms in force, stating the strict observance and respect of the National Constitution individual guarantees, as well as of

⁷³ Daniel Santoro, *El Ejercito Despedirá a 500 Espías Civiles*, Clarín, February 13, 2000; *Admiten Riesgos por el Despido de Agentes de Inteligencia*, La Nación. February 14, 2000.

⁷⁴ Id.

⁷⁵ Title VII, Arts. 33 through 37, Internal Security Law.

⁷⁶ Art. 34, Internal Security Law.

the measures contained in the Human Rights American Convention, known as "San José de Costa Rica Agreement" and included in our legal arrangements through the law No. 23.054".

The details are established in article 36:

[T]he committee shall have all the authorities and functions needed to fulfill its assignment and especially to make those investigations which may be pertinent in the agencies and organizations mentioned in article 33. It shall be especially authorized to:

- a. Require from any agency or national, provincial, or municipal public entity, as well as from private entities, all the information deemed necessary, which must be supplied.
- b. Require the Judicial Branch to summon and call with public force assistance those persons, who are deemed pertinent, in order to expose facts linked to the subject of the committee.
- c. Require the pertinent judicial branch components to prevent those persons subjected to investigations to be undertaken, leave the national territory without permission.
- d. Propose to the Executive Branch those measures intended to overcome the deficiencies observed on the occasion of the investigations put forward.

A Presidential Decree⁷⁷ signed in July 1992, contains a set of regulations related to the Internal Security Law, and included additional provisions related to congressional control. The decree defined the congressional control as the act of “comparing the actions of the intelligence service with the pre-established provisions and goals, and detecting and correcting the eventual deviations.”⁷⁸ In addition, article 5 mandated the Internal Security Council to submit an annual report based on the results of policy formulation and implementation to the Joint Committee on Security and Intelligence.

⁷⁷ Presidential Decree 1273/92

⁷⁸ Annex A, Presidential Decree 1273/92

In March 1993, Congress passed a new law No. 24.194, modifying article 34 of the Internal Security Law. It increased the number of members of the Joint Committee on Intelligence and Internal Security from 12 to 16. This gives an idea of the raising political interest within Congress.

It is not clear yet the type of oversight activity that the congressional committee is going to carry out: an institutional -cooperative- or an investigative -aggressive- approach. The focus of this discussion was implicit during the drafting of the committee's rules of procedure when they were under consideration. Article 34 of the Internal Security Law specified that the permanent committee would determine its own rules. This was the first task undertaken by the committee, which began its work at the end of June 1993. Since then, there has been no agreement as to the specific functions of the Commission, which completely paralyzed its activities. A set of rules was under discussion for approval by August.

Article 40 of the new proposed committee rules establishes the following:

[T]he committee shall undertake a study with respect to the following matters, taking into consideration with respect to each such matter, all relevant aspects of the effectiveness of the planning, gathering of information, use, security, and dissemination of information and intelligence:

- 1) The effectiveness of the internal security prevention;
- 2) Efficiency of internal security coordination and its difficulties;
- 3) The work undertaken in the fields of training and equipment of the Security Forces and national and provincial Police Forces;
- 4) The work undertaken by the Internal Security Council and by the Planning and Control Center in the field of evaluation and planning, as well by the Direction of Internal Intelligence in the field of internal security information and intelligence;
- 5) The results obtained in the fight against crime through the Internal Security System established by law 24.059.

- 6) The quality of the analytical capabilities of the intelligence agencies and means for integrating more closely analytical intelligence and policy formulation;
- 7) The extent and nature of the authorities of intelligence agencies and the desirability of developing charters for each one of them;
- 8) The organization of intelligence activities to maximize the effectiveness of the conduct, oversight, and accountability of intelligence activities; to reduce duplication or overlap; and to improve qualifications and professionalization of the intelligence agencies;
- 9) The conduct of intelligence activities and the procedures by which Congress is informed of such activities;
- 10) The desirability of changing any law, executive decree or regulation, or rules of the Chambers or of this committee, to improve the protection of secrets, and provide for disclosure of information for which there is no compelling reason for secrecy;
- 11) The desirability of maintaining only a Joint Committee on Intelligence and Internal Security as it is established by Title VII of the Law No. 24.059, or of dividing the internal security and intelligence activities to establish separate committees for each matter within each chamber. In this last case, of establishing procedures under which both intelligence committees would receive joint briefings from the intelligence agencies and coordinate their policies with respect to the safeguarding of sensitive information;
- 12) The way in which intelligence agencies invest their funds and whether disclosure of the amounts of such funds is convenient;
- 13) The intelligence activities of other countries that are directed against Argentina or its political, military and economic interests.

The establishment of the Joint Commission of Oversight on Intelligence and Internal Security was a transcendental step and positive progress towards the democratization of the intelligence community. It created certain parameters and mechanisms of institutional oversight over an activity that was historically marked by a strong autonomy.

Nevertheless, many critics believe that the missions and functions of the Joint Committee suffer from many deficiencies.⁷⁹ In the first place, the law does not consider intelligence and interior security as two functionally distinct activities requiring distinct types of control and supervision from the controlling body. Two spheres under the jurisdiction of a same oversight committee, intelligence and internal security, may turn out to be a matter of crucial attention.

Indeed the Commission may choose to exert its power more in one of the spheres than the other. Proposals to create a separate committee for each sphere intended to solve the problem. At the same time, other proposals called for the establishment of a committee within each chamber to replace the Joint Commission already created by the law. This means that it is necessary to amend the present law or to approve another law to establish those changes.⁸⁰

A second problem relates to the type of control that the Commission is entitled to exercise according to the Internal Security Law (article 36). The description of its functions only makes possible an informative and external type of control, which lacks real efficiency. The fact that the law does not contemplate a permanent and regular control over intelligence activities impedes real and effective oversight, hindering the detection of irregularities and deficiencies. In other words, the Commission was not attributed real power over the intelligence community.

Congressional oversight must necessarily include the inspection of operations and activities, both in a general and specific way, of sources and methods for obtaining information, and of the information produced by intelligence activities, including classified and especially sensitive information. Without these faculties, congressional oversight is simply not going to be effective to detect and deter misconducts and illegalities within the intelligence community.

⁷⁹ Deputy Jesús Rodríguez and others (UCR-FREPASO), Proyecto de Ley de Control de las Actividades y Gastos de Inteligencia, Expte. 5406-D-97, House of Representatives, October 9, 1997.

⁸⁰ Estévez, *Argentina's Intelligence After Ten Years of Democracy: The Challenge of Reform and Congressional Oversight*, supra, note 55.

Third, the Internal Security Law did not contemplate some extremely challenging issues that present special problems for congressional controls, problems that are normally absent in the control of other state organs. In fact, there are some specific issues like police powers, secret budget, and the disclosure of information, which pose unique problems with regards to control. A law should clearly specify the congressional faculties in relation to these areas.

As mentioned above, in Argentina there have been vast congressional debates in the area of intelligence. These and other problems have been actively discussed by the joint commission and by each house of Congress. In the last ten years there were at least 15 bills presented in Congress⁸¹ related to the control of intelligence activities. Many of these bills seek to remedy the mentioned problems by modifying either the composition of the Commission or its faculties and capacities.

Although there are significant differences in the scope of control, the general purposes of these bills is to correlate the intelligence function to the rule of law as it must be in a democratic society, as well as to enhance the efficacy and capabilities of the intelligence community.

The main disagreement relates to the degree of control. While the members of the FREPASO provide for the strict scrutiny of all intelligence activities, the members of the UCR believe that the strict control of the activities would imply an illegal interference in the Executive powers and would interfere with the efficiency of intelligence activities.

⁸¹ Proyecto de Ley de Control de Información e Inteligencia, Deputy Víctor Bisciotti and others (UCR), Expte. 4865-D-92 (1992); Proyecto de Ley sobre el Tratamiento Legislativo de los Gastos Reservados, Deputy R. Baglini (UCR), Expte. 4031-D-93 (1993); Proyecto de Ley de Información e Inteligencia de Estado, Deputy Carlos Álvarez (FREPASO), Expte. 4085-D-94 (1994); Proyecto de Ley de Inteligencia Nacional, House of Representatives, Expte. 58-S-94, with have sanction in the Senate, Tramite Parlamentario No. 90/ Sept. 7, 1994; Proyecto de Ley de Inteligencia Nacional, Deputy Jesús Rodríguez and others (UCR), Expte. 4131-D-94; Proyectos de Ley de Información e Inteligencia, Deputy A. Berhongaray and others (UCR), Expte. 4121-94 (1994); Proyecto de Ley Sistema Nacional de Inteligencia, Deputies Barberis and Pascuala, Expte. 5200-D-98 (1998); Proyecto de Ley Sistema Nacional de Inteligencia, Deputies Nicotra and Veramendi, Expte. 1760-D-99 (1999); Proyecto de Ley Sistema Nacional de Inteligencia, Deputies Mourino and Moyano, Expte. 3670-D-99 (1999); Proyecto de Inteligencia Nacional, Senator Raijer and others (P.J.), Expte. S-00-1670 (2000).

However, both parties agree to completely eliminate the “secret budget” assigned to the State Intelligence Agency, establishing in their respective proposals a firm oversight over the agencies spending. These are issues that will eventually have to be resolved within the political process, where each party will have to make concessions in order to achieve the ultimate goal.

2. JUDICIAL CONTROL

In Argentina, intelligence agencies and their agents are subject to the judicial process whenever they commit a crime. Like other government agencies, they can be sued for actions undertaken in the course of their duties. In most cases, general constitutional and procedural provisions governing the interception of mail, eavesdropping of telephone, and other forms of communications, interfering with property, and engaging in different types of illegal activities, in theory, apply to the activities of the intelligence services.

In practice, however, judges are not informed about these activities. Be it because the agents consider the information to be classified or extremely sensitive, or because when performing search and seizures the agents are just following hints that do not meet the legal standards required for such activities, intelligence activities rarely reach the courts. They only do so when scandals or media intervention shed light over some specific episode. And then, generally it is too late to repair the damages already caused.

Besides, Argentina has no special judicial arrangement to deal with delicate issues involved in intelligence activities, such as sensitive or classified information. Moreover, several criminal statutes punish the revelation of classified information by security or intelligence agents.⁸² Thus, when judges conduct an investigation on intelligence agents’ activities, they often encounter themselves with agents claiming the impossibility to reveal classified information.

⁸² Arts. 175 and 222, National Criminal Code; National Law of Espionage and Sabotage, No. 13.985.

A special characteristic of the Argentinean system is the fact that judges must request telephonic interventions to the State Intelligence Agency. After the privatization by President Menem of the national telephone company (ENTEL), the interception of communications, which was originally done by the national company, was assigned to the SIDE in 1992 (Presidential Decree No. 1801)⁸³. When judges need to order those interventions, they have to request it to the Direction of Judicial Observations.

Thus, in the first place, it is almost impossible to guarantee that the information requested by the judiciary is not subsequently used by intelligence agents, and, in second place, there is no control of the eavesdropping conducted by these agents. Paradoxically, the Constitution mandates that the interception of any type of communication can only be done through a judicial order.⁸⁴

Some of the bills in Congress proposed to regulate the activities of the intelligence services contemplate the issue of judicial control.⁸⁵ The suggested legislation contemplates, among others, the following issues:

- 1) Establish a special tribunal within the judiciary or the Ministry of Defense to scrutinize intelligence activities in areas involving surveillance and interception of communications.
- 2) Require judicial authorization to intercept any type of communications by the intelligence services. The judiciary will only grant this authorization in cases in which it is found to be necessary for national defense and internal security reasons and when the facts investigated are considered to constitute a crime. The eavesdropping is limited to a certain amount of time.
- 3) Establish that intelligence services do not have police powers, meaning that they do not have the power to arrest or detain people. Such a measure must be taken by

⁸³ See supra note 55.

⁸⁴ Art. 18, National Constitution.

⁸⁵ See supra note 81.

the security and police forces, under the authority of the district attorney or judge. If in the course of an investigation the intelligence services discover the commission of a crime, they must hand the case over to the judicial authorities, and, may under no circumstances, make arrests themselves.

- 4) Prohibit the collection of information, as well as the production of intelligence, on the basis of race, religion, ethnicity, political convictions, profession, nationality, social condition, and affiliation with trade unions.
- 5) Prohibit the revelation of information on any citizen collected during the course of an investigation and establish that when there is a special public interest in the revelation of certain information, the head of the intelligence agency must request a judicial authorization.
- 6) Penalize the illegal interception of communications and other privacy infringements, and the publication of the information illegally obtained.

If Congress enacts some of these proposals, the judiciary will be able to effectively oversee many of the activities of the intelligence community. Certainly, judicial oversight is limited compared to congressional oversight. Judicial oversight should deal with legal issues, as opposed to policy issues. But judges can act as arbiters of governmental secrecy in a powerful way. In those areas most important to individual liberties, the judiciary should provide a secure forum for review of the intelligence activities.

The fact that some of the proposals consider the creation of a special body within the judiciary to oversee and review in secret the applications filed by intelligence services to conduct electronic surveillance is very positive. This is the new trend in most countries concerned with intelligence oversight. And although it does not guarantee that agents will bring into play these channels, it at least provides for specific mechanisms that can fulfill the requirement of making judicial approval easier.

CONCLUSION

Over the last decades, Argentina has attempted to develop external mechanisms to control the intelligence apparatus. Important legislation was enacted producing changes that were unforeseeable twenty years ago. The creation of a Congressional Commission to control intelligence activities constitutes one of these vital steps.

However, the process is far from being concluded. Many reforms are still pending and, although there has been a vast amount of legislative proposals both regulating and controlling the activities of the intelligence services and providing for effective congressional and judicial oversight, no law has been passed to these effects.

Eventually, the intelligence services will one day become accountable to Congress and to the Judiciary. That is the logical outcome of the process of reform embarked upon since the return of democracy in 1983. Even though the existing arrangements are merely transitional and are still evolving, they are clearly not enough to provide for the accountability that the democratic process requires from all intelligence agencies.

However, it is important to understand that the sooner these issues are resolved, the better. Accountability and oversight of the intelligence community should be established before some unforeseeable event of the sort that have occurred in the past causes a crisis which could well have been avoided had arrangements been in place for oversight to work efficiently.

As we have seen, the political conditions today are positive and weigh heavily in favor of changes in the intelligence legislation. The kinds of measures discussed in the proposals would constitute important steps towards a more productive, responsive, and accountable intelligence system.

Finally, it is also in the interest of the intelligence and security services themselves to be subject to a form of scrutiny that entails public trust. This view appears to be shared by many of those who work within the agencies. The Argentinean political community is finally beginning to understand that the accountability of the security and intelligence services to Congress and the Judiciary is a fundamental principle in a modern democracy.