

Fire Down Below: How the Underwear Bomber Revealed the U.S. Counterterrorism Community As Hemmed in by the Seams of Legislative Ambiguity

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On December 25, 2009 a 23-year old Nigerian national boarded Northwest Airlines Flight 253 in Amsterdam, the Netherlands bound for Detroit, Michigan. As the plane neared its final destination, passengers heard sharp popping noises, smelled something acrid, and saw smoke and flames emanating from seat 19A. Umar Farouk Abdulmutallab, his body covered by a blanket, had triggered an explosive device sewn into the hem of his underwear by mixing the chemical Pentaerythritol Tetranitrate (PETN) with Triacetone Triperoxide (TATP), using an acid-filled syringe. Quick-thinking passengers and crewmembers successfully put out the ensuing fire.¹ None of the 289 people aboard Flight 253 sustained serious injuries. Abdulmutallab was detained immediately upon the flight's arrival at Detroit Metropolitan Airport by federal authorities and indicted by a federal grand jury two weeks later.²

A preliminary review of the events leading up to the Christmas Day attack conducted by the White House "highlight[ed] human errors and a series of systemic breakdowns" that prevented the detection and disruption of the attack.³ The review identified several causes for the failure to interdict the plot to bring down Flight 253, but did not specify the degree to which each contributed to the ultimate outcome.⁴

The attack prompted a flurry of congressional hearings. Administration officials' testimony did little to quell Congress's outrage over the failure, and indeed prompted additional questions from congressional members eager to assign fault and uncertain where blame should lie. After all, several months prior to Christmas Day, the counterterrorism (CT) community⁵ had collected intelligence that indicated an impending attack of the very type eventually carried out by Abdulmutallab. Moreover, the CT community had fragmentary information that, if collated and understood, would have identified Abdulmutallab's

intentions and provided the government ample opportunity to interdict or neutralize the threat.⁶ Was this not the exact type of failure that permitted, in part, the attacks of September 11, 2001 to take place? In light of the dramatic overhaul of the intelligence community⁷ (IC) undertaken in the wake of 9/11, how is it that the U.S. government's CT apparatus remained so fundamentally flawed as to allow a known radical Islamist with a bomb sewn into his underwear to board a U.S.-bound flight?

Part I of this paper examines the events presaging the Christmas Day attack. Part II explains the complex allocation of authorities and responsibilities among members of the CT community. Part III demonstrates how this confusion affected the handling, processing, and response to critical information provided by Abdulmutallab's father on November 19 and 20, 2009. Part IV considers Congress's post-hoc inquiries, questioning whether the inability to disrupt the plot was justifiably labeled a "failure." Part V provides conclusions and Part VI, recommendations for corrective action.

I. A BRIEF LOOK AT THE THREADS OF AN UNDER-HANDED PLOT: THE "DOTS"

a. UPBRINGING, EDUCATION, AND RADICALIZATION

As the son of a wealthy Nigerian banker, Umar Farouk Abdulmutallab demonstrated none of the fundamentalist ardor at a young age that would later motivate his attempt at achieving martyrdom on behalf of al Qaeda in the Arabian Peninsula (AQAP).⁸ Like many children of means, he enjoyed basketball and PlayStation.⁹ By the time he graduated from the British International School in Lome, Togo in 2004, his views

¹ Scott Shane and Eric Lipton, *Passengers' Quick Action Halted Attack*, N.Y. TIMES, Dec. 26, 2009, at A1, available at <http://www.nytimes.com/2009/12/27/us/27plane.html?pagewanted=1&r=1>.

² U.S. v. Umar Farouk Abdulmutallab, 2:10-cr-20005-NGE-DAS.

³ *Summary of the White House Review of the December 25, 2009 Attempted Terrorist Attack*, Jan. 7, 2010 [hereinafter *White House Review*] available at <http://www.fas.org/irp/news/2010/01/whreview-summary.pdf>.

⁴ See *id.*

⁵ "CT community," for purposes of this study, refers to terrorism-focused components of various government entities, specifically the National Counterterrorism Center in the Office of the Director of National Intelligence, components of the Department of State, including consular officials and the Office of the Coordinator for Counterterrorism, and the Central Intelligence Agency's Counterterrorism Center.

⁶ As noted by the *White House Review*, *supra* note 3, "[t]he U.S. Government had sufficient information prior to [the attack] to have potentially disrupted the AQAP plot—i.e. by identifying Mr. Abdulmutallab as a likely operative of AQAP and potentially preventing him from boarding flight 253."

⁷ The "intelligence community" is ascribed its traditional meaning, and is inclusive of the smaller "CT community." The IC is comprised of 16 government organizations charged with all manner of intelligence collection and analysis, including the Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, National Reconnaissance Office, National Geospatial Intelligence Agency, and the intelligence components of the Armed Forces. Components of the Federal Bureau of Investigation, Department of Homeland Security, the Drug Enforcement Agency, Department of Energy, and Department of Treasury are also members of the IC.

⁸ Adam Nossiter, *Lonely Trek to Radicalism for Terror Suspect*, N.Y. TIMES, Jan. 16, 2010 at A1.

⁹ *Id.*

took a decidedly Islamist turn and he began openly advocating the cause of the Taliban.¹⁰ An itinerant student, Abdulmutallab traveled to Yemen in 2005 to study Arabic and, in 2006, studied engineering in London.¹¹ While he attended mosques kept under surveillance by British security services for their propensity to attract Islamists, he only appeared “on ‘the periphery of other investigations’ into radical suspects there...he was not considered a terrorist threat himself.”¹²

In June 2008, U.S. consular officers in London issued Abdulmutallab a multi-year, multiple-visit tourist visa.¹³ This visa was in fact the second U.S. visa Abdulmutallab had obtained. In 2004, a visa request by Abdulmutallab was initially denied after a consular official found false information on his application.¹⁴ However, the consular official’s supervisor overturned the denial due to Abdulmutallab’s clean record and distinguished family.¹⁵ Since the matter was considered resolved, it was not revisited when the 2008 visa application was made.¹⁶

In 2008, Abdulmutallab traveled to the United States and Egypt before pursuing a master’s degree in international business in Dubai.¹⁷ In May 2009, the British government denied Abdulmutallab’s application for renewal of a student visa and placed him on a watch list to prevent him from re-entering Britain.¹⁸ Because the denial was predicated on a fraudulent visa application rather than national security concerns, U.S. officials were not notified of this action despite the fact that Abdulmutallab possessed a U.S. visa at the time. He returned to Yemen in August 2009, ostensibly to resume his studies.¹⁹ Yemeni officials admitted him based on the fact that his passport contained a valid U.S. visa.²⁰ While there, Abdulmutallab stayed with an AQAP leader

for a month, training in preparation for the Christmas Day attack.²¹

b. UNDER SUSPICION: U.S. CT TAKES NOTICE

The individual data points discussed below must necessarily be viewed against the backdrop of the IC’s recognition of the threat to U.S. interests posed by AQAP. The IC had “strategic intelligence” that AQAP “had the intention of taking action against the United States prior to...December 25th.”²² Furthermore, the IC “had warned repeatedly of the type of explosive device used by Abdulmutallab and the ways in which it might prove a challenge to screening.”²³

In August 2009, the National Security Agency (NSA) intercepted communications of AQAP leaders in Yemen discussing a terror plot involving a Nigerian.²⁴ NSA translated and disseminated the information to the National Counterterrorism Center (NCTC). Subsequent intercepts revealed that AQAP was planning an operation for December 25.²⁵ On November 11, British intelligence officials sent their U.S. counterparts a cable revealing that a man named “Umar Farouk” had spoken to U.S.-born cleric and AQAP affiliate Anwar al-Awlaki and pledged to commit *jihād*, or holy war.²⁶

In October 2009, Abdulmutallab sent text messages to his father, Alhaji Umaru Mutallab, professing to have found “real Islam” and insisting that his family forget about him because he had no intention of ever returning to Nigeria.²⁷ His father, alarmed by his son’s ominous tone and espousal of radical ideology, solicited the assistance of Nigerian officials to help him locate his son and persuade him to return home.²⁸ On November 19 and 20, Alhaji Umaru met with U.S. officials from the Department of State (State) and the Central Intelligence Agency (CIA) at the U.S. Embassy in Abuja, Nigeria.²⁹ The officials sent memos relating

¹⁰ *Id.*

¹¹ *Id.* Multimedia graphic entitled *From Student to Terrorism Suspect available at* <http://www.nytimes.com/imagepages/2010/01/17/world/17abu-graphic.html>.

¹² *Id.*

¹³ Ruth Ellen Wassem, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens*, 19 CONGRESSIONAL RESEARCH SERVICE (March 2010).

¹⁴ John Solomon, *Visa Denial was Reversed for Terrorism Suspect in 2004*, WASHINGTON POST, March 25, 2010.

¹⁵ *Id.*

¹⁶ *Id.* Furthermore, a State Department spokesman noted that, “there was nothing in his application nor in any database at the time that would indicate the he should not receive a visa,” further adding that Abdulmutallab was enrolled at a reputable London university and had ample financial resources. Ian Kelly, *On the Record Briefing*, U.S. Department of State, Washington, D.C., Dec. 28, 2009.

¹⁷ *Lonely Trek to Radicalism*, *supra* note 8.

¹⁸ Russell Goldman and Huma Khan, *Timeline of Terror: Clues in Bomber Umar Farouk Abdulmutallab’s Past*, ABC NEWS, Dec. 30, 2009, reporting that Abdulmutallab’s application to renew his student visa was denied because he applied to study “life coaching” at a non-existent college.

¹⁹ Mohammed Albasha, Spokesman, Yemeni Embassy to the United States, is interviewed on CNN’s “The Situation Room,” December 29, 2009.

²⁰ *Timeline of Terror*, *supra* note 18.

²¹ *Id.*

²² *Aviation Security and Flight 253 before the S. Comm. on Commerce, Science, and Transportation*, 111th Cong. (Jan. 20, 2010) [hereinafter *Aviation Security and Flight 253 Before the S. Comm. on Commerce*] (statement of Michael Leiter, Director of NCTC).

²³ *Id.* AQAP had carried out an attack on a Senior Saudi CT official two months prior to Christmas Day in which a suicide bomber detonated PETN that was similarly sewn into his underwear. Although the attack did not achieve its objective, the PETN successfully detonated, killing the AQAP operative. Also, on Nov. 11, 2009, a Somali man was arrested trying to board a commercial airliner in Mogadishu carrying a syringe and explosives in his underwear – a homemade explosive device similar to the one Abdulmutallab was carrying on Christmas Day. *Timeline of Terror*, *supra* note 18.

²⁴ *Early Leads Before the Attack*, *supra* note 11.

²⁵ Eric Lipton, Eric Schmitt, and Mark Mazzetti, *Review of Jet Bomb Plot Shows More Missed Clues*, N.Y. TIMES, Jan. 17, 2010 at A1.

²⁶ *Detroit Bomber Cooperating with the FBI*, THE NATIONAL (UAE), Feb. 5, 2010, available at <http://www.thenational.ae/news/worldwide/americas/detroit-bomber-co-operating-with-fbi>.

²⁷ *Lonely Trek to Radicalism*, *supra* note 8.

²⁸ *Id.*

²⁹ Mark Mazzetti and Eric Lipton, *Spy Agencies Failed to Collate Clues on Terror*, N.Y. TIMES, Dec. 31, 2009, at A1.

general details of the meeting to designated components of the intelligence and law enforcement communities, including NCTC.³⁰ CIA then compiled biographical data on Abdulmutallab but did not share his profile with NCTC or other members of the IC.³¹

NCTC entered Abdulmutallab's name into the Terrorist Information Datamart Environment (TIDE), the largest terrorist watchlist, which contained the names of 550,000 people with potential ties to terrorist organizations. NCTC analysts, as a result of inadequate information on Abdulmutallab, decided not to nominate him for inclusion in the smaller, more refined watchlists that would have resulted in additional scrutiny at airport checkpoints or denial of entry to board a U.S.-bound flight.

**C. CAUGHT WITH OUR PANTS DOWN:
ABDULMUTALLAB FLIES WIDE OPEN**

On December 16, an unidentified individual in Accra, Ghana paid cash for Abdulmutallab's round-trip plane ticket to Detroit, Michigan. On the day of his flight Abdulmutallab did not check any luggage.³² Boarding Flight 253 in Amsterdam on December 25, Abdulmutallab was not subjected to any secondary passenger screening. Department of Homeland Security (DHS) officials received a routine electronic notice of Abdulmutallab's airline reservation—which may have included details about the cash payment to purchase his ticket and his lack of baggage.³³ During the eight-hour flight from Amsterdam to Detroit, Customs and Border Patrol (CBP) officers discovered that Abdulmutallab was listed in the TIDE database and decided to question him immediately upon his arrival.³⁴

**II. THE LEGISLATIVE UNDERPINNINGS OF THE CT
COMMUNITY: THE LOOSE ELASTIC HOLDING
IT ALL TOGETHER**

**a. INTELLIGENCE REFORM: READJUSTING THE
CONSTRUCTIVE FABRIC OF THE IC**

The CT community had fragmentary intelligence regarding the Christmas Day plot that, if properly collated and understood, would have resulted in Abdulmutallab's nomination to a visa screening "lookout" list and border inspection list.³⁵ By late November several "dots" of information had been collected from different components of the IC: (1) strategic intelligence that AQAP posed a "growing threat

to US interests" in the Arabian Peninsula;³⁶ (2) analysis indicating the possibility of AQAP directing attacks against the U.S. homeland;³⁷ (3) indications that PETN was becoming the weapon of choice for AQAP operations; (4) signals intercepts indicating AQAP was recruiting a Nigerian national for a future operation; (5) a cable indicating an "Umar Farouk" had met with known AQAP affiliate Anwar al-Awlaki; (6) and the information collected by State and CIA at the Abuja Embassy suggesting that Abdulmutallab had fallen in with extremists in Yemen. Administration officials later claimed the failure to detect and interdict Abdulmutallab did not result from inadequate information sharing among the CT community. Congressional testimony by NCTC officials echo and amplify this assertion, suggesting that NCTC and, perhaps, CIA all-source intelligence analysts had access to all of the intelligence described above.

Enjoying the benefit of 20/20 hindsight, some in Congress argued, given the wealth of available information on Abdulmutallab prior to the attack, the near success of the Christmas Day plot marked a clear failure on the part of the CT community. In congressional hearings, CT officials met with countless variations of the same basic query: what went wrong? Explanations offered by CT officials as to why the information was not collated reveal deficiencies in the analytic process, shortfalls in IC resource allocation and, most troubling of all, continued confusion as to the authorities, responsibilities, and functions of the various members of the CT community.

Prior to 9/11, the many databases of IC agencies were disjointed and lacked interoperability. Stovepiping, or the tendency of agencies to husband information, combined with the "wall" separating law enforcement investigations and intelligence operations, prevented authorities from watchlisting at least two 9/11 hijackers who were known to various law enforcement and intelligence authorities.³⁸ The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA)³⁹ sought to break down many of the barriers hindering interagency cooperation through the establishment of an organization designed to serve as a single hub for all international terrorist threat information. IRTPA established NCTC and designated it the "primary organization...for analyzing and integrating all intelligence possessed or acquired...pertaining to terrorism and counterterrorism, excepting intelligence pertaining exclusively to domestic terrorists and domestic counterterrorism."⁴⁰ NCTC, placed under the

³⁰ *Id.*

³¹ *Id.*

³² *Early Leads Before the Attack*, *supra* note 11.

³³ Mark Randol, *The Department of Homeland Security Intelligence Enterprise: Operational Overview and Oversight Challenges for Congress*, 24 CONGRESSIONAL RESEARCH SERVICE (March 2010).

³⁴ *Id.*

³⁵ *Sharing and Analyzing Information to Prevent Terrorism Before the H. Comm. on the Judiciary*, 111th Cong. (March 24, 2010) [hereinafter *Sharing and Analyzing Information Before the H. Judiciary Comm.*] (statement of Russell Travers, Deputy Director for Information Sharing and Knowledge Development, NCTC).

³⁶ *Intelligence Reform: The Lessons and Implications of the Christmas Day Attack, Part I Before the S. Comm. on Homeland Security and Governmental Affairs*, 111th Cong. (Jan. 20, 2010) [hereinafter *Lessons and Implications, Part I Before the S. Homeland Security Comm.*] (statement of the Hon. Dennis Blair, Director of National Intelligence).

³⁷ *Id.*

³⁸ See *National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report* 254-66 (New York: W.W. Norton & Company, 2004) [hereinafter *9/11 Commission Report*].

³⁹ IRTPA, P.L. 108-458, 118 Stat. 3638 (enacted Dec. 17, 2004).

⁴⁰ *Id.* Subtitle B, Sec. 1021(d)(1); codified at 50 USC § 4040(d)(1).

authority of the Director of National Intelligence (DNI), is tasked with serving “as the central and shared knowledge bank on known and suspected terrorists and international terror groups.”⁴¹

Even with NCTC’s tasking, no member of the CT community has been forced to eliminate its analytic components that receive and analyze information related to terrorism. On the contrary, although NCTC is the primary mechanism for the analysis and synthesis of international terrorism-related information, CIA continues to conduct its own all-source analysis with capabilities and methods discrete from those of NCTC.⁴² This intentional redundancy serves to “layer” the analytic process and hedge against the possibility of critical information falling through interagency gaps.⁴³

**b. NCTC’S DIRECTORATE OF INTELLIGENCE:
UNDER-EQUIPPED, UNDER-STAFFED, AND
UNDER-RESOURCED**

With primary responsibility for the analysis of all international terrorism-related information and a statutory position at the heart of the IC, NCTC’s Directorate of Intelligence (DI) bears the burden for the “failure” to make sense of the fragmentary information concerning Abdulmutallab. Several possible explanations shed light on why NCTC, at least in the view of Congress, came up short. As a general matter, improving intelligence collection has long been the focus of the IC, with intelligence analysis historically regarded as a secondary priority.⁴⁴ The incredibly high volume of intelligence received by NCTC’s DI on a daily basis requires cutting-edge technology and a well-resourced staff to process and analyze information intake. NCTC’s DI receives and reviews around five thousand pieces of

CT intelligence on a daily basis, often implicating thousands of identities.⁴⁵ Partial names and different spellings hinder NCTC’s ability to draw linkages from the data.⁴⁶ In 2009 alone, NCTC received 3,000 Visas Viper cables, the type of transmittal sent by consular officials to NCTC as a result of the meetings with Alhaji Umaru in the Abuja Embassy.⁴⁷

NCTC officials insisted that the two Visas Viper cables, discussed in Part IIIA, sent to NCTC as a result of the Abuja meetings “existed largely ‘in the noise,’ and there was simply nothing particularly alerting about either ‘dot.’”⁴⁸ While Congress expressed dismay over NCTC’s inability to separate the wheat from the chaff given what was known about Abdulmutallab, NCTC officials’ testimony suggests that, given the volume of intelligence monitored by NCTC and the absence of a single piece of derogatory data suggesting Abdulmutallab posed a serious threat, the inability to collate pertinent data was not an aberration. Piecing together fragmentary information is “a very complicated challenge involving both numbers of analysts and the use of technology to correlate vast amounts of information housed in multiple agencies and systems.”⁴⁹ NCTC officials acknowledged that technological progress was needed to improve intelligence analysis;⁵⁰ however, technological improvement alone is not a panacea for curing the deficiencies of the analytic process.

Understaffing was also a critical part of the equation, with NCTC operating with around 600 analysts when the Christmas Day attack occurred.⁵¹ As NCTC Director Michael E. Leiter noted in congressional testimony, “we simply need the people to do [the analysis], because you can have the best Google-like tool in the world [but]...the people to work that watch list and look at that information [are still necessary].”⁵² NCTC did not have the manpower to sift through and analyze all available data, which would explain in part why “NCTC...personnel who are responsible for watchlisting did not search all available databases to uncover additional derogatory information that could have been correlated with Abdulmutallab.”⁵³ The White

⁴¹ *Id.* Subtitle B, Sec. 1021(d)(6); codified at 50 USC § 404o(d)(6).

⁴² In accordance with statute, CIA maintains the responsibility and resource capability to “correlate and evaluate intelligence related to national security and provide appropriate dissemination of such intelligence.” 50 U.S.C. § 403-4a(d)(2).

⁴³ As NCTC Director Leiter noted in testimony, “Also with responsibility, pursuant to the president’s conclusions and consistent with past practice, was the CIA. We both had responsibility to [collate the available data on Abdulmutallab].” *Aviation Security and Flight 253 Before the S. Comm. on Commerce*, *supra* note 22 (testimony of Michael Leiter, Director of NCTC). At the same hearing, the Hon. Lee Hamilton described the benefit of this redundancy, stating:

Redundancy doesn’t bother me particularly, because if you got the CIA doing analytical work on the threat and the NCTC, that’s OK, because the thing that impresses me about the analyst is the work can be boring -- I mean really boring, sorting through massive amounts of data and trying to figure out what’s right there or what’s significant. And somebody’s going to be asleep at the switch now and then, so some redundancy doesn’t bother me.

⁴⁴ Intelligence Reform: The Lessons and Implications of the Christmas Day Attack, Part II *Before the S. Comm. on Homeland Security and Governmental Affairs*, 111th Cong. (Jan. 26, 2010) (testimony of Lee Hamilton, Chair of the 9/11 Commission, stating “The collection side we’re -- we’re very good at; the analyst side less good at. And I think the reason for it is because we simply haven’t given it the priority it deserves”).

⁴⁵ *Sharing and Analyzing Information Before the H. Judiciary Comm.*, *supra* note 35 (statement of Russell Travers, NCTC).

⁴⁶ *Id.*

⁴⁷ Wassem, *Immigration: Terrorist Grounds for Exclusion*, *supra* note 13.

⁴⁸ *Sharing and Analyzing Information Before the H. Judiciary Comm.*, *supra* note 35 (testimony of Russell Travers, NCTC).

⁴⁹ *Id.*

⁵⁰ *Aviation Security and Flight 253 Before the S. Comm. on Commerce*, *supra* note 22 (in testimony, NCTC Director Leiter asked, “Do we have the systems in place that make it easy to connect those pieces of data in the first instance? And the answer is yes in some places and not nearly enough so in others. Some agencies are far ahead of others. And we still have clearly some systems which are so rudimentary and basic, that they’re not doing a good job of that”).

⁵¹ Richard Best, *The National Counterterrorism Center (NCTC)—Responsibilities and Potential Congressional Concerns*, at 4 CONGRESSIONAL RESEARCH SERVICE (Jan. 15, 2010).

⁵² *Aviation Security and Flight 253 Before the S. Comm. on Commerce*, *supra* note 22 (statement by Michael Leiter, Director of NCTC).

⁵³ *White House Review*, *supra* note 3; *see also supra* note 51 (offering a discussion of analytic responsibilities among the IC).

House Review found that one of the “failures” of the CT community was that “[IC] leadership did not increase analytic resources working on the full AQAP threat.” If the Review’s finding was referring to NCTC, the term “failure” was a mischaracterization: NCTC does not possess direct authority over either its budget or staffing.⁵⁴ The issue of inadequate resource allocation is a symptom of a more fundamental deficiency in the 2004 intelligence reform legislation that is further evidenced, if not epitomized, by NCTC’s Directorate of Strategic Operational Planning.

c. NCTC’S DIRECTORATE OF STRATEGIC OPERATIONAL PLANNING: JOCKEYING FOR RELEVANCE IN THE CT COMMUNITY

We therefore propose a new institution: a civilian-led unified joint command for counterterrorism. It should combine strategic intelligence and *joint* operational planning [emphasis added].⁵⁵ – *9/11 Commission Report*

The White House Review found that one of the primary explanations for the “failure” to detect the Christmas Day plot was that no CT entity took responsibility for “running down” the threat streams emanating from AQAP.⁵⁶ According to the President, “the intelligence community did not aggressively follow up on and prioritize particular streams of intelligence related to a possible attack against the homeland.”⁵⁷ NCTC Director Leiter acknowledged that, by presidential instruction, NCTC bears primary responsibility “to ensure a system of...follow-up of high priority threats.”⁵⁸ The White House Review, however, did not explicitly blame this failure on NCTC, stating only that, “[n]o single component of the CT community assumed responsibility for the threat reporting.”⁵⁹

The White House’s reluctance to pin this responsibility on any one actor is telling—not because the White House was trying to avoid taking ownership of the “failure” for the sake of political expediency, but rather because of the uncertainty, codified in statute, as to where responsibility for following up on threats should lie. NCTC is only capable of conducting follow-up by developing analytic resources devoted to focusing on specific pieces of information. Although the Office of the DNI (ODNI) has authority to task members of the IC with collecting additional information on specified targets,

NCTC does not have derivative tasking authority by virtue of being within ODNI. Information flow between NCTC and the rest of the CT community is decidedly one-way. Bearing that in mind, NCTC Director Leiter’s testimony before a congressional committee investigating the attack on Flight 253 merits scrutiny. Leiter discussed the possibility of NCTC conducting operational follow-up when more information is needed on a particular threat stream. He implied NCTC should assert more authority over the process, claiming operational follow-up could be conducted through a system whereby NCTC identifies threats and tasks an agency with taking further investigative action. It was unclear whether Congress was receptive to the NCTC Director’s implicit request for a measure of authority over the tasking process.⁶⁰ NCTC’s lack of tasking authority might have been a moot point with respect to the Christmas Day plot, as no publicly available information suggests any IC agency tasked additional collection after receiving information on Abdulmutallab.

An examination of NCTC’s authority, or lack thereof, to conduct operations offers insight into the depth of confusion surrounding NCTC’s role in the CT community. IRTPA expressly prohibits the NCTC Director from “direct[ing] the execution of counterterrorism operations.”⁶¹ Although the scope of activity falling within the definition of “CT operations” is uncertain, it likely entails operations intended to collect additional “dots” of information. Testifying before Congress following the Christmas Day attack, Leiter did not seek any amendment to this prohibition.⁶² While this prohibition and Leiter’s acceptance of it are unremarkable, they raise a perplexing question: just what is NCTC’s Directorate of Strategic Operational Planning?

One of NCTC’s primary missions is “to conduct strategic operational planning for counterterrorism activities, integrating all instruments of national power...within and among agencies.”⁶³ IRTPA

⁵⁴ The NCTC Director is completely reliant upon the Director of National Intelligence for determining budgetary allocations and policy with respect to personnel. NCTC’s budget is comparatively modest among members of the IC, and most NCTC spending goes to covering personnel expenses. *NCTC—Responsibilities and Potential Concerns*, *supra* note 51, at 9. ⁵⁵ *9/11 Commission Report*, at 403, *supra* note 38.

⁵⁶ *White House Review*, *supra* note 3 (finding that there was a “failure within the CT community, starting with established rules and protocols, to assign responsibility and accountability for follow up of high priority threat streams, run down all leads, and track them through to completion”).

⁵⁷ *President Obama’s Remarks on Security Review of Attempted Terrorist Attack on Christmas Day* (Jan. 7, 2010).

⁵⁸ *Aviation Security and Flight 253 Before the S. Comm. on Commerce*, *supra* note 22 (statement by Michael Leiter, Director of NCTC).

⁵⁹ *White House Review*, *supra* note 3.

⁶⁰ *Aviation Security and Flight 253 Before the S. Comm. on Commerce*, *supra* note 22. NCTC Director Leiter said, “at least we will establish a system whereby each of these threats, when we identify threats, can, in fact, be followed up through appropriate department or agency action. And the results of that follow-up are reported back to the [NSC] to ensure that they have the information they need to further direct action as necessary.” Leiter acknowledged that, as constituted, NCTC does not have the tasking authority he describes in terms of follow-up investigations: “I do not [have], nor do I believe the DNI as currently constructed has, all of the authorities to move all of the information in a way that will maximize the likelihood of detecting these plots.” Although the DNI possesses tasking authorities, many commentators suggest that authority is not transmitted to NCTC which, in effect, had no such authority prior to the Christmas Day attack. See Marc Armbrinder, *The Leiter They Are, the Quicker They Fall*, *THE ATLANTIC* (Jan. 7, 2010), available at <http://www.theatlantic.com/politics/archive/2010/01/the-leiter-they-are-the-quicker-they-fall/33118/>.

⁶¹ IRTPA, P.L. 108-458, Section 1021, Sec. 119(g).

⁶² *Aviation Security and Flight 253 Before the S. Comm. on Commerce*, *supra* note 22 (statement by Michael Leiter, Director of NCTC).

⁶³ 50 USCS § 4040(d)(2).

established the nominally contradictory⁶⁴ Directorate of Strategic Operational Planning (DSOP) to accomplish this end. DSOP was chartered “to provide the ‘connective tissue’ between national counterterrorism policy and strategy established by the President, normally via the National Security Council system, and counterterrorism operations conducted by the departments and agencies.”⁶⁵ In theory, DSOP coordinates along both vertical and horizontal lines: it receives policy guidance from the NSC and, through an interagency process, “assign[s]...roles and responsibilities”⁶⁶ to various CT agencies to implement the policy at an operational level. Assuming DSOP performs the functions ascribed to it by statute, the threat posed by Abdulmutallab would fall within DSOP’s purview.⁶⁷

In reality, had NCTC analysts pieced together the available information on Abdulmutallab, it is unlikely DSOP would have been able to coordinate any operational response to the identified threat. A report issued in February 2010 by the Project on National Security Reform (PNSR) identified several “systemic impediments” that undercut DSOP’s ability to effect either strategic or operational planning, including: overlapping authorities among CT entities; inadequate congressional understanding of DSOP’s mission and insufficient oversight of its activities; and inadequate means available to DSOP for “prioritiz[ing] resources and investments in capabilities for complex, multidimensional [CT] missions.”⁶⁸ Two interrelated issues raised by PNSR are important to understanding the foundational flaws in the CT community that allowed Abdulmutallab to slip through the cracks: (1) the overlapping authorities among NCTC, State, and CIA; and (2) the institutional tensions inhibiting DSOP from managing collaborative interagency CT operations.

As noted earlier, the NCTC Director is prohibited by statute from executing CT operations, leaving that responsibility to individual agencies. Although the 9/11 Commission recommended that NCTC be “given the authority of planning the activities of other agencies,” the Commission did not specify the scope of this

authority,⁶⁹ and IRTPA, although largely implementing the 9/11 Commission’s recommendations regarding NCTC, refrained from granting DSOP this unprecedented power.⁷⁰ IRTPA also required the president to issue guidance to the DNI to implement reform “in a manner that respects and does not abrogate the statutory responsibilities of the heads” of other IC agencies.⁷¹

So, although DSOP was tasked with providing strategic operational plans for CT operations, which includes coordinating operational activities among agencies, assigning roles and responsibilities, and monitoring plans’ implementation, it was given no “hammer” authority to compel agencies to align their plans and activities, or to fulfill their roles and responsibilities under strategic operational plans.⁷² Nor was NCTC given the budgetary control necessary to encourage interagency buy-in—the NCTC Director possesses only the ability to advise the DNI on “the extent to which counterterrorism recommendations and budget proposals of departments, agencies and elements of the United States government conform to the priorities established by the president.”⁷³

DSOP, as a component of NCTC, lacks even the authority to determine “which personnel or specific capabilities should be utilized by agencies in mission execution.”⁷⁴ Existing mechanisms to ensure participation in the interagency strategic operational planning process at DSOP are weak,⁷⁵ and DSOP has been reluctant to aggressively use what authority it has, preferring instead to rely on the willingness of other agencies to support DSOP’s mission. When DSOP attempts to exercise its authority, CIA and State tend to resist what they view as DSOP’s encroachment, using the statutory vagueness of “strategic operational planning” as a means to block DSOP’s efforts to live up to its statutory mandate. As one NCTC official put it:

If you started to do an operational plan they would say, “That’s too operational, that’s too tactical. You’re supposed to be focused more on strategic.” If we trended toward the strategic they would say,

⁶⁴ PROJECT ON NATIONAL SECURITY REFORM, TOWARD INTEGRATING COMPLEX NATIONAL MISSIONS: LESSONS FROM THE NATIONAL COUNTERTERRORISM CENTER’S DIRECTORATE OF STRATEGIC OPERATIONAL PLANNING, (Feb. 2010) at 47-51 [hereinafter referred to as PNSR REPORT] (explaining that the term “joint operational planning” was the source of contentious debate, as it implied the allocation of too much authority to the DSOP—the compromise language, “strategic operational planning,” beyond its contradiction in terms, has become a point of consternation for those in the DSOP).

⁶⁵ *Id.* at XI.

⁶⁶ 50 USCS § 404o(d)(3).

⁶⁷ According to a statement by Leiter, NCTC is “intended to be a one stop shop for mapping out the terrorism threat and designing a plan for the U.S. Government to counter it—whether it is immediate, emerging, or long-term.” *Looming Challenges in the War on Terror, Remarks by Michael Leiter to the Washington Institute*, Feb. 13, 2008. See also PNSR REPORT (stating that, “[DSOP] was proposed to translate counterterrorism policy and strategy into strategic and operational interagency plans that range from broad objectives to specific tasks and from the long term to the immediate”) at 49.

⁶⁸ PNSR REPORT at XV, *supra* note 64.

⁶⁹ See *9/11 Commission Report* at 406, *supra* note 38.

⁷⁰ PNSR REPORT at 33, *supra* note 64 (granting NCTC that authority was considered “unprecedented” by PNSR because few, if any, government agencies in the history of the U.S. government have had the ability to cut through the normal bureaucratic hindrances common to all interagency processes).

⁷¹ IRTPA 2004, P.L. 108-458, Title I, Subtitle A, § 1018, 118 Stat. 3670 (effective not later than six months after enactment, as provided by § 1097 of such Act, which appears as 50 USCS § 401 note); see also *The Lessons and Implications of the Christmas Day Attack: Intelligence Reform and Interagency Integration Before the S. Comm. on Homeland Security and Governmental Affairs*, 111th Cong. (March 17, 2010) (testimony of the Hon. Benjamin Powell, Former General Counsel to DNI, stating “[t]he goal is not to diminish the authorities or the capabilities of one organization in favor of another organization such as the DNI. The goal is to have an integrated intelligence community that is more than the sum of its parts”).

⁷² PNSR REPORT at 38, *supra* note 64.

⁷³ Codified at 50 USCS § 404o(f)(C).

⁷⁴ PNSR REPORT at 47, *supra* note 64 (quoting NCTC Director Michael Leiter’s testimony before the House Committee on Homeland Security on Oct. 4, 2007).

⁷⁵ *Id.* at 113.

"No, you should be more focused on the operational."⁷⁶

Interagency involvement in strategic operational planning is entirely voluntary, with DSOP relegated to facilitating interagency cooperation and coordination rather than forcibly ensuring that it occurs.⁷⁷ As Leiter explained in testimony, "we've become a negotiator and mediator of sorts, rather than a director of action."⁷⁸ Leiter likely overstates the case, as other testimony suggests NCTC's lack of authority leaves it largely unable to perform even this arbitration function effectively.⁷⁹ An examination of the authorities, culture, and institutional interests of State and CIA with respect to CT reveal very little incentive for either entity to invest in DSOP-led processes.

d. STITCHED TOGETHER: TRACING THE SEAMS OF AUTHORITY AND FUNCTION AMONG NCTC, STATE, AND CIA

State's Office for Combating Terrorism was established in 1972, following the attack by Black September, a radical Palestinian terrorist organization, on Israeli athletes at the Munich Olympics. As the PNSR report notes, "it has always (nominally) been the primary entity within the U.S. government responsible for managing international terrorist incidents and programs."⁸⁰ By statute, State's Office of the Coordinator for Counterterrorism (State/CT), as it has come to be known, is charged with providing "overall supervision (including policy oversight of resources) of international counterterrorism activities."⁸¹ Like the NCTC Director, the Coordinator was given no "hammer"

⁷⁶ [The Lessons and Implications of the Christmas Day Attack: Intelligence Reform and Interagency Integration Before the S. Comm. on Homeland Security and Governmental Affairs](#), *supra* note 71 (testimony of Richard Nelson, former DSOP official).

⁷⁷ PNSR REPORT at 70, *supra* note 64 (Kevin Brock, former Principal Deputy Director at NCTC, clarified this role by stating, "NCTC is not directing operations.... We're here just to kind of act as the air traffic controller and make sure everyone is talking"). Furthermore, DSOP has tended not use its authorities robustly and risk alienating its interagency partners and has favored a strategy of maintaining a "coalition of the willing." For example, DSOP has traditionally tended to shy away from any assessment that holds departments and agencies accountable for fulfillment of certain objectives. While DSOP has the authority to assign roles and responsibilities and monitor department and agency implementation of strategic operational planning, there have been instances where departments and agencies did not participate in the planning process, implement DSOP's strategic operational plans, or even perform the roles and responsibilities assigned to it.

⁷⁸ *Intelligence Reform, Part I Before the S. Comm. on Homeland Security and Governmental Affairs*, *supra* note 12 (testimony by NCTC Director Michael Leiter).

⁷⁹ Richard Nelson testified, "Somebody should be arbitrating...decisions at a much lower level. And that's a role that NCTC could take -- undertake, but it can't do because it doesn't have the credibility and the authority currently to do that." [The Lessons and Implications of the Christmas Day Attack: Intelligence Reform and Interagency Integration Before the S. Comm. on Homeland Security](#), *supra* note 71.

⁸⁰ PNSR REPORT at 116, *supra* note 64.

⁸¹ P.L. 105-227 [H.R. 4328].

to compel operational activities by other departments and agencies or ensure compliance with CT objectives set forth by State. State/CT views itself as the leader of U.S. government CT efforts, and its mission statement is laid out in terms strikingly similar to those of DSOP as prescribed by IRTPA.⁸² It is therefore no surprise that DSOP planning processes often lack participation by State personnel. It is also no surprise that the PNSR found that, "ambiguous delineation of roles and responsibilities has resulted in duplication of effort and inefficiency" between State and NCTC.⁸³

While consular officials at the Abuja Embassy followed protocol by notifying NCTC of the meeting with Abdulmutallab's father, various claims by State officials suggest CIA, rather than NCTC, called the shots in any subsequent operational planning that occurred with respect to Abdulmutallab. Given the nebulous lines of authority and responsibility among State, NCTC, and CIA, the State officials who were privy to the information provided by Alhaji Umaru were justified in pursuing one of three routes in terms of operational response: (1) deferring to NCTC to formulate a plan for running the threat to the ground; (2) deferring to CIA; or (3) assuming operational responsibility.⁸⁴ In light of the existing collaborative relationship between State and CIA in responding to international terrorism threats, strengthened by a history of mutual cooperation, it is likely standard practice for State to defer to CIA to address the type of threat posed by Abdulmutallab. The State-CIA relationship tends to further exclude NCTC from exerting any influence on CT operational planning.

CIA's broad authority to conduct international operations relating to national security, codified in the "fifth function" of its legislative framework, has put international terrorism in its crosshairs at least as far back as 1972.⁸⁵ Although CIA's Counterterrorism Center (CTC) was only established in 1986 following the marine barracks bombing in Lebanon, CIA had, since 1947, enjoyed premier status in the IC and served as the primary agency for combating all manner of international threats to the U.S. With its own all-source intelligence collection and paramilitary capabilities, CIA

⁸² Compare State/CT's mission statement, to develop and lead "a worldwide effort to combat terrorism using all the instruments of statecraft: diplomacy, economic power, intelligence, law enforcement, and military," and providing "foreign policy oversight and guidance to all U.S. Government international counterterrorism activities" with that of DSOP, which is "to conduct strategic operational planning for CT activities, integrating all instruments of national power, including diplomatic, financial, military, intelligence, homeland security, and law enforcement activities within and among agencies." PNSR REPORT at 117, *supra* note 64.

⁸³ *Id.*

⁸⁴ While unilateral responsive action by State might seem far-fetched with CIA case officers close at hand in U.S. embassies in consulates worldwide, State's Diplomatic Security Service does play a role in CT investigations abroad.

⁸⁵ The "fifth function," originally set forth in the National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495, refers to CIA's statutory responsibility to "perform such other functions and duties related to intelligence affecting the national security as the President or the Director of National Intelligence may direct...". 50 USC §403-404(a).

enjoyed de facto authority in addressing international terrorism prior to IRTPA's passage in 2004. If an organization's "role in the CT mission is informed by the organization's history, culture, and leadership...codified by statutes and Executive Orders,"⁸⁶ it should come as no great shock that CIA has been indisposed to submitting its resources and personnel to the planning activities of a newly-minted and ill-defined interagency planning process. The PNSR report describes one telling episode when a DSOP-drafted plan was roundly criticized for not incorporating input from CIA. However, as CIA had not participated in the planning process and DSOP, reluctant to engage in a turf war with such a formidable and well-established agency,⁸⁷ did not attempt to solicit CIA's involvement, it is "no surprise that [CIA's] perspectives were not fully considered."⁸⁸

Following the meetings between Embassy-based CIA operations officers and Abdulmutallab's father on November 19 and 20, CIA analysts compiled biographical data on Abdulmutallab. As noted in Part II, this information was not shared with NCTC. This information sharing failure was attributed to the mere oversight of one office within CIA; it was not regarded as symptomatic evidence of underlying confusion regarding proper authorities in CT operations.⁸⁹

DSOP, although nominally charged with serving a similar function to State/CT and CTC, lacks the authority, budget, and institutional legitimacy of the other entities. DSOP has no mechanism to control any constituent part of the CT community, and therefore no means by which to hold departments and agencies accountable for missteps. Personnel from CT agencies serving in rotation at NCTC remain beholden to their respective agencies.⁹⁰ Serving at DSOP, like many interagency posts, offers little chance for advancement. There is, to put it mildly, little incentive for the CT community to buy into DSOP's interagency processes.

Even when NCTC has attempted to assign roles and responsibilities in CT operations, CT entities have refused to accept NCTC's delegation. All CT entities, including those in State, CIA, and the Department of Defense (DoD) possess the authority to plan and execute CT operations.⁹¹ The current structure is woefully inefficient: "[t]he counterterrorism system is a spider web of overlapping missions, conflicting cultures, and

ambiguous lines of authority...this diffusion of responsibility and accountability leads to ineffective management of the mission."⁹² A former DSOP official, referring to the coordination of CT activities, offers a frank assessment of the current state of the CT community, noting, "the [IC] and, arguably the government as a whole, still lacks a truly interactive process for addressing terrorism."⁹³

In discussing NCTC authorities during a congressional hearing, NCTC Director Leiter noted that the statutory language ostensibly placing NCTC in charge of CT operations was left "purposefully vague."⁹⁴ Perhaps this vagueness was an effort to provide the CT community flexibility and leeway to adapt to the fluid and dynamic threat posed by international terrorism. Statements by 9/11 Commission Chairman Lee Hamilton and Senator Susan Collins suggest that, while statutory vagueness exists, the more pertinent issue is the unwillingness of those officials in offices created by IRTPA to exercise existing authorities.⁹⁵ It is interesting to note, however, Hamilton's admonition that NCTC should not be given tasking authority to assign roles and responsibilities for conducting follow-up investigations.⁹⁶ The fact that Hamilton, a co-author of the 9/11 Commission Report, makes somewhat inconsistent claims about what NCTC's authorities and responsibilities should be may simply reflect his acknowledgment of the laborious horse-trading inherent in pursuing further reform. IRTPA was hard enough to pass; perhaps it is best to leave well enough alone. Senator Collins has expressed similar concerns. Acknowledging the messiness of the initial legislative process, she recalled how §1018 of IRTPA, prohibiting "abrogat[ion]" of existing agency and department authorities, was the result of a compromise without which the House Armed Services Committee would have killed the entire intelligence reform bill.⁹⁷ Senator Joseph Lieberman's colorful use of metaphor to describe the deliberative process preceding passage of IRTPA amplified this point:

⁹² PNSR REPORT at 113, *supra* note 64.

⁹³ The Lessons and Implications of the Christmas Day Attack: Intelligence Reform and Interagency Integration *Before the S. Comm. on Homeland Security and Governmental Affairs*, *supra* note 71 (testimony of Richard Nelson, former DSOP official).

⁹⁴ *Aviation Security and Flight 253 Before the S. Comm. on Commerce*, *supra* note 22 (statement of Michael Leiter, Director of NCTC).

⁹⁵ *Intelligence Reform: The Lessons and Implications of the Christmas Day Attack, Part II Before the S. Comm. On Homeland Security and Governmental Affairs*, *supra* note 44 (testimony of Lee Hamilton, former co-chair, 9/11 Commission, stating, "I think there probably are some ambiguities in the law, although you can argue, as I think Senator Collins was doing in her opening statement, that it's more a failure of exercising authority that ambiguity").

⁹⁶ *Id.* Hamilton testified, "I don't think that's the role of the NCTC. I -- I am not quite sure where -- where that responsibility lies, but the assignment of responsibility to investigate and to pursue a suspect has to be very clear."

⁹⁷ The Christmas Day Attack: Intelligence Reform and Interagency Integration *Before the S. Comm. on Homeland Security and Governmental Affairs*, *supra* note 71.

⁸⁶ PNSR REPORT at 113, *supra* note 64.

⁸⁷ NCTC's reluctance to assert its influence on CT operations, some critics maintain, is commonplace. One report notes that NCTC has demonstrated "a seeming unwillingness to take a bold implementation approach and a preference to avoid bureaucratic conflict." Brian R. Reinwald, *Assessing the National Counterterrorism Center's Effectiveness in the global War on Terror*, U.S. ARMY WAR COLLEGE (Carlisle Barracks, Pennsylvania) (2007).

⁸⁸ PNSR REPORT at 115, *supra* note 64.

⁸⁹ *Aviation Security and Flight 253 Before the S. Comm. on Commerce*, *supra* note 22 (statement of Michael Leiter, Director of NCTC).

⁹⁰ One critic of NCTC notes that it "sustains an environment that fosters continued loyalty of NCTC employees to their parent agencies rather than the NCTC itself." Brian R. Reinwald, *Assessing the National Counterterrorism Center's Effectiveness in the global War on Terror*, *supra* note 87.

⁹¹ Title X, USC.

I can remember the debates, the extensive debates about the various terms that we put into the 9/11 legislation. And it's seems as if -- but not quite as neat, that we were architects or construction management operation deciding how best to build a building. They're not as neat because there was [sic] more interests at the table than the design and construction teams. Because in some sense, the people at the table wanted to preserve the existing parts of their building.⁹⁸

Whatever the reason for legislative ambiguity, its ultimate effect is to obscure lines of accountability and responsibility, thereby hindering oversight and support of the CT community. Despite the Administration's insistence that the CT community's "failures" preceding the Christmas Day plot are distinct from those preceding the attacks on 9/11, the conclusions of the 9/11 Commission Report are unsettlingly applicable to the more recent case. The 9/11 Commission correctly concluded that the inability of CT entities to conduct joint action, share information, and connect the dots were only symptoms of a larger disease plaguing the CT community. The more fundamental problem, which IRTPA was specifically intended to address, was that:

[N]o one was firmly in charge of managing the case and able to draw relevant intelligence from anywhere in the government, assign responsibilities across the agencies...track progress, and quickly bring obstacles up to the level where they could be resolved. Responsibility and accountability were diffuse.⁹⁹

As the individual components of the CT community "interpret their [CT] responsibilities largely based on their individual statutes, histories, bureaucratic cultures, and current leadership,"¹⁰⁰ Congress's histrionic finger-pointing following the Christmas Day attack seems profoundly misguided. Rather than forcing CT officials to offer platitudes and reassurances that no such mistakes will be made in the future, congressional inquiry should reexamine the underlying framework of the CT community. Evidence of its debilitating effects on CT efforts was laid bare by the CT community's response to the information provided by Abdulmutallab's father in Abuja.

III. UNDER-INTEGRATION IN PRACTICE: HOW AN UNSTABLE LEGISLATIVE FOUNDATION PLAYS OUT AT THE OPERATIONAL LEVEL

A. THE U.S. DEPARTMENT OF STATE AS THE OUTER GARMENT OF THE CT COMMUNITY: THE ABUJA MEETING

Alhaji Umaru Mutallab, upon receiving unsettling text messages from his son described in Part I, visited the U.S. Embassy in Abuja, Nigeria on November 19 and 20 to seek help. On November 20, the Embassy sent a cable to NCTC providing a general overview of the

discussions with Alhaji through the Visas Viper system, the standard form of interagency communication for screening suspected terrorists.¹⁰¹ The memo read, "Information at post suggests [that Farouk] may be involved in Yemeni-based extremists."¹⁰² However, a consular officer misspelled Abdulmutallab's name when conducting a name check in the State's Consolidated Consular Database (CCD), a resource available to all embassies and consulates containing the names of current U.S. visa holders. As a result of the misspelling, the Visas Viper cable did not indicate that Abdulmutallab held a visa.¹⁰³ On November 25, an amended cable containing the correct spelling was sent to NCTC—however, for reasons that remain unclear, the second cable was sent from "another [State] source" in the Embassy, and Abdulmutallab's visa status was not checked prior to sending the amended cable.¹⁰⁴ NCTC was not notified of Abdulmutallab's status as a visa holder.

A short time after the initial Visas Viper cable was sent, Abdulmutallab's name was entered into the Consular Lookout and Support System (CLASS), a database of 27 million records of derogatory information used by consular officials to screen visa applicants for travel to the United States.¹⁰⁵ On this occasion, Abdulmutallab's name was spelled correctly. The CLASS entry, which matches derogatory information to current visa holders in the CCD, resulted in a "lookout" that connected Abdulmutallab's status as a visa holder with the information provided by his father. By design, the CLASS system only transmitted this information to the primary lookout system used by DHS. This information was merely "accessible" to two agencies primarily responsible for managing air travel watchlists, the Federal Bureau of Investigation's Transportation Screening Center (TSC) and NCTC, but was not required reading.¹⁰⁶

However, it is doubtful whether the misspelling in the initial Visa Viper cable contributed to the overall "failure" to detect the AQAP plot. The correctly spelled, more detailed cable and the CLASS entry revealing Abdulmutallab's visa status were eventually consolidated into a single file. Depending on the timeframe in which this consolidation occurred, it is not

¹⁰¹ Wassem, *Immigration: Terrorist Grounds for Exclusion*, at 20, *supra* note 13.

¹⁰² *Intelligence Reform, Part I Before the S. Comm. on Homeland Security and Governmental Affairs*, *supra* note 12 (testimony by Patrick Kennedy, Under Secretary for Management, U.S. Department of State).

¹⁰³ Wassem, *Immigration: Terrorist Grounds for Exclusion*, at 20, *supra* note 13.

¹⁰⁴ *Securing America's Safety: Improving the Effectiveness of Anti-Terrorism Tools and Inter-Agency Communication Before the S. Comm. on the Judiciary*, 111th Cong. (Jan. 20, 2010) (statement by Patrick Kennedy, Under Secretary for Management, U.S. Department of State).

¹⁰⁵ *Sharing and Analyzing Information to Prevent Terrorism Before the H. Comm. on the Judiciary*, *supra* note 35 (statement by Patrick Kennedy, Under Secretary of State for Management, Department of State).

¹⁰⁶ *Id.* The Terrorist Screening Center, managed by the FBI was established pursuant to Homeland Security Presidential Directive 6, signed by President Bush in 2003.

⁹⁸ *Id.*

⁹⁹ 9/11 Commission Report at 400, *supra* note 38.

¹⁰⁰ PNSR REPORT at 113, *supra* note 64.

unreasonable to assume the validity of State's assertion that "...the misspelling – our error – was obviated" by the pairing up of the correctly spelled cable and the CLASS entry providing visa information on Abdulmutallab."¹⁰⁷

**B. THE DECISION NOT TO REVOKE
ABDULMUTALLAB'S VISA¹⁰⁸**

In congressional hearings following the Christmas Day attack, State officials repeatedly pointed out that TSC is responsible for the continual vetting of names located in TSC's Terrorist Screening Database (TSDB) and maintaining the secondary screening ("Selectee") and "No Fly" watchlists. To determine whether individuals in the TSDB hold visas, all records added to the TSDB are checked against the State's CCD.¹⁰⁹ When a match occurs, TSC sends a notice to State to flag cases for visa revocation and, according to a State official, "In almost all such cases, visas are revoked."¹¹⁰ Notices can also be sent from NCTC and DHS.

Alhaji Umaru's visit to the Embassy in Abuja and the subsequent discovery of Abdulmutallab's status as a visa holder would seem alarming to any reasonable observer. Even assuming State and DHS were the only departments fully aware of the situation by November 20 (as NCTC had received the Visas Viper cable without information regarding Abdulmutallab's visa status), and further assuming that these two pieces of information were all that was known to either department, revocation of Abdulmutallab's visa should have at least been considered. Congressional hearings shed light on why Abdulmutallab was permitted to retain his visa after November 20.

One explanation is that the meetings on November 19 and 20 simply did not provide sufficient information to justify visa revocation.¹¹¹ As noted earlier, NCTC placed Abdulmutallab's name on the TIDE list upon receiving the cable from the Abuja Embassy. Pursuant to established protocol, once Abdulmutallab was added to TIDE, an NCTC analyst had to determine whether there was a "reasonable suspicion" that Abdulmutallab intended to engage in a terrorist attack.¹¹² Had the "reasonable suspicion" standard been met, Abdulmutallab would have been nominated for inclusion on TSC's TSDB and possibly considered for placement on

the Selectee or No-Fly lists. Based on State's initial report to NCTC, which contained scant details and made no mention of Abdulmutallab's status as a visa holder, NCTC was justified in not sending his name to TSC. Although NCTC plays an advisory role in the visa revocation process, revocation "would have only occurred if there had been a successful integration of intelligence" by NCTC.¹¹³ It would be tempting to conclude that NCTC's failure to connect the dots, then, played a role in the decision not to revoke Abdulmutallab's visa. Even if this were the case, it is far from clear that NCTC should be held to account – NCTC analysts had relatively little cause to strictly scrutinize the Visa Viper cable, as the State officials who drafted it did not include any assessment of its significance and offered no recommendations as to how NCTC should regard the information.

Although consular officers and the Secretary of State have discretionary authority to revoke a visa at any time,¹¹⁴ and consular officers are able to revoke visas on terrorist grounds, it is common practice for State to defer to NCTC to identify suspected terrorists and make the proper designations prior to visa revocation.¹¹⁵ State officials have confirmed that, in accordance with established protocol, both the November 20 Visa Viper and the amended version, sent on November 25, went to proper IC and law enforcement offices to solicit additional information on Abdulmutallab.¹¹⁶ While NCTC plays an integral part in the advisory process that decides whether visas should be revoked, it does not, contrary to an implication made by a State official testifying before Congress, have authority to unilaterally revoke visas. This official's implication drew a harsh rebuke from Senator Collins and prompted NCTC Director Leiter to jokingly express his surprise at learning of NCTC's newfound visa revocation authority.¹¹⁷

State officials also drew the ire of Congress by repeatedly noting that DHS also possesses a measure of authority over visa revocation.¹¹⁸ Although State did not explicitly suggest that DHS should have assumed

¹⁰⁷ *Securing America's Safety: Improving the Effectiveness of Anti-Terrorism Tools and Inter-Agency Communication Before the S. Comm. on the Judiciary*, *supra* note 104.

¹⁰⁸ Although the legislative ambiguity underlying the CT community is amply demonstrated by both the decision-making process with respect to visa revocation and the failure to nominate Abdulmutallab to either the "selectee" or "no fly" watchlists, the explanations for non-revocation and the failure to watchlist dovetail. A discussion of watchlisting practices and how they applied to Abdulmutallab is omitted.

¹⁰⁹ *Sharing and Analyzing Information to Prevent Terrorism, H. Comm. on the Judiciary*, *supra* note 35 (statement of Patrick Kennedy).

¹¹⁰ *Id.*

¹¹¹ Wassem, *Immigration: Terrorist Grounds for Exclusion*, at 20, *supra* note 13.

¹¹² Laura Rozen, *What Happened After NCTC Got Report on Abdulmutallab*, POLITICO, Dec. 29, 2009.

¹¹³ *White House Review*, *supra* note 3.

¹¹⁴ Immigration and Nationality Act, Section 221(i); codified at 8 USC § 1201(i).

¹¹⁵ Wassem, *Immigration: Terrorist Grounds for Exclusion*, at 20, *supra* note 13.

¹¹⁶ *Flight 253: Learning Lessons from an Averted Tragedy Before the H. Comm. on Homeland Security*, 111th Cong. (Jan. 27, 2010) (statement of Tim Kennedy, U.S. Department of State).

¹¹⁷ *Lessons and Implications, Part I Before the S. Homeland Security Comm.*, *supra* note 36. Sen. Collins took State to task, stating "At the very least, [Abdulmutallab] should have been required to report to our embassy and explain his activities and answer questions before he was allowed to retain his visa. [State] has this authority...But [State] failed to act. Most disturbing, [State] is also pointing fingers at other agencies to explain this failure." Leiter jokingly responded that he was surprised to learn from the State Department that NCTC had visa revocation authority. *Id.*

¹¹⁸ *Flight 253: Learning Lessons from an Averted Tragedy Before the H. Comm. on Homeland Security*, *supra* note 116 (statement of Tim Kennedy, "[t]he Department has a close and productive partnership with DHS, which has authority for visa policy"); see also Wassem, *Immigration: Terrorist Grounds for Exclusion*, *supra* note 13, for a full discussion of State and DHS's respective authorities over visa issuance and revocation.

responsibility for revocation, the question of DHS's role in visa revocation and, more generally, its existential purpose as a member of the IC muddied the waters enough for congressional members to take aim at DHS despite its utter lack of involvement in any decision regarding Abdulmutallab prior to Christmas Day. DHS Secretary Janet Napolitano felt compelled to spell out, in simple terms, DHS's basic role in both the IC and the immigration process:

What is our contribution in the INA [immigration/visa policy] field? And the fundamental contribution...is to take information, intel that has been gathered and analyzed, and to push that out -- push that out operationally where it needs to go, or push that out, most importantly -- or as importantly - to state and local law enforcement.¹¹⁹

Other statements by DHS officials have reinforced the notion that it views its primary role in the intelligence process with respect to immigration information is that of consumer, rather than producer.¹²⁰

Despite the uncertainties in roles and responsibilities among State, DHS, and NCTC revealed by congressional inquiry regarding the visa revocation process, it is unlikely that this confusion played a major role in the decision not to revoke Abdulmutallab's visa. There is, in fact, a far more compelling explanation.

C. GOING COMMANDO: THE CENTRAL INTELLIGENCE AGENCY AND THE EXPLANATION UNDERNEATH IT ALL

The driving force behind the decision not to revoke Abdulmutallab's visa can be inferred from a common refrain of State officials during congressional testimony: "There have been numerous cases where our unilateral and uncoordinated revocation would have disrupted important investigations that were underway by one of our national security partners."¹²¹ Federal regulations sanction this practice: the Foreign Affairs Manual instructs consular officers, when they suspect a visa revocation may involve law enforcement interests, to consult with other agencies to determine whether revocation would hinder a law enforcement or intelligence investigation.¹²² Reports indicating that Abdulmutallab's father met with CIA officers during his visit to the Embassy in Abuja suggest CIA had a part to play in the decision not to revoke the visa.

CIA, whose absence in the public records detailing the events leading up to the Christmas Day attack is both

conspicuous and understandable, undoubtedly viewed the information gleaned from the Abuja meetings as an opportunity. Rather than merely preventing one extremist from boarding a U.S.-bound flight, CIA would use the information gathered on Abdulmutallab to locate and identify the more dangerous threat posed by his sponsoring network. While tracing CIA's involvement with the investigation of Abdulmutallab is an assumptive exercise given the covert nature of CIA operations, there can be little doubt that CIA counseled against visa revocation so as not to spook Abdulmutallab and maintain the operational flexibility necessary to eventually roll up the AQAP network.¹²³

CIA's involvement with the case of Abdulmutallab, however, extends beyond its role in counseling against visa revocation. Intelligence officers in the Abuja Embassy notified CIA headquarters of the meeting with Abdulmutallab's father. Media accounts suggest CIA analysts immediately compiled biographical information on Abdulmutallab.¹²⁴ However, due to an "oversight mistake of an individual office" within CIA, the information "was not disseminated in a way that it was widely available to the rest of the intelligence community."¹²⁵

While this failure to share information might evoke the information hoarding among the IC that, the 9/11 Commission concluded, permitted the 9/11 plotters to carry their plan through to completion, NCTC Director Leiter insisted that this mistake was "still different from what happened on 9/11."¹²⁶ Leiter did not publicly attribute much significance to the oversight and, in fact, lauded State and CIA for convening after the meeting with Alhaji Umaru and deciding to make a recommendation to NCTC to nominate Abdulmutallab for inclusion on TIDE.

D. LESSONS FROM ABUJA: THE NAKED TRUTH

The handling of information obtained from the November 19 and 20 meetings, the decision not to revoke Abdulmutallab's visa, and whatever responsive (and unknown) action taken as a result of the information should be contextualized with reference to the discussion offered in Part II. The confusion over who, between State and NCTC, bore the burden of flagging Abdulmutallab as a threat worthy of consideration for inclusion on the Selectee or No Fly watchlists was never resolved because State deferred to CIA's judgment in how to address the information provided by Alhaji Umaru. Neither State nor NCTC felt they needed to take the initiative on flagging

¹¹⁹ *Aviation Security and Flight 253 Before the S. Comm. on Commerce*, *supra* note 22 (testimony of DHS Secretary Janet Napolitano).

¹²⁰ *Securing America's Safety: Improving the Effectiveness of Anti-Terrorism Tools and Inter-Agency Communication Before the S. Comm. on the Judiciary* *supra* note 104, (statement of David Heyman, Assistant Secretary for Policy, Department of Homeland Security).

¹²¹ *Flight 253: Learning Lessons from an Averted Tragedy Before the H. Comm. on Homeland Security*, *supra* note 116. Kennedy explicitly stated that this was the case with Abdulmutallab, *see infra* note 122.

¹²² 22 CFR § 41.

¹²³ Kennedy acknowledged that this was indeed the case with Abdulmutallab, noting, "And one of the members [of the IC] -- and we'd be glad to give you that out of -- in private -- said, "Please, do not revoke this visa. We have eyes on this person. We are following this person who has the visa for the purpose of trying to roll up an entire network, not just stop one person," *supra*, note 116.

¹²⁴ *Early Leads Before the Attack*, *supra* note 11.

¹²⁵ *Aviation Security and Flight 253 Before the S. Comm. on Commerce*, *supra* note 22 (testimony of Michael Leiter, Director, NCTC).

¹²⁶ *Id.*

Abdulmutallab; CIA was on the case. Although any clandestine operations conducted against Abdulmutallab and AQAP as a result of the meetings are classified, it is a safe assumption that DSOP's role in operational planning was negligible. As discussed in Part II, CIA's primacy in conducting CT operations, taken together with the fact that it did not share its biographical profile of Abdulmutallab with NCTC, suggest that any action taken subsequent to the Abuja meetings did not involve much consultation with NCTC despite its nominative role as the CT community's central hub.

Given the difficulty in discerning the particulars of CIA action taken as a result of the Abuja meeting, it cannot be categorically concluded that this episode is illustrative of the problems identified in Part II. However, the fact that both State and NCTC were justified in not assuming responsibility for taking further action on visa revocation is telling. NCTC did not follow up on the information for any or all of several reasons: it did not have the resources to do so and was therefore unable to correlate the information collected at Abuja with other available "dots"; State either did not realize or did not properly emphasize the gravity of the threat in the Visa Viper cable; and/or CIA had assumed responsibility for formulating and conducting an operational response as a result of the information obtained from Alhaji Umaru. State was similarly blameless, as it rightly deferred to NCTC to search for further information on Abdulmutallab – which did not request any further information from State – and it deferred to CIA to formulate operational follow-up. Assuming CIA formulated a plan without consulting NCTC regarding its implementation, it too should not be held to account. Its actions accorded with its historical autonomy and purpose, and there is no statutory provision requiring it to defer to NCTC's judgment in operational planning. The conclusions and recommendations in Parts V and VI, respectively, do not to suggest that NCTC should be dictating how CIA carries out CT operations. The discussion above is offered to highlight that DSOP is incapable of ensuring that it even be made aware of CIA activity so that it can, at the very least, adjust its planning process to account for ongoing operations. It is also offered to raise a more fundamental question: if, as suggested above, State, NCTC, and CIA performed largely in accordance with their design, how did the CT community "fail" to stop Abdulmutallab from boarding Flight 253?

Proponents of maintaining the statutory status quo of the CT community may argue that the connection between the legislative underpinnings of the CT community and the handling of the information provided by Alhaji Umaru at Abuja is tenuous. But this argument does not address a more salient question: what should the appropriate response to the Abuja meetings have been? The answer to that question should entail a consideration of the legislative framework, discussed in Part II, and the function and purpose of NCTC, CIA, and State in the U.S. government's greater CT efforts.

IV. THE BLAME GAME: UNDER WHERE CAN WE HIDE?

It did not take long after the Christmas Day attack for the finger-pointing to begin in earnest. Many blamed NCTC for failing to piece together information.¹²⁷ NCTC Director Leiter was lambasted for going on vacation immediately following the attack.¹²⁸ Others held CIA responsible for not having shared biographical data on Abdulmutallab with other agencies.¹²⁹ State was roundly criticized for "failing to act" to revoke Abdulmutallab's visa following his father's visit to the Abuja consulate.¹³⁰ DHS Secretary Napolitano was taken to task in absentia by a congressional member for not attending a congressional hearing.¹³¹ The former vice president, Dick Cheney, launched withering attacks on President Obama for demonstrating weakness in the War on Terror.¹³² Administration officials shot back, blaming the previous administration for allowing al Qaeda to regroup by shifting its focus to military operations in Iraq.¹³³ It did not take long for administration officials to start taking aim at one another.¹³⁴

Eager to assign blame,¹³⁵ many congressional members demanded to know why no one had been fired as a result of the attack.¹³⁶ Either the desire to score

¹²⁷ *Spy Agencies Failed to Collate Clues on Terror*, *supra* note 29.

¹²⁸ *White House Defense Terror Aide's Vacation Day After Dec. 25 Attack*, *NEW YORK POST*, Jan. 7, 2010.

¹²⁹ *Spy Agencies Failed to Collate Clues on Terror*, *supra* note 29.

¹³⁰ "At the very least, he should have been required to report to our embassy and explain his activities and answer questions before he was allowed to retain his visa. The State Department has this authority...But the State Department failed to act. Most disturbing, the State Department is also pointing fingers at other agencies to explain this failure." *Lessons and Implications, Part I Before the S. Homeland Security Comm*, *supra* note 36 (remarks by Sen. Susan Collins). NCTC Director Leiter jokingly responded that he was surprised to learn from the State Department that NCTC had visa revocation authority. *Id.*

¹³¹ Rep. Paul Broun stated he was "incensed" that Secretary Napolitano was not in attendance (she was in Spain during the hearing, negotiating for stricter passenger screening standards in foreign airports). *Flight 253: Learning Lessons from an Averted Tragedy Before the H. Comm. on Homeland Security*, *supra* note 116.

¹³² *Spy Agencies Failed to Collate Clues on Terror*, *supra* note 29.

¹³³ *Id.*

¹³⁴ Although Leiter largely accepted responsibility, he offered some criticism of other offices, stating "I was surprised at the extent to which other agency searches weren't hitting against very critical data sets that might've uncovered this and then highlighted them for NCTC..." *Lessons and Implications, Part I Before the S. Homeland Security Comm.*, *supra* note 36. FBI Director Mueller, when asked during congressional testimony which agency is responsible for conducting follow-up investigations on threat streams, seemed to point the finger at CIA in stating that "some person" should have, and did not, pass information to NCTC prior to the attack.

¹³⁵ Sen. Dorgan stated, "This is a tough job. But still, I -- I think you and us need to understand what failed, and who failed and who's accountable." *Aviation Security and Flight 253 Before the S. Comm. on Commerce*, *supra* note 22.

¹³⁶ *Flight 253: Learning Lessons from an Averted Tragedy Before the H. Comm. on Homeland Security*, *supra* note 116 (Rep. Broun declared, "I think the president of the United States should ask for the -- the resignation of Secretary Napolitano and get somebody there who is not in la-la land"). Sen. McCain, in a separate hearing, inquired of administration officials as to

political points or a fundamental lack of understanding of the CT community's function and capabilities prevented many in Congress from parsing through the complexity of events leading up to the Christmas Day attack to determine what went wrong. In response to Congress's barrage of accusatory questioning, CT officials offered assurances that the system is sound and needs only minor modification. Any additional authorities required by the DNI and/or NCTC will be minor.¹³⁷ Rest assured, remedial measures are being taken, improvements are being made, responsibilities are being straightened out,¹³⁸ and a comprehensive interagency process is taking place to ensure that this does not happen again. Surely, a person who leaves a trail identical to that of Abdulmutallab will not have the opportunity to board a U.S.-bound flight.¹³⁹

Much of the dialogue in congressional hearings was tragically misguided. Aside from simple human error and failure to follow protocol as described in Part III, neither of which were determinative factors in the ultimate outcome, it is not clear that any "failure" actually occurred. Even with respect to NCTC's "failure" to connect the dots, Leiter's comments on the matter are particularly noteworthy:

The...category of -- of failing is did you connect these two pieces of data? I frankly think that [this] category is a lot harder to identify and -- and clearly say you made a mistake. We want analysts to do that. But whether or not they actually could, and piece that all together, given the resources, the workload they are facing, it's -- I think it's much more difficult to say that that was a clear failure.¹⁴⁰

While many congressional members were content to chalk the near success of the AQAP plot up to a failure by the CT community, Leiter's testimony, perhaps unintentionally, seemed to implicitly implore Congress to conduct a more thorough examination of the adequacy of the current structure of the CT community. That the AQAP plot was not detected can only be regarded as a "failure" insofar as the CT community did

whether they had fired any personnel as a result of the attack). *Lessons and Implications, Part I Before the S. Homeland Security Comm.*, *supra* note 36.

¹³⁷ *Lessons and Implications, Part I Before the S. Homeland Security Comm.*, *supra* note 36 (DNI Blair noted "[t]he authorities of the DNI, I think, heretofore were able to make the big pieces happen. There was lots of -- there was lots of sharing of information in this -- in this case. What we're finding now is some individual pieces in which I think more authority may be required).

¹³⁸ Blair: We have a 30-day deadline that the president established to provide authoritative proposed pieces of paper that could be anything from executive order down to an intelligence community directive that -- which I would sign or -- or similar authorities within Secretary Napolitano's organization.

¹³⁹ *Current and Projected Threats to the U.S. Before the S. Select Comm. on Intelligence*, 111th Cong. (Feb. 2, 2010) (DNI Dennis Blair confidently asserted that, "I'm confident that someone who left the trail that Mr. Abdulmutallab did would now be -- would now be found").

¹⁴⁰ *Flight 253: Learning Lessons from an Averted Tragedy Before the H. Comm. on Homeland Security*, *supra* note 116 (statement by Michael Leiter, Director of NCTC).

not perform as Congress hoped it would. In reality, Congress had stacked the deck against CT efforts through deficient legislation and the CT community performed according to its design. If the deck is to be reshuffled to ensure a higher probability of success in CT efforts, Congress will have to play a critical role. As much of the information regarding terrorist threats and CT operations remains classified, congressional understanding of the CT community is particularly important.¹⁴¹ As the PNSR found, congressional support and oversight of NCTC is complicated by the fact that Congress does not fully understand NCTC's function or value.¹⁴² Throughout congressional hearings committee members repeatedly expressed confusion regarding what NCTC does or is capable of doing.¹⁴³

That is not to say that the cause for further reform is lost, however. During the hearings, certain lines of questioning homed in on the confusion in authority between NCTC and the rest of the IC,¹⁴⁴ revealing an acknowledgment by several congressional members of a central problem, legislative ambiguity, affecting CT efforts.¹⁴⁵ A hearing before the Senate Committee on Homeland Security and Governmental Affairs got to the

¹⁴¹ Gov. Thomas Kean testified, "[s]o the public cannot really get involved because of the nature of the information. So we are dependent in this area, more than any other, on congressional oversight. And that's why we made such a point in our report of saying how important we thought congressional oversight was." [Intelligence Reform: The Lessons and Implications of the Christmas Day Attack, Part II Before the S. Comm. on Homeland Security and Governmental Affairs](#), *supra* note 44.

¹⁴² PNSR REPORT at XV, *supra* note 64.

¹⁴³ *Securing America's Safety: Improving the Effectiveness of Anti-Terrorism Tools and Inter-Agency Communication Before the S. Comm. on the Judiciary*, *supra* note 104 (Senator Whitehouse expressed confusion regarding NCTC capabilities, stating "And I don't know that our NCTC system is designed to play in that quick a timeline or even to search for passenger characteristics that would seem to be inconsistent with the nature of the -- of the flight").

¹⁴⁴ Rep. Pascrell's statement with respect to the State Department's misspelling of Abdulmutallab's name was particularly astute: This is human error, but maybe it's human error precipitated by the fact that we have created a bureaucratic nightmare so that no one is held accountable. *Flight 253: Learning Lessons from an Averted Tragedy Before the H. Comm. on Homeland Security*, *supra* note 116.

¹⁴⁵ [The Lessons and Implications of the Christmas Day Attack: Intelligence Reform and Interagency Integration Before the S. Comm. on Homeland Security and Governmental Affairs](#), *supra* note 71. Senators Lieberman and Collins are acutely aware of the legislative deficiencies afflicting NCTC. Senator Collins' opening statement in a March 17 hearing raised several salient points:

The question is, however, whether or not these authorities have been used as often, as effectively, and in the manner that Congress intended. For example, does the institutional resistance of agencies like the CIA make the use of these authorities such an onerous ordeal that the...DNI is hesitant to embark upon the journey? Is the DNI concerned that exercising these authorities more aggressively might create ill will that will make it even more difficult to coordinate activities in other areas?

heart of the matter. A former DNI official's testimony noted many of the successes of intelligence reform and ably attacked many of the common criticisms of the DNI, concluding that executive branch support and guidance is essential to addressing the issues of overlapping and otherwise unclear lines of authority.¹⁴⁶ A former CIA official put the onus elsewhere. The official's frank assessment was that "Congress gave the DNI broad responsibility, but not clear authority to carry out many of these responsibilities," and this confusion "lies at the heart of the problem."¹⁴⁷ CIA's institutional resentment towards the DNI is well-documented and stems from a number of perceived affronts, not least of which is the DNI's nominative primacy in the IC, but the official's testimony offers clear evidence that "friction" and "mistrust" among the IC primarily results from confusion over authority and function. All sides of the debate seem to agree that the allocation of authorities and responsibilities of the DNI and NCTC should be clarified by, at the very least, the president. The CIA official went a step further, challenging Congress to "take a fresh look at th[e] statute."¹⁴⁸

V. CONCLUSION: ALWAYS BE PREPARED, *SEMPER UBI SUB UBI*

The complexity of the system we have in place today to ensure the nation's security from terrorism can be overwhelming. The system reflects the broad diversity of major players, dozens of strategic objectives, and an intricate web of relationships, roles, and responsibilities. It evolved largely in a piecemeal, ad hoc fashion, without the benefit of an overarching strategy or blueprint for how best to organize for success. In part, the complexity of the current system is due to successive administrations redefining relationships, roles, and responsibilities often without rescinding or fully integrating with the direction established by their predecessors.¹⁴⁹

The "systemic breakdowns" and "human errors" identified by the White House Review only partially account for the inability of the CT community to identify and disrupt the Christmas Day attack. Despite inconsequential human errors and failure to follow protocol the system, as DHS Secretary Napolitano was criticized for saying, "worked."¹⁵⁰ Any "failure" should be regarded as a natural consequence of an inadequate legislative framework underlying the CT community. This framework gives rise to a disunity of effort that bears far more resemblance to the disjointed and divergent efforts of the IC and law enforcement agencies prior to the attacks on 9/11 than either the administration or Congress care to admit. The non-disruptive improvements being made by DHS, State, NCTC, and FBI are consistent with the overall

¹⁴⁶ *Id.* Testimony of the Hon. Benjamin Powell, Former General Counsel to the office of the DNI.

¹⁴⁷ *Id.* Testimony of the Hon. Jeffrey H. Smith, former General Counsel to CIA.

¹⁴⁸ *Id.*

¹⁴⁹ PNSR REPORT at 1, *supra* note 64.

¹⁵⁰ Peter Baker and Scott Shane, *Obama Seeks to Reassure U.S. After Bombing Attempt*, N.Y. TIMES, Dec. 28, 2009, appearing at A1.

development of the CT community—they are piecemeal, ad hoc responses to the most recent threatening event.

The most difficult challenge facing the CT community is "deciding what's a threat in the first instance."¹⁵¹ This task often falls to NCTC and CIA. Information sharing and analysis are the key ingredients to identifying these threats. Information sharing has improved since IRTPA, but problems remain. Some of those problems were made clear by the events leading up to Christmas Day, but they were relatively minor in scale and it is doubtful they contributed in any significant measure to the inability to detect the AQAP plot.

Information analysis is the primary means to identify threats. Given the incredibly high traffic of intelligence received by the IC, technological limitations that hinder the ability to sift through the data, and insufficient manpower to manage the data, connecting fragmentary "dots" will remain a primary challenge. Technological improvements are being made, but they will do little if NCTC is unable to hire more analysts, receive raw data and finished intelligence products from those components in a timely manner, and solicit follow-up assistance from the rest of the IC.

When threats are identified, follow up investigation must run those threats to the ground. NCTC claims to be expanding the scope of threat streams that receive further investigation and tasking "pursuit teams" with this specific purpose.¹⁵² These narrowly-focused teams, however, are analytic units only. As described by one media report, the new pursuit teams "will be responsible for identifying threads of information — the warning Mr. Abdulmutallab's father gave to officials at the United States Embassy in Nigeria, for instance — and tracking and connecting them to other tips."¹⁵³ While the development of pursuit teams is an obvious step in the right direction, it is only a first step. Responding to the intelligence is the other part of the equation, and inadequate interagency cooperation and disunity of effort, identified by the 9/11 Commission as fatal flaws in the CT system that prevented detection and interdiction of al Qaeda cell members who carried out the 9/11 attacks,¹⁵⁴ continue to plague the CT community.

Intelligence experts categorically advocate for more senior-level support and involvement, particularly from the President, in clarifying the lines of authority within the IC.¹⁵⁵ The President has taken a number of

¹⁵¹ *Lessons and Implications, Part I Before the S. Homeland Security Comm.*, *supra* note 36 (testimony of Michael Leiter, Director of NCTC).

¹⁵² *Id.*

¹⁵³ Eric Schmitt, *New Teams Connect Dots on Terror Plots*, N.Y. TIMES, Jan. 29, 2010, appearing on A3.

¹⁵⁴ *9/11 Commission Report*, at 401, *supra* note 38.

¹⁵⁵ [The Lessons and Implications of the Christmas Day Attack: Intelligence Reform and Interagency Integration Before the S. Comm. on Homeland Security and Governmental Affairs](#), *supra* note 71 (testimony of Benjamin Powell, Former General Counsel to DNI); *also* Gov. Thomas Kean goes so far as to say it is the sole responsibility of the President to clear up authority and budgetary issues: "These ambiguities can cause mission confusion and sometimes a lack of clarity, perhaps, in the lanes in the road. But the burden is on the president to be clear on who is in charge of the intelligence community and where final

steps towards accomplishing this end. Following the Christmas Day attack, he directed NCTC to design a process “whereby there would be follow-up of priority threat streams.” Leiter believes this “will be an empowering of strategic operational planning” that will allow NCTC “to demand accountability at a more tactical level for more and a broader range of threats.”¹⁵⁶ Intelligence officials by and large seem content that executive branch guidance will address the confusion of authority, and they largely deny that any substantive statutory amendment needs to occur to address the flaws revealed by the Christmas Day attack. It is also worth considering that the Christmas Day attack might have provided the impetus for CT offices to submit to NCTC’s interagency processes.

However, there is only so much clarity that executive orders can provide amidst a background of legislative ambiguity. After all, §1018 called for this exact guidance in 2004 by instructing the president to “issue guidelines to ensure the effective implementation and execution...of the authorities granted to the DNI,”¹⁵⁷ and this guidance, in the form of an amended EO 12,333, has brought the IC to its current state.¹⁵⁸ As long as the underlying statutory regime limits NCTC’s ability to solicit meaningful interagency cooperation while insisting NCTC serve as the “central hub” of all CT efforts, improvement in CT coordination is likely to be short-lived.

authority lies on budget and on personnel matters.” Lee Hamilton agrees with this assessment. [Intelligence Reform: The Lessons and Implications of the Christmas Day Attack, Part II Before the S. Comm. on Homeland Security and Governmental Affairs](#), *supra* note 44.

¹⁵⁶ *Lessons and Implications, Part I Before the S. Homeland Security Comm.*, *supra* note 36 (testimony of Michael Leiter, Director of NCTC).

¹⁵⁷ IRTPA, P.L. 108-458.

¹⁵⁸ *Lessons and Implications, Part I Before the S. Homeland Security Comm.*, *supra* note 36. DNI Dennis Blair’s remarks at a recent congressional hearing provide a frank assessment of the current state of the CT community:

I think you’re putting your finger...on a characteristic of the -- this combating terrorism effort that we need to tighten down with the -- with the strong enthusiasm for counterterrorism, the -- a sense that we all have to be working on it. I think we did not drive some of these responsibilities as far as we should of in terms of, “No kidding. OK, everybody’s -- everybody’s helping, but who is it -- who is it at the end?” And I think...we need to, and are going to tighten right down so that primary responsibilities, support responsibilities and ultimate responsibility are made to -- are -- are made clearer. Because there -- there is a tendency to say, “Hey, I’ve got this new capability. Let me help you.” And -- and we ought to do that. But we should not allow that to interfere with a -- with a clear understanding of who -- who has the ultimate call.

VI. RECOMMENDATIONS: STITCHING UP THE HOLES THAT LEAVE US DANGEROUSLY EXPOSED

Intelligence reform is incomplete. Abdulmutallab’s ability to slip under the radar resulted from a lack of clear-cut delineation of authority and responsibility among the members of the CT community. It is incumbent upon the President *and* Congress to eliminate the present confusion and complete the reforms of the IC undertaken in response to 9/11. Below are recommendations of measure to achieve this objective.

The conflation of the terms “strategic” and “operational” in the name and mission of the Directorate of Strategic Operational Planning “has hindered DSOP since its inception and remains a significant problem.”¹⁵⁹ As noted, “joint,” not “strategic,” was the descriptor preferred by the 9/11 Commission. The term was opposed by those CT components charged with carrying out operations, which bristled at the possibility of ceding authority to a DNI-based office.¹⁶⁰ The term “strategic,” which was meant to emphasize the role of DSOP, and more generally NCTC, as the interlocutor between the NSC and various CT components charged with operations, has put DSOP in a “planning no man’s land.”¹⁶¹ One way to address this problem is to bifurcate the DSOP into “strategic” and “tactical” components. However, bifurcation is a minor adjustment and does not address the underlying, more contentious issue of which office properly holds the authority to conduct operations.

A former DSOP official argues that although the authority to execute operations should not be granted to DSOP, it should be given increased authority over its resources and personnel.¹⁶² Increased authority might improve the credibility of the DSOP among members of the IC and increase interagency participation in the planning process. However, this model, like that of the Joint Chiefs of Staff, seems more adequately suited to bolstering strategic planning rather than improving the IC’s ability to respond to the exigencies of the day, and does not bring DSOP fully “in the loop” with respect to CT operational planning.

Both the military, on the one hand, and the intelligence and law enforcement communities, on the other, engage in strategic planning. A critical difference between the two is that the CT efforts of intelligence and law enforcement communities are more heavily focused on taking preventive action. For that reason, the Joint Chiefs model is ill-suited for the IC. As there is general agreement that NCTC should not have operational authority, there are two alternative methods of ensuring the IC’s responsiveness to NCTC through executive order, both of which require dramatic transformation of

¹⁵⁹ [The Lessons and Implications of the Christmas Day Attack: Intelligence Reform and Interagency Integration Before the S. Comm. on Homeland Security and Governmental Affairs](#), *supra* note 71 (testimony of Richard Nelson, former DSOP official).

¹⁶⁰ PNSR REPORT at 49-51, *supra* note 64.

¹⁶¹ [The Christmas Day Attack: Intelligence Reform and Interagency Integration Before the S. Comm. on Homeland Security and Governmental Affairs](#), *supra* note 71 (testimony of Richard Nelson, former DSOP official).

¹⁶² *Id.*

the IC.

First, all terrorism-focused analytical components of the IC could be placed literally under the roof of NCTC. Folding terrorism analysts into the NCTC's Directorate of Intelligence, with NCTC exerting direct authority over the analysts, presents significant logistical obstacles that were present in the initial establishment of the DNI.¹⁶³ However, NCTC's absorption of analysts from the IC at large would force every member of the IC to look to NCTC for strategic and operational guidance, thereby fulfilling the statutory mandate that NCTC serve as the central hub of information sharing. By giving DSOP unfettered access to all terrorist threat-related information and personnel by virtue of its proximity to the strengthened NCTC DI, DSOP would have a better vantage point from which to assign roles and responsibilities in CT operations.

A second, more practicable but perhaps no less transformative option is to fold NCTC into CIA's CTC. The CIA is the "only agency that's still... 'central'"¹⁶⁴ in terms of its relationships with other IC components, and it remains the only entity responsible for the production of all-source intelligence and capable of conducting covert operations (aside from DoD). Relocating NCTC would strengthen the vertical coordination of CT efforts from the NSC down to satellite programmers and operations officers in the field. With institutionalized collaboration with NCTC, CTC would have access to all terrorism-related information in NCTC's DI, and DSOP would have proximity to those it charges with carrying out operations. NCTC/CTC would form a symbiotic relationship, with each organization accounting for the weaknesses of the other: NCTC would gain an institutionalized advisory role with respect to operational planning while CTC would benefit from NCTC's statutory role as the central hub of international terrorism-related information. Although one result of the aggregation of NCTC and CTC would undercut a central purpose of the 2004 reforms by returning CIA to preeminence among the IC at the cost of further diminution of the DNI's authority, clear statutory language establishing the DNI's superior role and granting additional budget and personnel authority to the DNI would ensure that NCTC and CTC remain subject to DNI authority.

These reforms can be effectuated by executive order without running afoul of existing statutes. The President has broad authority to institutionalize cooperation and coordination of CT activities through NCTC, but Congress also has a part to play. For the reasons mentioned above, Congress should leave the provision denying the NCTC Director the authority to

¹⁶³ See generally Patrick Neary, *Intelligence Reform, 2001-2009: Requiescat in Pace?* STUDIES IN INTELLIGENCE Vol. 54, No. 1 (Extracts, March 2010) (describing the logistical difficulties, compounded by the IC's reluctance to support the DNI, in establishing even a physical presence for the DNI).

¹⁶⁴ [The Lessons and Implications of the Christmas Day Attack: Intelligence Reform and Interagency Integration Before the S. Comm. on Homeland Security and Governmental Affairs](#), *supra* note 71 (testimony of the Hon. Jeffrey H. Smith, former General Counsel to CIA).

execute operations in place.¹⁶⁵ However, Congress should amend 50 USC § 404o(d)(2) to conform to the recommendations of the 9/11 Commission and give DSOP a part to play in operational planning.

With respect to the primary missions of the NCTC, the amended statute could read as follows: "To conduct *joint* strategic operational planning for counterterrorism activities" [amendment highlighted]. The change is ostensibly minor, but consequential in effect. DSOP would be given a firmer statutory basis for involvement in interagency planning processes. The amendment also preserves the "strategic" function of DSOP, as many IC officials have acknowledged that strategic planning remains a glaring weakness of the IC. Furthermore, NCTC has proven capable of defining the "strategic operational" paradox, presenting another justification for maintaining its "strategic" aspect.

The second statutory amendment required to strengthen DSOP and eliminate confusion will likely be far more politically challenging to codify.¹⁶⁶ Section 404o(j)(2) of 50 USC, pertaining to the DSOP, currently reads (taking conforming changes from the earlier suggested amendment into account):

(2)(a) *Joint* strategic operational planning shall include the mission, objectives to be achieved, tasks to be performed, interagency coordination of operational activities, and the assignment of roles and responsibilities [amendment emphasized].

To ensure compliance with DSOP functions, Congress could amend current law by adding § 404o(j)(2)(b), which would state:

(b) Those agencies identified by DSOP as necessary for the performance of missions under (2)(a) shall comply with the tasks assigned them by DSOP pursuant to (2)(a) unless they can show cause that compliance unduly burdens agency resources or requires the agency to perform tasks contrary to those permitted by statute.

With this language, NCTC will be given a place at the table in joint strategic operational planning without running afoul of the prohibition against NCTC's conducting operations. It will allow NCTC to function in accordance with the recommendations of the 9/11 Commission and will permit DSOP to fulfill its statutory obligations.

Congress's attempts to hold someone, anyone accountable for the Christmas Day attack were not guided solely by the need to score political points. Ensuring accountability is indeed a *raison d'être* of congressional committees. However, the critical point here is that given diffuse, conflicting, and overlapping authorities and responsibilities among members of the CT community, there is no adequate means of determining accountability. Presidents, current and former, can be blamed for providing insufficient

¹⁶⁵ 50 USC § 404o(g).

¹⁶⁶ As the Hon. Lee Hamilton testified, "that statute was very hard to pass. And it is not going to be amended quickly or soon, so you're going to be living with it." *Aviation Security and Flight 253 Before the S. Comm. on Commerce*, *supra* note 22.

guidance pursuant to § 1018 of IRTPA. However, Congress should recognize itself as responsible in the first instance for establishing a CT community of such complexity as to give rise to the conditions that allowed Abdulmutallab to come so close to bringing down Flight 253. By clarifying roles and responsibilities within the CT community and offering necessary support to certain CT entities to enable them to fulfill their statutory mission, Congress would improve its ability to ensure accountability in the conduct of CT operations.

As the PNSR found, “barring the idea of vesting one individual with directive authority over departments and agencies...there is no silver bullet—no single recommendation that ensures an integrated and unified counterterrorism mission.”¹⁶⁷ Several steps need to be taken to strengthen the CT community, and Congress and the President bear the burden. Intelligence reform, begun in 2004, is not yet finished. The “failure” to connect the dots relating to Abdulmutallab has been repeatedly described as a failure to walk “the last tactical mile.” It is time to walk the last tactical mile. Abdulmutallab should have never been allowed to board a U.S.-bound flight and, but for perhaps a deficient explosive device, its operator’s inability to use it, and the courage and quick thinking of Flight 253’s passengers and crew, AQAP would have carried out the most significant terrorist attack against the U.S. since 9/11. Congress and the President have a limited opportunity to right the ship and complete the implementation of reforms recommended by the 9/11 Commission.

VII. A BRIEF EPILOGUE

Less than a month following the completion of this analysis, the Senate Select Committee on Intelligence (SSCI) made public portions of a 55-page classified report entitled, *Attempted Terrorist Attack on Northwest Airlines Flight 253*.¹⁶⁸ The unclassified version of the report contained only an Executive Summary and comments. Fortunately, SSCI’s primary findings were included in the summary:

- “NCTC was not organized adequately to fulfill its missions”
- No single agency considered itself responsible for “tracking and identifying all terrorism threats”
- Technology across the IC was inadequate to providing analysts with search enhancing tools needed to identify Abdulmutallab¹⁶⁹

SSCI also identified fourteen specific “points of failure,” including “a series of human errors, technical problems, systemic obstacles, analytical misjudgments, and competing priorities” that contributed to the failure to identify Abdulmutallab prior to his boarding Flight 253.¹⁷⁰ The points of failure listed by SSCI were distributed among several agencies, and included: State’s failure to revoke Abdulmutallab’s visa; the failure

to put Abdulmutallab on the TSDB; CIA’s failure to search databases containing information relating to Abdulmutallab; the failure to disseminate information to all “appropriate” elements of CIA; CIA’s failure to disseminate key reporting until after the attempted attack; CTC’s limited name search which failed to produce key information on Abdulmutallab; CTC analysts’ failure to connect the dots of information relating to Abdulmutallab; NCTC DI’s failure to connect the dots; and NCTC Watchlisting Office’s failure to conduct additional research on Abdulmutallab.¹⁷¹ Most predictably, SSCI faulted IC analysts for “not connecting key reports partly identifying Abdulmutallab,” failing to disseminate all available information on Abdulmutallab, and focusing on the threat posed by AQAP to U.S. interests in Yemen rather than to the homeland.¹⁷²

SSCI’s recommendations, like its findings, were largely predictable. Regarding visa revocation, SSCI recommended that State exercise “independent judgment and authority” in the revocation process and that NCTC make recommendations to State to “deny or revoke a U.S. visa based on terrorism-related intelligence.”¹⁷³ On the inadequacy of search-related technology, SSCI charged certain department and agency heads with undertaking a dizzying array of navel-gazing verbs: “review,” “report,” “develop,” etc.¹⁷⁴ In conclusions and recommendations regarding the failure to connect the dots of information on Abdulmutallab, SSCI simply broadened its vocabulary, tasking components of the IC with “ensur[ing] that analysts understand their responsibility,” “organiz[ing]” offices in a manner that optimizes analysts’ ability to understand available information, and “conducting” additional research on targets.¹⁷⁵ Those following Congress’s investigation of the “failures” that allowed Abdulmutallab to board Flight 253 were likely least surprised by SSCI’s recommendation that the DNI:

[R]eview the roles and responsibilities of counterterrorism analysts throughout the [IC] to ensure that all agencies understand their counterterrorism role, their role in identifying and analyzing threats to the U.S. homeland, and that [CT] analysts actively collaborate across the IC to identify

¹⁷¹ *Id.*

¹⁷² *Id.* The report’s only revelatory points of failure that had not been previously discussed at length in committee hearings were those of the IC’s chief signals intelligence agency, the NSA, which SSCI faulted for not pursuing “potential collection opportunities that could have provided information on Abdulmutallab” and failing to nominate Abdulmutallab for watchlisting based on available information. However, neither the unclassified portion of the report nor committee hearings shed light on which agency, if any, holds responsibility for tasking NSA with collecting additional information. The conclusion cannot be drawn from SSCI’s report that NSA itself was responsible for determining that additional collection activities needed to be undertaken to identify Abdulmutallab, particularly since SSCI’s qualms with NSA seemed to have more to do with its “backlog of reports that require review for watchlisting” rather than its failure to act on its own initiative to strengthen its collection efforts against AQAP.

¹⁷³ *Id.* at 4.

¹⁷⁴ *Id.* at 6.

¹⁷⁵ *Id.* at 6-9.

¹⁶⁷ PNSR REPORT at 13, *supra* note 64.

¹⁶⁸ S. REP. NO. 111-119 (2010).

¹⁶⁹ *Id.* at 1-2.

¹⁷⁰ *Id.* at 2.

such threats.¹⁷⁶

In fairness to SSCI, many of the report's recommendations remained classified. Giving SSCI the benefit of the doubt, it is worth considering that the classified recommendations contained more substance than those included in the Executive Summary. SSCI is to be commended for recognizing that, contrary to assertions by administration officials that the failure to identify Abdulmutallab was unlike those that preceded 9/11 in that it was a failure to understand available intelligence rather than a failure to collect and share information, many of the "failures" that allowed Abdulmutallab to board Flight 253 were, in fact, reminiscent of those identified in the 9/11 Commission Report.

In the end, SSCI's findings were demonstrative of Congress's failure to take responsibility for its own role in the creation of a CT community rife with ambiguity in the roles and responsibilities of its constitutive parts.¹⁷⁷ Perhaps the most telling example of Congress' inability and/or unwillingness to address the uncertainty among the CT community was the fact that the report, while laying blame for the near success of the Christmas Day attack across the CT community, seemed to single out NCTC as the most culpable entity. The report cited the strong language of NCTC's statutory foundation naming it the central hub of all terrorism-related information, concluding "[d]espite its statutory mission, NCTC did not believe it was the sole agency in the IC for piecing together all terrorism threats." The report took NCTC to task for "fail[ing] to organize itself in a manner consistent with Congress's intent or in a manner that would clearly identify the roles and responsibilities necessary to complete its mission"¹⁷⁸ while making no mention of Congress's culpability in undercutting NCTC's ability to fulfill its mission. SSCI's recommendations were a further reflection of Congress' inability to understand its central role in creating and perpetuating the system it so often criticizes.

The unclassified portions of SSCI report validate the central findings of this study. Congress's identification of the various "failures" of the CT community misses the point: the system performed in accordance with its statutory design. Congress's calls for the CT community to "review," "study," "examine," "develop," "ensure," etc. might address the specific "failings" that allowed the Christmas Day attack to occur, but Congress's failure to assertively address the statutory ambiguity underlying the CT community will

continue to hinder efforts to combat the threat of terrorism.

¹⁷⁶ *Id.* at 9.

¹⁷⁷ Dr. Amy Zegart has written extensively on intelligence reform and organizational deficiencies among national security agencies. Dr. Zegart has also examined the systemic reasons underlying Congress's inability to understand, much less provide meaningful oversight for, the activities of the IC. Her findings offer considerable context to understanding congressional action taken in response to the Christmas Day attack. See Amy Zegart, *The Domestic Sources of Irrational Intelligence Oversight*, Presentation at the Robert S. Strauss Center for International Security and Law at the University of Texas (Sep. 15, 2010) (summary available at <http://www.robertstrausscenter.org/events/125>.)

¹⁷⁸ S. REP. NO. 111-119 at 11, *supra* note 168.