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## Diversity in the Age of Terror: How Racial and Ethnic Diversity in the U.S. Intelligence Community Enhances National Security

William Y. Chin

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# DIVERSITY IN THE AGE OF TERROR: HOW RACIAL AND ETHNIC DIVERSITY IN THE U.S. INTELLIGENCE COMMUNITY ENHANCES NATIONAL SECURITY

*William Y. Chin\**

## SYNOPSIS

Racial and ethnic diversity in the intelligence community enhances U.S. national security. But a history of homogeneity in the intelligence community has undermined national security. The failure to maximize the benefits of a pluralistic population led to a dearth of diverse intelligence personnel that helped account for the failure to fully understand the al-Qaeda threat. The post-9/11 Intelligence Reform Act of 2004, which for the first time statutorily mandated efforts to diversify the intelligence community, was a significant step in remedying the lack of diversity in the intelligence community. Nevertheless, the intelligence committee needs to undertake further steps including continuing congressional oversight and race-related bona fide occupational qualifications to overcome a history of exclusion in the intelligence community. Despite incremental progress, the efforts to diversify the intelligence community must continue to attain both security and equality.

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## I. INTRODUCTION

The U.S. intelligence community may well be the last federal bastion to be racially and ethnically diversified,<sup>1</sup> spurred in part by its

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1. See *Central Intelligence Agency, Defense Intelligence Agency and National Security Agency: Minority Hire, Retentions and Promotions: Hearing Before the House Permanent Select Comm. on Intelligence*, 103rd Cong. 1 (1994) (statement of Rep. Glickman, Chair, House Permanent Select Comm. on Intelligence) (declaring that “[p]ublic scrutiny of the intelligence community’s commitment to equal employment opportunity and work force

failure to warn against al-Qaeda's terrorist attacks on U.S. soil on September 11, 2001. Prior to 9/11, Robert Callum presciently wrote about the need for diversity in the intelligence community. Callum explained, "Either the IC [intelligence community] will embrace diversity on its own, or it will find change thrust upon it in the wake of failure."<sup>2</sup> Failure occurred on 9/11 and forced change upon the intelligence community by the Intelligence Reform and Terrorist Prevention Act of 2004.<sup>3</sup> A portion of the changes in the 2004 Act includes the prescription to ethnically and culturally diversify the intelligence agencies.<sup>4</sup>

Legislation diversifying the intelligence community was long overdue because for decades, the "hidden handicap" due to the lack of homogeneity within the intelligence community made the legislation diversifying the intelligence community necessary.<sup>5</sup> In order to address this "hidden handicap," this article focuses on the people within the intelligence organizations. Because the post-9/11 U.S. intelligence community is a modern-day behemoth it is easy to overlook the people within the organization. For example, the intelligence community is comprised of the following seventeen agencies: (1) the Office of the Director of National Intelligence (ODNI); (2) the Central Intelligence Agency (CIA); (3) the National Security Agency (NSA); (4) the Defense Intelligence Agency (DIA); (5) the Federal Bureau of Investigation (FBI); (6) the National Reconnaissance Office; (7) the National Geospatial-Intelligence Agency; (8) the Bureau of Intelligence and Research of the State Department; the intelligence elements of the four military services consisting of the (9) Army, (10) Navy, (11) Marine Corps, and (12) Air Force; and intelligence components of the (13) Drug Enforcement Administration, (14) Department of Energy, (15) Department of Treasury, (16) Department of Homeland Security, and (17) Coast Guard.<sup>6</sup> The intelligence community creates a huge bureaucracy that continues to distend,<sup>7</sup> but the people within this ever-expanding colos-

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diversity has been virtually nonexistent due to classification and security concerns") (the hearing was held Oct. 28, 1993) [hereinafter 1993 House Hearing].

2. Robert Callum, *The Case for Cultural Diversity in the Intelligence Community*, 14 INT'L J. INTELL. & COUNTERINTELLIGENCE 25, 39 (2001) (emphasis added).

3. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2006) (codified in scattered sections of 50 U.S.C. and other titles) [hereinafter Intelligence Reform Act].

4. *Id.* at § 1011(f)(3)(A)(iv), 118 Stat. at 3649 (codified at 50 U.S.C. § 403-1(f)(3)(A)(iv) (2006)).

5. Callum, *supra* note 2, at 34.

6. JEFFREY T. RICHELSON, *THE US INTELLIGENCE COMMUNITY* 12 (5th ed. 2008).

7. Dana Priest & William M. Arkin, *Top Secret America: A Hidden World, Growing Beyond Control*, WASH. POST, July 19, 2010, available at: <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/>.

sus should not be forgotten. As stated by Representative Norm Dicks of the House Permanent Select Committee on Intelligence: “People are at the forefront of all advances in technology, intelligence operations, and analysis.”<sup>8</sup>

The emphasis on the importance of the people within the intelligence community leads to the second focus of this article — a focus on ethnic, cultural, and racial diversity — rather than gender, age, or other types of diversity).<sup>9</sup> “Ethnicity” means “a ‘sense of peoplehood,’ and the racial, linguistic, religious and other cultural traits that contribute to that sense.”<sup>10</sup> “Culture” is defined as “a group’s values, standards, and beliefs.”<sup>11</sup> “Race” is characterized as “a human group that defines itself and/or is defined by other groups as different from other groups by virtue of innate and immutable physical characteristics.”<sup>12</sup> However, “race” is an oft-debated term. For example, Professor Sharona Hoffman argues “race” is an “incoherent term” that should be replaced with terms such as “color,” “continent of origin,” or “national origin.”<sup>13</sup> Due to the ubiquitousness of the term, this article will include the usage of “race.”

Third, this article focuses on two primary activities that intelligence personnel engage in: (1) clandestine collection of non-public data using human sources (as opposed to using technical sources such as satellites), and (2) analysis of the collected data to turn into useful intelligence for policymakers.<sup>14</sup> The article focuses on these two activities because they rely on people, and “people are the Intelligence Community’s most precious resource.”<sup>15</sup>

The three foci above lead to this article’s thesis that the intelligence community’s lack of diversity creates a hidden handicap that

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8. 8 *Diversity and Minority Hiring in Intelligence Agencies: Hearing Before the House Permanent Select Committee on Intelligence*, 104th Cong. 21 (1996) (statement of Rep. Dicks, Member, House Permanent Select Comm. on Intelligence) (the hearing was held Nov. 29, 1995) [hereinafter 1995 House Hearing].

9. 9 Gender, age, and other types of diversity are also significant, but the limited scope of this article requires that they be addressed another time.

10. Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 272 n.7 (1992).

11. David T. Moore & Lisa Krizan, *Core Competencies for Intelligence Analysis at the National Security Agency*, in BRINGING INTELLIGENCE ABOUT 95, 121 (Russell G. Swenson ed., 2003).

12. PIERCE L. VAN DEN BERGHE, RACE AND RACISM: A COMPARATIVE PERSPECTIVE 9 (1967).

13. Sharona Hoffman, *Is there a Place for ‘Race’ as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093, 1100 (2004).

14. RICHELSON, *supra* note 6, at 2-3.

15. GREGORY F. TREVERTON & C. BRYAN GABBARD, ASSESSING THE TRADECRAFT OF INTELLIGENCE ANALYSIS 27 (2008).

must be removed to enhance national security. This article explicates this thesis in five parts. Part II reveals how the history of intelligence community homogeneity led to this hidden handicap. Part III explains why this homogeneity handicap must be removed. Part IV explores how heterogeneity can be achieved. Part V examines insights that can be drawn from the ongoing process of diversifying the intelligence community.

## II. THE LACK OF DIVERSITY IN THE PAST

Examining how the intelligence community historically fared in minority hiring and retention is difficult because the intelligence community's workforce statistics are classified. Thus, one will encounter difficulty when attempting to examine the intelligence community's historical deficiency in hiring and retaining minorities.<sup>16</sup> The U.S. intelligence community classifies the total workforce statistics of agencies due to national security concerns.<sup>17</sup> Despite this information being classified, the intelligence community makes some hiring data available, such as the percentage of racial minorities within the total workforce.<sup>18</sup> One may glean additional information from congressional hearings, intelligence officials' memoirs, and other unclassified sources. The data gathered shows slow progression in the diversification of the intelligence community. This slow progress is charted through the following periods: (1) Pearl Harbor and World War II, (2) Post-World War II, and (3) 9/11 and the War on Terror. The first period (Pearl Harbor and World War II) is marked by minimal, if any, progress in diversifying the intelligence community. The second period (Post-World War II) is marked by an increasing awareness of the need to diversify and burgeoning efforts to do so. The third period (9/11 and the War on Terror) is marked by reform legislation expressly mandating diversity in the intelligence community and attempts to implement this mandate.

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16. 1993 House Hearing, *supra* note 1, at 1.

17. See generally NAT'L SEC. & INT'L AFFAIRS DIV., U.S. GENERAL ACCOUNTING OFFICE, INTELLIGENCE AGENCIES: PERSONNEL PRACTICES AT CIA, NSA, AND DIA COMPARED WITH THOSE OF OTHER 10 (1996), available at <http://www.gao.gov/archive/1996/ns96006.pdf> [hereinafter Personnel Practices].

18. 1993 House Hearing, *supra* note 1, at 1.

### A. Pearl Harbor and World War II

#### 1. The Office of Coordinator of Information (COI)

World War II was the crucible in which the modern U.S. intelligence community emerged.<sup>19</sup> As war blazed in Europe, President Franklin D. Roosevelt sent New York attorney William J. Donovan on a fact-finding mission to London. He reported back on the need for a centralized intelligence agency, and President Roosevelt in July 1941 established the Office of Coordinator of Information (COI) with Donovan in charge to provide intelligence for the president.<sup>20</sup>

Because diversity policies and other equal opportunity efforts in the workplace did not exist at that time, the COI was not a paragon of diversity. Also, the need to quickly staff the COI required Donovan to recruit from those around him rather than from a broad demographic base.<sup>21</sup> As head of the Donovan, Leisure, Newton & Lumbard law firm, he drew upon the resources of his firm.<sup>22</sup> Thus, one of his close assistants was his former law clerk working in the antitrust division of the Justice Department. Another recruit was a friend, William Whitney, a member of Oxford University and a barrister of Inner Temple.<sup>23</sup>

#### 2. The Office of Strategic Services (OSS)

Consequently, the Office of Coordinator of Information did not endure. The December 1941 Japanese attack on U.S. naval forces in Pearl Harbor marked the official entry of the United States into World War II.<sup>24</sup> The attack impelled the establishment of a larger and more capable intelligence agency — America's first national intelligence agency — the Office of Strategic Services (OSS).<sup>25</sup> The OSS consisted of a centralized intelligence agency incorporating multiple functions including espionage, covert action, counterintelligence, and intelligence analysis.<sup>26</sup> Again, with Donovan in charge, the OSS mirrored the COI and lacked diversity. Although the OSS sought out those with lan-

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19. See THOMAS F. TROY, *DONOVAN AND THE CIA* 1 (1984).

20. Rhodri Jeffreys-Jones, *The Rise and Fall of the CIA*, in *THE OXFORD HANDBOOK OF NATIONAL SECURITY INTELLIGENCE* 122, 124 (Loch K. Johnson ed., 2010).

21. TROY, *supra* note 19, at 78.

22. *Id.* at 77.

23. *Id.* at 78.

24. ANNI P. BAKER, *AMERICAN SOLDIERS OVERSEAS: THE GLOBAL MILITARY PRESENCE* 30 (2004).

25. RICHELSON, *supra* note 6, at 445.

26. *Id.* at 15-16.

guage skills and knowledge of foreign cultures, the agency initially recruited by word of mouth.<sup>27</sup> Donovan and other OSS officials would learn about potential recruits from friends or other OSS staffers and recruit from this limited pool. Personal connection, not pluralism, steered staffing choices in the early OSS.<sup>28</sup>

Arguably, the OSS attempted to diversify the agency. According to CIA Director John M. Deutch during his 1995 congressional testimony on minority hiring in the intelligence community, OSS Director Donovan stated: “We took this seeming liability [racial and gender equality] and made an asset of it.”<sup>29</sup> Furthermore, Director Deutch explained that Donovan realized the benefits of hiring racially and ethnically diverse OSS agents.<sup>30</sup> For instance, the diverse agents could utilize their understanding of the culture and psychology of the enemy forces to better penetrate their defenses.<sup>31</sup> Unfortunately, Director Deutch did not provide written policies or workforce numbers demonstrating the OSS methodology of employing minority agents. The lack of supporting historical materials and the agency practice of hiring acquaintances contradict the assertion of a diverse OSS.

## B. *Post-World War II*

### 1. CIA inception and Ivy League Recruits

The end of World War II in 1945 ended the OSS, but Cold War fears of Soviet domination and memories of Pearl Harbor rekindled calls for a centralized intelligence organization.<sup>32</sup> Two years after World War II, President Harry S. Truman signed the National Security Act of 1947, which established the Central Intelligence Agency (CIA).<sup>33</sup> The 1947 Act made the CIA director head of the intelligence community and tasked the CIA with various duties including correlating, evaluating, and disseminating intelligence.<sup>34</sup> Like the COI and the OSS, the nascent CIA developed a homogenous workforce. The CIA

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27. AGOSTINO VON HASSELL, SIGRID MACRAE & SIMONE AMESKAMP, *ALLIANCE OF ENEMIES* 116-17 (2006).

28. *Id.* at 116.

29. 1995 House Hearing, *supra* note 8, at 4 (author’s comment for clarity).

30. *Id.*

31. *Id.*

32. BOB GRAHAM & JEFF NUSSBAUM, *INTELLIGENCE MATTERS: THE CIA, THE FBI, SAUDI ARABIA, AND THE FAILURE OF AMERICA’S WAR ON TERROR* 15 (2004).

33. RICHELSON, *supra* note 6, at 16.

34. National Security Act of 1947, Pub. L. No. 80-253, § 102(a),(d)(3), 61 Stat. 495, 497-98 (codified as amended at 50 U.S.C. § 403-3(d)(3) (2000)).



lacked diversity because it recruited heavily from a narrow segment of society — Ivy League college graduates. CIA Director William Colby, who joined the fledgling CIA in 1950, described it as populated by patriotic young men and women from the “finest Ivy League campuses and with the most impeccable social and establishment backgrounds . . . .”<sup>35</sup> Senator Bob Graham, who chaired the Senate Select Committee on Intelligence and co-chaired the House-Senate Joint Inquiry into the intelligence community’s 9/11 failures protested the same issue. As stated by Sen. Graham: “[T]he CIA has historically recruited people who can be categorized as ‘White, male, and Yale.’”<sup>36</sup>

Unsurprisingly, CIA Director Colby described the CIA as having a “poor record with respect to minorities in regards to promotions.”<sup>37</sup> Upon becoming CIA Director in 1973, Colby realized that although the CIA “had some blacks in traditional service positions, their rarity at the professional level was one of the worst in government.”<sup>38</sup> In one instance a CIA employee, who was a black woman, spoke with Colby about her lack of promotion. Colby inquired on the employee’s behalf and was told she did not seem to try very hard to obtain the more competitive position whereupon Colby insisted that a training program be developed.<sup>39</sup> After receiving proper training, the employee received her promotion based on her ability.<sup>40</sup>

The CIA’s lack of diversity continued into the 1980s. One researcher’s examination of *Who’s Who in America* for 1982-84 showed that of the seventy listed CIA employees, 93% had college or university degrees, and of this number, 32% were from the Ivy League institutions (Brown, Columbia, Cornell, Dartmouth, Harvard, Pennsylvania, Princeton, and Yale).<sup>41</sup> Further, of the 32%, 86% were from three schools — Harvard, Yale, and Princeton.<sup>42</sup> By recruiting heavily from Ivy League institutions that historically excluded students of color,<sup>43</sup> the CIA maintained a predominantly white workforce for most its existence.

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35. WILLIAM COLBY & PETER FORBATH, *HONORABLE MEN: MY LIFE IN THE CIA* 77 (1978).

36. GRAHAM & NUSSBAUM, *supra* note 32, at 258 (alteration in original).

37. COLBY AND FORBATH, *supra* note 35, at 362-63.

38. *Id.* at 363.

39. *Id.*

40. *Id.*

41. Rhodri Jeffreys-Jones, *The Socio-Educational Composition of the CIA Elite: A Statistical Note*, 19 J. AM. STUD. 421, 422-23 (1985).

42. *Id.*

43. William C. Kidder, *Negative Action Versus Affirmative Action: Asian Pacific Americans are Still Caught in the Crossfire*, 11 MICH. J. RACE & L. 605, 610-620 (2006).

Continuing recruitment inequity was joined by continuing promotion inequity. As confirmed by Tyler Drumheller, who served in the CIA during the 1980s and rose to the position of Chief of CIA Clandestine Operations in Europe, the CIA continually failed to facilitate career advancement for women and minority employees.<sup>44</sup> The CIA must “shake off its old boys’ network image,” Drumheller advised, and he did his best to change the CIA by promoting subordinates who looked and sounded different from him.<sup>45</sup>

## 2. Congressional Oversight and Increased Accountability

Significant progress in diversifying the intelligence community began when Representative Louis Stokes in 1987 became chair of the House Permanent Select Committee on Intelligence.<sup>46</sup> He was the first African American to chair this committee, serving two years in the position.<sup>47</sup> Stokes began his effort to diversify the intelligence community by changing the all-white composition of the intelligence committee staff when he placed the first African American in a key position on the committee staff.<sup>48</sup>

Under Stokes’s leadership, the House Committee on Intelligence pushed for minority scholarship programs (Undergraduate Training Programs) to be established within the intelligence agencies to recruit students of color.<sup>49</sup> Authorization to begin the program was given to the Central Intelligence Agency and National Security Agency in 1987, to the Defense Intelligence Agency in 1988, and to the National Imagery and Mapping Agency in 2000.<sup>50</sup> Stokes and other committee members also called on the various intelligence agency heads to provide reports on minority underrepresentation, provide plans to remedy minority underrepresentation, and appear before the committee to testify about minority hiring and promotion. The goal

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44. TYLER DRUMHELLER, *ON THE BRINK: AN INSIDER’S ACCOUNT OF HOW THE WHITE HOUSE COMPROMISED AMERICAN INTELLIGENCE* 189(2006).

45. *Id.*

46. *1993 House Hearing, supra* note 1, at 56 (statement of Rep. Lewis, Member, House Permanent Select Comm. on Intelligence).

47. *Hiring, Promotion, Retention and Overall Representation of Minorities, Women and Disabled Persons Within the Intelligence Community: House Permanent Select Comm. on Intelligence*, 103rd Cong. 7-8 (1995) (statement of Representative Stokes, former Chair, House Permanent Select Comm. on Intelligence) (the hearing was held on Sept. 20, 1994) [hereinafter 1994 House Hearing].

48. *Id.* at 7.

49. 148 CONG. REC. H5441-04 (daily ed. July 24, 2002) (statement of Representative Hastings) (2002 WL 1724308).

50. *Id.* at H5448-04.

was to instill in the intelligence agencies the concept of equal employment opportunity as a “positive benefit” to the intelligence community.<sup>51</sup>

### 3. Enduring Inequality

Congressional oversight prodded the intelligence community towards greater equality, but the diversification of the intelligence community remained a work in progress in the 1990s and beyond. The CIA’s 1991 Glass Ceiling Study found that women and minority CIA employees faced career advancement obstacles. Women and minorities were concentrated in the lower grades and their promotion rates were lower than white male employees.<sup>52</sup>

Other intelligence agencies in addition to the CIA faced diversity problems. From 1992 to 1994, the percentages of minorities in the DIA, NSA, and CIA were below the percentages of minorities in the federal workforce and civilian labor force.<sup>53</sup> The FBI also suffered from minority underrepresentation during this period.<sup>54</sup>

The table below shows that minority employee numbers for the FBI and NSA in 1993 were less than the *U.S. workforce* numbers.

	Blacks	Hispanics	Asian Americans
<b><i>U.S. workforce</i></b>	“just over”10% <sup>55</sup>	“just over” 8% <sup>56</sup>	2.9% <sup>57</sup>
FBI	5.0% <sup>58</sup>	6.0% <sup>59</sup>	1.6% <sup>60</sup>
NSA	9.0% <sup>61</sup>	1.2% <sup>62</sup>	0.9% <sup>63</sup>

51. H.R. REP. NO. 100-591, at 11 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2469, 2478-79, 1988 WL 169806.

52. 1993 House Hearing, *supra* note 1, at 4 (statement of R. James Woolsey, Director, Cent. Intelligence Agency).

53. Personnel Practices, *supra* note 17, at 23.

54. 1994 House Hearing, *supra* note 47, at 93 (statement of Louis J. Freeh, Director, Fed. Bureau of Investigation).

55. 1993 House Hearing, *supra* note 1, at 27 (statement of J.M. McConnell, Director, Nat’l Security Agency).

56. *Id.*

57. *Id.*

58. 1995 House Hearing, *supra* note 8, at 26 (statement of Robert Bryant, Asst. Director, Fed. Bureau of Investigation).

59. *Id.*

60. *Id.*

61. 1993 House Hearing, *supra* note 1, at 27 (statement of J.M. McConnell, Director, Nat’l Security Agency).

62. *Id.*

63. *Id.*

When compared with the *Federal workforce* numbers, the 1993 numbers below for the DIA, CIA, FBI, and NSA also show minority employees being underrepresented.

FEDERAL WORKFORCE versus INTELLIGENCE AGENCIES	PERCENTAGE OF MINORITY EMPLOYEES
<i>Federal workforce</i>	27.7% <sup>64</sup>
DIA	19.3 % <sup>65</sup>
CIA	14.1 % <sup>66</sup>
FBI	13.0% <sup>67</sup>
NSA	11.0 % <sup>68</sup>

The numbers above were disclosed by intelligence agency heads in congressional hearings on diversity problems in the intelligence field. Congressional inquiry revealed that workplace inequities in the intelligence community were extensive and entrenched. In testimony before Congress in 1993, DIA Director James R. Clapper recounted meeting with longtime black DIA employees who voiced their struggle against inherent inequities within the system.<sup>69</sup> NSA Director J.M. McConnell, also testifying before Congress in 1993, described the most-senior ranks of the NSA as consisting of mostly white males.<sup>70</sup> Representative Norman Dicks declared that due to years of neglect and insensitivity, the intelligence community's minority hiring and promotion record was the worst in the federal government in 1993.<sup>71</sup>

Two years later in 1995, minority underrepresentation was still a problem despite the increase of minority employees in the intelligence community. As seen in the table below, the percentages of minority employees in the intelligence agencies were still below the ci-

64. *Id.* at 2 (statement of Representative Glickman, Chair, House Permanent Select Comm. on Intelligence).

65. *Id.*

66. *Id.*

67. 1995 House Hearing, *supra* note 8, at 26 (statement of Robert M. Bryant, Asst. Director, Fed. Bureau of Investigation).

68. 1993 House Hearing, *supra* note 1, at 2 (statement of Representative Glickman, Chair, House Permanent Select Comm. on Intelligence).

69. *Id.* at 9 (statement of James R. Clapper, Director, Def. Intelligence Agency). Clapper was at different times director of the Defense Intelligence Agency and National Imagery and Mapping Agency, which became the National Geospatial-Intelligence Agency. He is currently Director of National Intelligence. Office of the Director of Nat'l Intelligence, [http://www.dni.gov/clapper\\_bio.htm](http://www.dni.gov/clapper_bio.htm) (last visited Sept. 10, 2010).

70. *Id.* at 44 (statement of J.M. McConnell, Director, Nat'l Security Agency).

71. 1995 House Hearing, *supra* note 8, at 20 (statement of Representative Dicks, Member, House Permanent Select Comm. on Intelligence).

vilian labor force percentage, except for the NSA's percentage which increased from 11.0% in 1993 to 22.0% in 1995 to equal the *Civilian labor force* percentage.

CIVILIAN LABOR FORCE VERSUS INTELLIGENCE AGENCIES	PERCENTAGE OF MINORITY EMPLOYEES
<i>Civilian labor force</i>	22.0% <sup>72</sup>
DIA	19.8% <sup>73</sup>
CIA	15.9% <sup>74</sup>
FBI	14.3% <sup>75</sup>
NSA	22.0% <sup>76</sup>

After decades of minority underrepresentation in the intelligence community, workforce diversity guidelines for the intelligence community were finally established in 1995 (by CIA Director Deutch).<sup>77</sup> But even after this helpful step was taken, inequality in the intelligence community endured. In 1995, CIA Director Deutch stated that minorities, especially Hispanic and Asian Pacific employees, remained underrepresented in the CIA.<sup>78</sup>

Later George Tenet, CIA director from 1997 to 2004, became versed on racial bias within the ranks of the CIA shortly after becoming director when he attended a meeting called by black CIA employees. As Tenet recounts: "One after another, black employees rose to tell disturbing stories of how over the years they had been disrespected and treated as second-class citizens . . ." Tenet described the meeting as "several of the most eye-opening hours I spent during my time at the CIA."<sup>79</sup>

CIA Director Tenet's candid acknowledgement of being surprised by the presence and puissance of racial bias within the CIA is emblematic of the greater incomprehension by policymakers and the public of the inequality problem in the intelligence community. An overlooked problem remains an unremedied problem, as was the case

72. *Id.* at 37 (statement of J.M. McConnell, Director, Nat'l Security Agency).

73. *Id.* at 57 (statement of Kenneth A. Minihan, Director, Def. Intelligence Agency).

74. *Id.* at 113 (statement of Nora Slatkin, Exec. Director, Cent. Intelligence Agency).

75. *Id.* at 104 (statement of Robert Bryant, Asst. Director, Fed. Bureau of Intelligence).

76. *Id.* at 37 (statement of J.M. McConnell, Director, Nat'l Security Agency).

77. *Id.* at 4 (statement of John M. Deutch, Director, Cent. Intelligence Agency).

78. *Id.* at 8.

79. GEORGE TENET & BILL HARLOW, AT THE CENTER OF THE STORM: MY YEARS AT THE CIA 23 (2007).

during the Cold War period when policymakers and intelligence officials focused externally on the communist threat rather than internally on racial inequality issues.<sup>80</sup> Also, the secretive nature of the intelligence field, where intelligence agencies deal with classified information and engage in covert activities, further cloaked the protracted problem of racial inequality.<sup>81</sup> Only belatedly was there an awareness of how overcoming internal racial inequity helps defend against external enemies. As Tenet stated in his 2007 memoir after leaving the CIA: “We need demographic diversity and diversity of thought . . . to penetrate our toughest targets around the world.”<sup>82</sup> Regrettably, no U.S. intelligence agency possessed sufficient diversity to penetrate al-Qaeda and prevent terrorists from attacking the United States on September 11, 2001.

### C. 9/11 and the War on Terror

#### 1. The 9/11 Attacks and Reform

Al-Qaeda directly attacked America on September 11, 2001, “the day that changed everything,” according to CIA Director Tenet.<sup>83</sup> President George W. Bush regarded the attack as this generation’s Pearl Harbor.<sup>84</sup> After the 9/11 attacks, the lack of diversity in the intelligence community was again identified as a problem. The Joint Inquiry of the Intelligence Committees of the House and Senate issued their recommendations on December 10, 2002, that included urging the intelligence community to “enhance recruitment of a more ethnically and culturally diverse workforce and devise a strategy to capitalize upon the unique cultural and linguistic capabilities of first-generation Americans . . . .”<sup>85</sup>

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80. 1994 House Hearing, *supra* note 47, at 2 (statement of Representative Glickman, Chair, House Permanent Select Comm. on Intelligence).

81. 1993 House Hearing, *supra* note 1, at 1 (statement of Representative Glickman, Chair, House Permanent Select Comm. on Intelligence).

82. TENET & HARLOW, *supra* 79, at 23.

83. *Id.* at 161.

84. Dan Balz & Bob Woodward, *America’s Chaotic Road to War: Bush’s Global Strategy Began to Take Shape in First Frantic Hours After Attack*, WASH. POST, Jan. 27, 2002, at A01, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A43708-2002Jan26>.

85. Report of the U.S. Sen. Select Comm. on Intelligence and U.S. House Permanent Select Comm. on Intelligence Together with Additional Views, Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, S. REP. NO. 107-351, H.R. REP. NO. 107-79 (see page 12 of the Errata Print insert) (Dec. 2002) [hereinafter Joint Inquiry].

But, it was easier to issue this recommendation than to implement it. Despite post-9/11 efforts to increase intelligence diversity, it was difficult to reverse minority underrepresentation trends.<sup>86</sup> For example in 2003, a CIA officer revealed that only “2 to 4 percent” of CIA officers were from non-Western European ethnic groups whereas the desired number was at least 20 percent.<sup>87</sup> Congressional findings in 2003 stated that the intelligence community had a “significantly lower percentage of . . . minorities than the total workforce of the Federal government and the total civilian labor force.”<sup>88</sup> Moreover, minorities were still underrepresented in senior-grade levels and in core mission areas.<sup>89</sup>

## 2. The Intelligence Reform and Terrorism Prevention Act of 2004

Finally, in 2004, the Intelligence Reform and Terrorism Prevention Act<sup>90</sup> was passed amid the post-9/11 clamor for radical reform of the intelligence community. The reforms included establishing a Director of National Intelligence (DNI) to replace the CIA Director as head of the intelligence community.<sup>91</sup> More significantly, for diversity purposes, the 2004 Intelligence Reform Act for the first time legislatively mandates the diversification of intelligence personnel. The 2004 Act requires the DNI to prescribe policies and programs ensuring intelligence personnel are “sufficiently diverse for purposes of the collection and analysis of intelligence through the recruitment and training of women, minorities, and individuals with diverse ethnic, cultural, and linguistic backgrounds.”<sup>92</sup> The Act also requires the CIA director to emphasize hiring diverse personnel to improve CIA capabilities.<sup>93</sup> These legislative provisions point the intelligence community towards an integrated intelligence workforce.

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86. *Building Capabilities: The Intelligence Community's National Security Requirements for Diversity of Language, Skills, and Ethnic and Cultural Understanding: Hearing Before the House Permanent Select Comm. on Intelligence*, 108th Cong. 5 (2003) (statement of Representative Hastings, Member, House Permanent Select Comm. on Intelligence) (the hearing was held Nov. 5, 2003) [hereinafter 2003 House Hearing]. available at [http://www.fas.org/irp/congress/2003\\_hr/110503hpsci.html](http://www.fas.org/irp/congress/2003_hr/110503hpsci.html).

87. Steve Hirsch, *CIA Recruiting in High Gear*, NAT'L J., Aug. 30, 2003, at 2636.

88. Intelligence Authorization Act for Fiscal Year 2004, Pub. L. No. 108-177, Title III, § 319(a)(3), 117 Stat. 2599, 2614 (2003) (codified at 50 U.S.C.A. § 403 note).

89. *Id.* at § 319(a)(4).

90. Intelligence Reform Act, *supra* note 3.

91. *Id.* § 1011(a).

92. *Id.* § 1011(f)(3)(A)(iv).

93. *Id.* § 1011.

### 3. The Officer of Director of National Intelligence's Diversity Efforts

Another positive step was the ODNI's 2007 *500 Day Plan for Integration and Collaboration* listing as one of its "Core Initiatives" the following: "Treat Diversity as a Strategic Mission Imperative."<sup>94</sup> Despite this admonition to treat diversity as a strategic need, progress in diversifying the intelligence community continued at a languid pace. In a 2007 statement to the House Subcommittee on Intelligence Community Management, one intelligence expert criticized the *500 Day Plan* because only one of seven "Enabling Initiatives" directly related to the core initiative to treat diversity as a strategic mission imperative — "Improve Recruiting, Hiring and Retention of Heritage Americans (1st and 2nd Generation Americans)."<sup>95</sup> Further, the *500 Day Plan* provided no specifics on how to carry out this enabling initiative.<sup>96</sup>

Statements made by the Principal Deputy Director of National Intelligence, Donald Kerr, to the House Subcommittee on Intelligence Community Management only confirmed that there was inadequate agency effort to treat diversity as a mission imperative.<sup>97</sup> Deputy Director Kerr offered only two minor activities in support of diversity efforts — one was holding an Intelligence Community Diversity Strategy Implementation Workshop and the other was holding a Second Affinity Group and Special Emphasis Program Leadership Colloquium.<sup>98</sup> These minimal activities merely underscore the difference between ambitious plans and actual diversity in the intelligence community.<sup>99</sup> Merely holding a workshop and colloquium fails to fulfill the ambitious initiative to treat diversity as a strategic mission imperative. Additional action is needed to transform diversity into a strategic exigency.

Whether the necessary actions will be undertaken by the ODNI is an open question. Another intelligence expert providing testimony to

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94. OFFICE OF THE DIRECTOR OF NAT'L INTELLIGENCE, *500 DAY PLAN FOR INTEGRATION AND COLLABORATION* 3, 4 (2007), available at <http://www.dni.gov/500-day-plan.pdf>.

95. *Hearing on the Director of Nat'l Intelligence's 500 Day Plan: Hearing Before the Subcomm. on Intelligence Community Mgmt. of the House Permanent Select Comm. on Intelligence*, 110th Cong. 5 (2007) (statement of Suzanne E. Spaulding, former General Counsel, Senate Intelligence Comm.), available at <http://intelligence.house.gov/Media/PDFS/spaulding120607.pdf>.

96. *Id.*

97. *Id.* at 7-8 (statement of Donald Kerr, Principal Deputy Director of Nat'l Intelligence, Office of Director of Nat'l Intelligence), available at <http://intelligence.house.gov/Media/PDFS/kerr120607.pdf>.

98. *Id.*

99. *See Id.* at 5 (statement of Tim Roemer, President, The Center for Nat'l Pol'y), available at <http://intelligence.house.gov/Media/PDFS/roemer120607.pdf>.



the Subcommittee recounted his observations of how Americans abroad created self-sufficient “Little Americas” populated by Americans incapable of speaking the local language or blending into the local culture.<sup>100</sup> He further criticized the feeble post-9/11 efforts to bring qualified Arabic language speakers into the intelligence community.<sup>101</sup> His prognosis on intelligence reform was pessimistic because he perceived the intelligence community as “retreating into greater secrecy and old cultural habits . . . .”<sup>102</sup>

Naturally, the ODNI presents a more favorable picture. According to the DNI’s FY 2005 Annual Report on Intelligence Community Diversity, female and minority representation improved, especially in the areas of new hires and promotion to senior officer positions.<sup>103</sup> Other positive efforts by the ODNI include retaining the Diversity Senior Advisory Panel (comprised of senior officials from industry, academia, the military, and the intelligence community) and recruiting at national conferences sponsored by diverse organizations such as the Hispanic Professional Engineers Association and member institutions of Historically Black Colleges and Universities (HBCU).<sup>104</sup>

Despite these efforts, the numbers reveal minority underrepresentation persists. The FBI’s 2008 workforce numbers<sup>105</sup> below reveal that all ethnic groups (except for whites) are underrepresented when compared with the federal work force numbers.<sup>106</sup>

	American Indian	Asian	Black	Hispanic	White	Hawaiian/Pacific Islander	Two or More Races
<b>Federal Work Force</b>	1.64%	5.87%	18.30%	7.94%	65.39%	0.31%	0.56%
FBI	0.4%	4.1%	5.2%	7.8%	81.9%	0.0%	0.0%

100. *Id.* at 5 (statement of Robert L. Hutchings, Diplomat-in-Residence, Woodrow Wilson School), available at <http://intelligence.house.gov/Media/PDFS/hutchings120607.pdf> [hereinafter Hutchings Statement].

101. *Id.*

102. *Id.*

103. OFFICE OF THE DIRECTOR OF NAT’L INTELLIGENCE, THE US INTELLIGENCE COMMUNITY’S FIVE YEAR STRATEGIC HUMAN CAPITAL PLAN 20 (2006), available at <http://www.dni.gov/DNIHumanCapitalStrategicPlan18October2006.pdf>.

104. *Id.* at 19-20.

105. FED BUREAU OF INVESTIGATION, TODAY’S FBI: WORKING FOR THE FBI, [http://www.fbi.gov/facts\\_and\\_figures/working.htm](http://www.fbi.gov/facts_and_figures/working.htm) (last visited Sept. 8, 2010).

106. U.S. EQUAL EMP. OPPORTUNITY COMM’N ANNUAL REPORT ON THE FED. WORK FORCE FISCAL YEAR 2008, [http://www.eeoc.gov/federal/reports/fsp2008/aed/table\\_a\\_1.html](http://www.eeoc.gov/federal/reports/fsp2008/aed/table_a_1.html) (last visited Aug. 17, 2010).

These recent 2008 FBI numbers indicate continuing minority underrepresentation in the intelligence community. Even more recently in 2009, Dennis C. Blair, Director of National Intelligence (DNI), conceded that minority representation in the intelligence community was inadequate compared to the federal workforce, the workforce at large, and the population at large.<sup>107</sup>

### III. THE NEED FOR DIVERSITY IN THE PRESENT

The prior section show the intelligence community *was* and *is* not diverse. This section argues why the intelligence community *should* be diverse. DIA Director Clapper stated that achieving a diverse workforce was “critical for doing intelligence well.”<sup>108</sup> CIA Director Deutch declared that “[d]iversity in our work force is critical to the ability of the intelligence community to perform its missions in the post-Cold War world.”<sup>109</sup> Current CIA Director Leon E. Panetta averred that the “CIA relies on diversity for success.”<sup>110</sup> A House Committee on Intelligence report described a heterogeneous intelligence community as a “positive benefit.”<sup>111</sup> The intelligence community should be diverse, among other reasons, because of diversity’s positive benefits. These positive benefits are examined in the following sections.

#### A. *The Specific Benefits of Diversity*

Diversity benefits the intelligence community in numerous ways. Although not exhaustive, the list highlights benefits specific to intelligence agencies and provides ample reasons to diversify the intelligence community.

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107. *Annual Threat Assessment: Hearing of the House Permanent Select Committee on Intelligence*, 111 CONG. 14 (2009) (statement of Dennis C. Blair, Director, National Intelligence), available at [http://www.dni.gov/testimonies/20090225\\_transcript.pdf](http://www.dni.gov/testimonies/20090225_transcript.pdf).

108. 1994 House Hearing, *supra* note 47, at 33 (statement of James R. Clapper, Director, Def. Intelligence Agency).

109. 1995 House Hearing, *supra* note 8, at 3-4 (statement of John M. Deutch, Director, Cent. Intelligence Agency).

110. CENT. INTELLIGENCE AGENCY, DIVERSITY AT CIA: DIRECTOR'S STATEMENT ON OUR COMMITMENT TO DIVERSITY (April 20, 2007), <https://www.cia.gov/careers/diversity/directors-diversity-commitment.html>.

111. H.R. REP. 100-591(I), at 11, 1988 U.S.C.C.A.N. at 2478-79, (1988) (1988 WL 169806).

### 1. Promotes Creativity

This is an important attribute in intelligence endeavors.<sup>112</sup> During congressional testimony in 1995, NSA Director J.M. McConnell stated: “Maximizing the creativity inherent in our diversity is integral to our mission of providing superior intelligence . . . .”<sup>113</sup> Diversity “adds perspectives that would otherwise be absent . . . .”<sup>114</sup> The cross-fertilization of these added perspectives during brainstorming sessions stimulates creative thinking.<sup>115</sup> This is not to say that group sessions should always replace individual thinking, but using both is optimal, with group-derived ideas supplementing individual cogitation.<sup>116</sup>

### 2. Inhibits Group-Think

Group-think occurs when group members desire group harmony over thoughtful answers.<sup>117</sup> The desire to compromise and find consensus rather than discuss diverse and even dissenting views results in useless intelligence assessments that are based on the lowest common denominator.<sup>118</sup> Thus, the “CIA relies on diversity for success” because “[i]f we all think the same, failure is certain,” explains CIA Director Panetta.<sup>119</sup> Further, group-think is not remedied by increasing the number of intelligence agencies if the agencies are staffed by like-minded analysts. In fact, group-think errors will only be compounded.<sup>120</sup> Rather, the remedy is increasing the diversity of the intelligence personnel within the intelligence agencies. This helps ensure genuine diversity in a pluralistic intelligence system.<sup>121</sup>

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112. RICHARD J. HEUER, JR., *PSYCHOLOGY OF INTELLIGENCE ANALYSIS* 75 (1999).

113. 1995 House Hearing, *supra* note 8, at 43 (statement of J.M. McConnell, Director, Nat'l Security Agency).

114. JAMES SUROWIECKI, *THE WISDOM OF CROWDS* 29 (2005).

115. HEUER, *supra* note 112, at 77.

116. *Id.* at 77-78.

117. DANIEL LEVI *GROUP DYNAMICS FOR TEAMS* 156 (2d ed. 2007).

118. JOHN J. MCGONAGLE & CAROLYN M. VELLA, *THE MANAGER'S GUIDE TO COMPETITIVE INTELLIGENCE* 145 (2003).

119. CENT. INTELLIGENCE AGENCY, *supra* note 110 (alteration in original).

120. Steve Chan, *The Intelligence of Stupidity: Understanding Failures in Strategic Warning*, 73 *AM. POL. SCI. REV.* 171, 177 (1979).

121. *See Id.*

### 3. Mitigates Mirror-Imaging

Mirror-imaging is assuming others think like we do and act like we would.<sup>122</sup> Mirror-imaging is a side-effect of ethnocentrism—the penchant to perceive the world with our rules and norms at the center.<sup>123</sup> The problem of mirror-imaging has been described as the greatest single defect in U.S. intelligence analysis accounting for multiple intelligence failures including the Cuban Missile Crisis, Pearl Harbor, the Vietnam War, and the fall of the Shah of Iran.<sup>124</sup> The best, and perhaps only, method of counteracting mirror-imaging is to employ a culturally diverse assemblage of intelligence analysts.<sup>125</sup>

### 4. Demystifies Other Cultures

According to DIA Director James R. Clapper, the United States is far stronger with a culturally diverse intelligence workforce because such a workforce can better “demystify foreign cultures, motivations, and actions.”<sup>126</sup> Representative Dicks stated that a diverse intelligence workforce “can provide insights and understandings to basically every ethnic and minority culture worldwide.”<sup>127</sup> Diversity helps intelligence analysts better understand a complex, diverse world, a world that CIA Director R. James Woolsey remarked as “far from being all or even in the majority white male . . . .”<sup>128</sup>

Rank-and-file members of the intelligence profession also realize the need to understand other cultures. In an informal 2003-2004 survey of thirty-seven intelligence analysts and managers across various intelligence agencies, a mere 3% of the respondents assessed “language and cultural knowledge” as a “strength” within the intelligence community, and 14% assessed “language and cultural and regional understanding” as “significant weaknesses” within the intelligence community.<sup>129</sup>

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122. HEUER, *supra* note 112, at 181.

123. CALLUM, *supra* note 2, at 32.

124. *Id.*

125. *Id.*

126. 1993 House Hearing, *supra* note 1, at 7 (statement of James R. Clapper, Director, Defense Intelligence Agency).

127. 1995 House Hearing, *supra* note 8, at 21 (statement of Representative Dicks, Member, House Permanent Select Comm. on Intelligence).

128. 1994 House Hearing, *supra* note 47, at 11 (statement of R. James Woolsey, Director, Cent. Intelligence Agency).

129. TREVERTON & GABBARD, *supra* note 15, at 10, 12.

## 5. Penetrates Targets

Intelligence agents who look as though they belong can more readily penetrate intelligence targets. CIA Director Tenet averred that one crucial CIA imperative is to “penetrate our toughest targets around the world,” but this will not occur “[i]f all of our employees looked like me . . . .”<sup>130</sup> According to CIA Director Panetta, “If we all look the same, our mission suffers.”<sup>131</sup>

Intelligence work includes gaining access to the targeted group,<sup>132</sup> but the intelligence community will fail to access hostile groups if diversity is lacking. Such failure was evident to Senator Graham when he attended a CIA intelligence briefing in Haiti in 1987.<sup>133</sup> Looking around, he recounted seeing people “just like me” who were “white, middle-aged men.” This prompted Senator Graham to wonder how nondiverse intelligence agents could acquire useful intelligence in a country where the people are 99.9% Afro-Caribbean. His answer was, “[T]hey didn’t.”<sup>134</sup>

The CIA has failed to be a “first-rate spy service” as intended by its creators, asserts Tim Weiner who wrote *Legacy of Ashes: The History of the CIA* that won the 2007 National Book Award.<sup>135</sup> To succeed, the CIA must recruit men and women with certain attributes including “cultural awareness and historical knowledge.”<sup>136</sup> Moreover, advises Weiner, they should be able to pass for Palestinians, Pakistanis, or Pathans.<sup>137</sup>

## 6. Increases language capabilities

Diverse intelligence personnel, especially foreign born Americans, can provide critical language capabilities to the intelligence community.<sup>138</sup> This ensures translation needs are met. But foreign language proficiency requires more than mere translation of words and instead also requires understanding the deeper meaning of words in

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130. TENET & HARLOW, *supra* note 79, at 23 (alteration in original).

131. CENT. INTELLIGENCE AGENCY, *supra* note 110.

132. ALLEN W. DULLES, *THE CRAFT OF INTELLIGENCE* 58 (1963).

133. GRAHAM & NUSSBAUM, *supra* note 32, at 37.

134. *Id.* at 37-38 (alteration in original).

135. TIM WEINER, *LEGACY OF ASHES: THE HISTORY OF THE CIA* xv (2007).

136. *Id.* at 501.

137. *Id.*

138. Mike McConnell, Director, Nat'l Intelligence, Remarks and Q&A by the Director of Nat'l Intelligence, Mr. Mike McConnell, at the 2007 Border Security Conference 5 (Aug. 14, 2007), [http://www.dni.gov/speeches/20070814\\_speech.pdf](http://www.dni.gov/speeches/20070814_speech.pdf).

the appropriate context.<sup>139</sup> For example, the German terms *Gemeinschaft* and *Gesellschaft* can be translated into English simply as “community.” But this simple translation is incomplete. To provide a more effective translation, the intelligence analyst should understand the deeper meaning of the terms—*Gemeinschaft* “community” involves relationships in an interpersonal context whereas *Gesellschaft* “community” involves relationships in a business context.<sup>140</sup>

Further, understanding the deeper meaning of terms can help the intelligence analyst better understand target intentions and actions.<sup>141</sup> For example, knowing that insurgents communicate using the language of the elite members from their culture provides class and personal relationship information that, in turn, may provide clues to the insurgents’ behavior.<sup>142</sup> Such information constitutes useful intelligence, and diverse personnel with foreign language capabilities increases the chances of acquiring such information.

## 7. Solves Intelligence Problems

Intelligence analysis is a problem solving activity.<sup>143</sup> The problems to be solved include determining when and where the next terrorist attack will occur, understanding what the other side seeks during arms control or trade negotiations, and knowing if other countries are complying with international treaties.<sup>144</sup> Research by Professor Page (Professor of Complex Systems, Political Science, and Economics at the University of Michigan) shows that “in problem solving, diversity is powerful stuff.”<sup>145</sup> Diversity’s power is such that it sometimes trumps ability.<sup>146</sup> In experiments where Prof. Page formed a random (diverse) group and a best-individual-performers group, the first (diverse) group almost always did better.<sup>147</sup> Although his earlier research focused mainly on *cognitive* diversity, it later included *identity* diversity (i.e., diversity in skin color, gender, or ethnicity).<sup>148</sup> Diversity is not a cure-all for all the ills besetting the intelligence com-

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139. Moore & Krizan, *supra* note 11, at 117.

140. *Id.*

141. *Id.* at 116.

142. *Id.* at 121-22.

143. See HEUER, *supra* note 112, at 82.

144. See RICHELSON, *supra* note 6, at 10-11.

145. SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* xx (2007).

146. *Id.*

147. *Id.* at xix-xx.

148. *Id.* at xxi.

munity because diversity has its limits.<sup>149</sup> But according to Professor Page, “[i]dentity diversity does produce benefits — not every time, not in every context — but there is a there there.”<sup>150</sup>

Also, seeking diversity does not mean sacrificing ability. This is a false comparison that incorrectly assumes the two are like items. However, diversity is the property of a group; ability is the property of an individual.<sup>151</sup> These two unlike properties, rather than canceling each other in a zero-sum dynamic, actually complement one another in a mutually reinforcing manner.<sup>152</sup>

In sum, the seven benefits discussed above reveal how diversity in the intelligence community enhances national security. A diverse intelligence workforce will produce better intelligence. As stated by CIA Director Woolsey, “[b]eing able to tap a diverse work force gives U.S. intelligence unique advantages in achieving our objectives.”<sup>153</sup>

### B. *The Benefits of Diversity Applied to 9/11*

A heterogeneous intelligence community possessing the above-mentioned benefits could have improved intelligence collection and analysis efforts against al-Qaeda. But the intelligence community was handicapped by ethnocentric biases that underestimated al-Qaeda. A diverse intelligence workforce less prone to these biases could have produced more accurate assessments of the al-Qaeda threat. Also, the intelligence community was handicapped by its inability to penetrate al-Qaeda. A diverse intelligence workforce with personnel better able to blend into other cultures would have more likely penetrated al-Qaeda.

#### 1. Avoid Underestimating al-Qaeda

The failure to predict 9/11 was based in part on cultural stereotypes that blinded the United States to the true nature of the al-Qaeda threat.<sup>154</sup> Although, stereotypes help us simplify a complex world,<sup>155</sup> they create a “we-they” dichotomy and produce a type of “group think”

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149. *Id.* at xxiii-xxiv.

150. *Id.* at xxii (alteration in original).

151. *Id.* at xxiii.

152. *See Id.*

153. 1994 House Hearing, *supra* note 47, at 11 (statement of R. James Woolsey, Director, Cent. Intelligence Agency) (alteration in original).

154. *See* MELVIN A. GOODMAN, FAILURE OF INTELLIGENCE: THE DECLINE AND FALL OF THE CIA 13 (2008)..

155. *Id.* at 161.

that misperceives opposing forces.<sup>156</sup> These generalizations reduce people to a few memorable traits<sup>157</sup> and can cause us to misperceive and misunderstand a person or group of people.<sup>158</sup> This was the case with al-Qaeda. As one author stated, “[W]e underestimated bin Laden’s motivation, complexity, and determination.”<sup>159</sup> The “We” included the American public, policymakers, and intelligence officials.

First, the American public underestimated al-Qaeda because in U.S. society Arabs<sup>160</sup> are stereotyped as, among other things, “religious fanatics” and “oil-rich dimwits.”<sup>161</sup> Many comedies present Arabs as “buffoons,” from Bob Hope and Bing Crosby in *Road to Morocco* (1942) to Dustin Hoffman and Warren Beatty in *Ishtar* (1987).<sup>162</sup> Many action movies depict soldiers decimating “backward” desert Bedouins.<sup>163</sup> Such portrayals cast Arabs as a primitive people of limited intelligence.

These pop culture stereotypes seep into the public consciousness.<sup>164</sup> A 1980 telephone poll of 600 Americans showed 12% of the respondents described Arabs as “Incompetent, Bungling, [and] Stupid.”<sup>165</sup> Twice that much (24%) described Arabs as “Backward, Primitive, [and] [u]ncivilized.”<sup>166</sup> Moreover, 49% of the respondents had a “low opinion” of Arabs while 36% had a “high opinion,” and 41% had a “low opinion” of Muslims while 39% had a “high opinion.” Although the numbers do not lean decisively towards one side, they do show that more Americans have a “low opinion” rather than a “high opinion” of Arabs and Muslims.<sup>167</sup> These stereotypes of Arabs and Muslims as primitive are transferred to al-Qaeda and Osama bin Laden. As an editor from *Time Magazine* stated, “The view that exists

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156. See Debra Merskin, *The Construction of Arabs as Enemies: Post September 11 Discourse of George W. Bush*, 7 MASS. COMM. & SOC. 157, 159 (2004).

157. *Id.* at 160-61.

158. See *Id.* at 160-61.

159. MICHAEL SCHEUER, THROUGH OUR ENEMIES’ EYES: OSAMA BIN LADEN, RADICAL ISLAM, AND THE FUTURE OF AMERICA xi (2003) (alteration in original).

160. Jack G. Shaheen, *Reel Bad Arabs: How Hollywood Vilifies a People*, ANNALS OF THE AM. ACAD. OF POL. & SOC. SCIENCE 170, 173 n.1 (2003), available at <http://ann.sagepub.com/content/588/1/171> (defining “Arab” as those residing in or from the 22 Arab states consisting of Algeria, Chad, Djibouti, Egypt, Iraq, Jordan, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen).

161. *Id.* at 172.

162. *Id.* at 176-77.

163. *Id.* at 179.

164. *Id.* at 176-77.

165. Shelley Slade, *The Image of the Arab in America: Analysis of a Poll on American Attitudes*, 35 MIDDLE EAST J. 143, 147 (1981).

166. *Id.* (alteration in original).

167. *Id.* at 146.



in the U.S. is that bin Laden is living in a cave somewhere . . . .”<sup>168</sup> These stereotypes can wend their way “into more serious matters of national policy” crafted by policymakers.<sup>169</sup>

Second, policymakers also underestimated al-Qaeda. They too viewed bin Laden and his followers as primitive cave dwellers.<sup>170</sup> In 1997, after terrorists bombed a market in Jerusalem, Senator Robert Torricelli expressed his outrage in declaring that “[w]herever these terrorists might be hiding tonight, whatever cave may conceal their cowardice, Israel, with America’s support, would remain free.”<sup>171</sup> In 1999, Sen. Torricelli stated, “Bin Laden in his cave in Afghanistan” was plotting against Israel and their peace process.<sup>172</sup> Shortly after 9/11, President George W. Bush stated the United States would pursue the terrorists even though “[t]he terrorists may burrow deeper into caves and other entrenched hiding places.”<sup>173</sup> President Bush, in 2002, told a group of citizens that the al-Qaida terrorists were “evil people” with a “backward, barbaric point of view.”<sup>174</sup> In 2008 during the Obama-McCain presidential race, former Arkansas governor Mike Huckabee told the Republican convention attendees that presidential candidate John McCain would protect America from terrorists by “follow[ing] the fanatics to their caves in Pakistan or to the gates of hell.”<sup>175</sup>

Policymakers underestimate al-Qaeda because they cannot bridge the cultural divide. As explained by Dalton Fury,<sup>176</sup> Delta Force commander who hunted Osama bin Laden, there is a cultural difference between the austere lifestyles of the average Afghani or Pashtun versus the materialistic lifestyles of many Westerners. Osama bin Laden lives the austere lifestyle of the average Afghani and Pashtun,

168. Bobby Ghosh, *What a Top Terror Tracker Learned About Osama bin Laden*, TIME (Oct. 20, 2008), available at <http://www.time.com/time/world/article/0,8599,1852005,00.html>.

169. Tung Yin, *Through a Screen Darkly: Hollywood as a Measure of Discrimination Against Arabs and Muslims*, 2 DUKE F. FOR LAW & SOC. CHANGE 103, 104 (2010).

170. 143 CONG. REC. § 8383 (July 30, 1997) (statement of Sen. Torricelli), 1997 WL 425652.

171. *Id.* (alteration in original).

172. 145 CONG. REC. § 10106 (Aug. 3, 1999) (statement of Sen. Torricelli), 1999 WL 564478.

173. Merskin, *supra* note 155, at 169 (alteration in original).

174. Stewart M. Powell, *Bush Exhorts Nation to Be On Guard: He Urges Involvement in the Volunteer Citizen Corps*, MILW. J. & SENTINEL, Jan. 31, 2002, at 3, 2002 WLNR 3671053.

175. Michael D. Shear, *Palin Comes Out Fighting*, WASH. POST, Sept. 4, 2008, 2008 WLNR 16686156.

176. DALTON FURY, KILL BIN LADEN: A DELTA FORCE COMMANDER’S ACCOUNT OF THE HUNT FOR THE WORLD’S MOST WANTED MAN xxvi (2008). (“Dalton Fury” is the pseudonym used by the Delta Force commander in his book).

content with simple meals of flat bread and rice and the opportunity to read the Koran. The Western mind finds it difficult to understand this type of ascetic contentment; even more difficult is finding Western leaders able to emulate such self-sacrifice.<sup>177</sup>

Third, intelligence officials underestimated al-Qaeda and bin Laden. The CIA incorrectly assumed that al-Qaeda would not attack inside the United States and the FBI incorrectly assumed that al-Qaeda lacked the organization in the United States to do so.<sup>178</sup> When asked if the United States had underestimated al-Qaeda, one FBI official, the chief of domestic terrorism from 1996 to 1998, replied no.<sup>179</sup> He argued instead that the United States simply lacked key intelligence.<sup>180</sup> However, this same FBI official essentially admitted to underestimating al-Qaeda when he expressed befuddlement with al-Qaeda's ability to successfully attack America: "This was a long-planned operation . . . I just can't understand clearly how an isolated small group, very, very conscious of operational security, could do this."<sup>181</sup> Michael Sheehan, head of counterterrorism for the State Department from 1998 to 2001, was also surprised by the 9/11 attacks. According to Sheehan: "The extent of this attack is, has clearly shocked me, and many in the community. . . . But this attack, and the audacity of it, and the use of hijacked aircraft in this manner—clearly was something we did not expect."<sup>182</sup>

## 2. Penetrate al-Qaeda

Prior to the 9/11 attacks, the intelligence community failed to effectively use human resources to penetrate al-Qaeda.<sup>183</sup> CIA officials recognized the need to penetrate al-Qaeda's leadership<sup>184</sup> but failed to actually penetrate al-Qaeda, thus failing to gather actionable intelligence that might have prevented 9/11.<sup>185</sup> Senator Richard Shelby, Vice Chair of the Senate Select Committee on Intelligence, stated, "[t]he

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177. Ghosh, *supra* note 168.

178. GOODMAN, *supra* note 154 at 13.

179. Frontline, *Inside the Terror Network: Interview Robert M. Blitzer* (interviewed Nov. 15, 2001), <http://www.pbs.org/wgbh/pages/frontline/shows/network/should/blitzer.html> (last visited Sept. 8, 2010).

180. *Id.*

181. *Id.*

182. Frontline, *Interview: Michael Sheehan* (interviewed Sept. 2001), <http://www.pbs.org/wgbh/pages/frontline/shows/terrorism/interviews/sheehan.html> (last visited Sept. 8, 2010).

183. GRAHAM & NUSSBAUM, *supra* note 32, at 206.

184. Joint Inquiry, *supra* note 85, at 387.

185. *Id.* at 388.

status quo of IC [intelligence community] approaches to human intelligence (HUMINT) was tested against the Al-Qa'ida threat and [and was] found wanting.”<sup>186</sup> The 9/11 attacks began when Khalid Sheikh Mohammed in 1998 proposed to bin Laden a plan to use airplanes to strike deep within the United States. Months later, bin Laden agreed. But the United States was blind to this plan in part because it had no human spy close enough to the terrorists to uncover the plot.<sup>187</sup> The intelligence community must hire ethnically and culturally diverse intelligence agents to succeed in penetrating terrorist groups.<sup>188</sup>

Admittedly, penetrating a group such as al-Qaeda is extremely difficult because bin Laden and his inner circle of followers are linked by kinship and combat to form a tight-knit group.<sup>189</sup> In addition, prior to 9/11, bin Laden and his associates lived in war-torn Afghanistan where the United States had no official presence.<sup>190</sup> Notwithstanding such difficulties, penetration of terrorist cells is possible. If the Drug Enforcement Administration (DEA) can put salaried American agents in clannish narco-trafficking organizations in foreign countries, then the CIA can learn to penetrate Islamic fundamentalist groups, asserts Senator Shelby.<sup>191</sup>

The exploits of Omar Nasiri also show that terrorist groups can be penetrated. Nasiri is a Morocco-born Muslim who infiltrated Middle East terrorist organizations and worked as a secret agent for French and British intelligence services. His penetration of terrorist organizations provided him with information about the 9/11 attacks. He did not personally know the 9/11 attackers, but he knew much about them. According to Nasiri, “I know who’s behind this. I know why they did it. I know who these people are, and I know how they think.”<sup>192</sup> Nasiri knew all of this because he successfully penetrated Middle Eastern terrorist organizations. The lesson here is that U.S. intelligence agencies can also penetrate Middle Eastern terrorist organizations. But it will require, as author Weiner noted above, a diverse intelligence commu-

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186. Senator Shelby, *September 11 and the Imperative of Reform in the U.S. Intelligence Community—Additional Views of Senator Richard C. Shelby Vice Chairman, Senate Select Committee on Intelligence*, at 12 (alteration in original).

187. TIMOTHY NAFTALI, *BLIND SPOT: A SECRET HISTORY OF AMERICAN COUNTERTERRORISM* 270 (2005).

188. Shelby, *supra* note 186, at 12.

189. Joint Inquiry, *supra* note 85, at 387.

190. *Id.*

191. Shelby, *supra* note 186, at 127.

192. OMAR NASIRI, *INSIDE THE JIHAD: MY LIFE WITH AL QAEDA 2* (2006).

nity with American intelligence agents able to pass for Palestinians, Pakistanis, or Pathans.<sup>193</sup>

#### IV. SOME MEANS OF ENSURING DIVERSITY IN THE FUTURE

Diversity brings benefits, however the intelligence community fails to maximize these benefits because of its torpid pace of reform. Even after the 9/11 attacks, employees of color in the intelligence community are still underrepresented. No single curative remedy exists for a diversity problem decades in the making. A multipronged approach is necessary. Several prongs are offered below. They are more *macro* (i.e., congressional oversight, statutory implementation, hiring qualifications, and educational inducements) than *micro* (i.e., diversity workshops or colloquia) in their approach to providing pervasive and enduring reform.

##### A. Continuing Congressional Oversight

Congressional oversight is needed to expose the hidden problems within the intelligence agencies and to assist them in overcoming those problems. It was Representative Stokes, chair of the House Committee on Intelligence, who canvassed the intelligence community and uncovered the problem of minority underrepresentation within the intelligence community.<sup>194</sup> He then assisted the intelligence agencies by passing legislation authorizing intelligence agencies to set up scholarship programs to aid in recruiting qualified minority students.<sup>195</sup>

Congressional oversight is also needed to pressure intelligence agency heads to diversify their personnel. Under Representative Stokes' leadership, the House Committee on Intelligence held hearings on diversity within the intelligence community and these hearings continued after Stokes departed from the Committee.<sup>196</sup> These hearings need to continue because of the somnambulistic pace of diversity reform in the intelligence community. As Representative Hastings, Vice Chair of the House Committee on Intelligence, bluntly stated during a 2009 congressional hearing attended by the Director of National Intel-

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193. WEINER, *supra* note 134, at 501.

194. 1994 House Hearing, *supra* note 47, at 8 (statement of Representative Stokes, former Chair, House Permanent Select Comm. on Intelligence).

195. *Id.*

196. 1995 House Hearing, *supra* note 8, at 1 (statement of Representative Combest, Chair, House Permanent Select Comm. on Intelligence).

ligence, “If I continue to see nothing but white people come in here and nothing but men come in here, then you are going to see a continuing harangue from me, you and everybody in the intelligence committee.”<sup>197</sup> Hastings is the first African American from Florida elected to Congress since the post-Civil War period.<sup>198</sup> The oversight efforts of Hastings and others in Congress are necessary to impel an intumescent intelligence community to create a diverse workforce that can operate effectively in a diverse world.

Intelligence agency heads also recognize the importance of congressional oversight. CIA Director Woolsey, during a 1993 congressional hearing on minority underrepresentation in the intelligence community, called the hearing “particularly timely” amidst a changing world.<sup>199</sup> DIA Director Clapper of the National Imagery and Mapping Agency, during a 2003 congressional hearing on minority underrepresentation, commended the committee for holding the hearing and felt it was a “positive thing” to shine a spotlight on the diversity problem.<sup>200</sup>

### B. *Implementing the Intelligence Reform Act of 2004*

The Intelligence Reform Act of 2004 is a significant step on the road towards diversity in the intelligence community. It is the first piece of legislation expressly calling for an intelligence community that is “sufficiently diverse for purposes of the collection and analysis of intelligence through the recruitment and training of women, minorities, and individuals with diverse ethnic, cultural, and linguistic backgrounds.”<sup>201</sup> But this general language lacks details. More needs to be done to transmute the 2004 Act’s broad hortatory language into concrete action. Efforts by the Office of the Director of National Intelligence and Congress reveal some of the ways the general language of the 2004 Act can be made more concrete.

The Office of the Director of National Intelligence in 2009 issued a directive promoting equal employment opportunity and

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197. *Annual Threat*, *supra* note 107, at 14, (statement of Representative Hastings, Vice-Chair, House Permanent Select Comm. on Intelligence).

198. U.S. Congressman Alcee L. Hastings, Biography, [http://www.alceehastings.house.gov/index.php?option=com\\_content&view=article&id=60&Itemid=53](http://www.alceehastings.house.gov/index.php?option=com_content&view=article&id=60&Itemid=53) (last visited Oct. 22, 2010).

199. 1993 House Hearing, *supra* note 1, at 3. (statement of R. James Woolsey, Director, Cent. Intelligence Agency).

200. 2003 House Hearing, *supra* note 86, at 15. (statement of James R. Clapper, Director, Nat’l Imagery and Mapping Agency).

201. *Intelligence Reform Act*, *supra* note 3, at § 1011(f)(3)(A)(iv).

diversity (EEOD).<sup>202</sup> The directive requires intelligence agency heads to “demonstrate their commitment to EEOD, integrate EEOD into their . . . strategic missions, be accountable for the management of their EEOD programs, and develop and implement performance measures . . . .”<sup>203</sup> The directive also establishes the Intelligence Community EEOD Council to coordinate, evaluate, and improve equal employment opportunity and diversity in the intelligence community.<sup>204</sup>

Congress has also supplied some guidelines on how to achieve diversity in the intelligence community. A 2010 Senate bill would require the Director of National Intelligence to submit to Congress a report that included plans and initiatives pertaining to: (1) “recruiting and hiring of diverse candidates, (2) “retention of diverse federal employees,” (3) “diversity awareness training and education programs,” (4) and “performance metrics.”<sup>205</sup>

These recent efforts by Congress and the Office of the Director of National Intelligence (ODNI) belatedly attempt to carry out the 2004 Intelligence Reform Act’s mandate to diversify the intelligence community. These efforts are worthwhile because they add teeth to the 2004 Intelligence Reform Act and can help institutionalize reform efforts. However, additional efforts, as discussed in the following section, will be needed before the Act’s diversity mandate is fulfilled.

### C. *Providing Bona Fide Occupational Qualifications (BFOQs)*

In addition to those efforts discussed above in the ODNI initiative and Senate bill is providing bona fide occupational qualifications (BFOQs) to the intelligence community.<sup>206</sup> This means authorizing *identity* attributes such as ethnicity and cultural background as BFOQs.<sup>207</sup> Bona fide occupational qualifications are exceptions to the statutory requirement that “[a]ll personnel actions affecting employees or applicants for employment . . . in executive agencies . . . [be] free from any discrimination based on race, color, . . . or national origin.”<sup>208</sup> Thus, it is not an unlawful employment practice to hire employees “on

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202. Office of the Director of Nat’l Intelligence, Intelligence Community Directive No. 110, *Intelligence Community Equal Employment Opportunity and Diversity*, ¶ B.1. (July 1, 2009), available at [http://www.dni.gov/electronic\\_reading\\_room/ICD\\_110.pdf](http://www.dni.gov/electronic_reading_room/ICD_110.pdf).

203. *Id.* at ¶ D.2.

204. *Id.* at ¶ E.3.

205. S. REP. NO. 111-223, at 30 (2010), 2010 WL 2837007.

206. Shelby, *supra* note 186, at 128.

207. *Id.* at 127-28.

208. 42 U.S.C.A. § 2000e-16(a) (alteration in original).

the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .”<sup>209</sup> Federal regulations define “national origin” to include “an individual’s, or his or her ancestor’s, place of origin” in addition to an individual’s “physical, cultural or linguistic characteristics of a national origin group.”<sup>210</sup>

The “national origin” BFOQ, then, might permit intelligence agencies to more aggressively hire employees of color. They are needed because understanding and penetrating terrorist organizations require native-speaking translators, culturally-attuned analysts, and diverse intelligence collectors able to blend into the targeted locale.<sup>211</sup>

Given the national security imperatives of a diverse intelligence workforce, bona fide occupational qualifications should be authorized not just for “national origin,” but for other identity<sup>212</sup> categories including “race,”<sup>213</sup> “ethnicity,”<sup>214</sup> and “color.”<sup>215</sup> Adding these categories will allow intelligence agencies maximum latitude in hiring diverse employees. Congress could add these extra categories to the present BOFQ statute. The revised statute would state that it is not an unlawful employment practice to employ an individual “on the basis of religion, sex, . . . national origin, [race, ethnicity, or color] in those certain instances where religion, sex, . . . national origin, [race, ethnicity, or color] is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .”<sup>216</sup>

The national origin BFOQ provision is not the only statutory provision that could aid intelligence agencies in ensuring a diverse workforce. Another statutory provision, one related to national security, states it is not an unlawful employment practice for an employer to not hire or to discharge an individual if the place of employment or position sought “is subject to any [1] requirement imposed in the interest of the [2] national security of the United States under any [3] security program in effect pursuant to or administered under any [4]

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209. 42 U.S.C.A. § 2000e-2(e) (The *national origin* BFOQ, however, is “strictly construed”). 29 C.F.R. § 1606.4 (emphases added).

210. 29 C.F.R. § 1606.1.

211. Shelby, *supra* note 186, at 127.

212. PAGE, *supra* note 145.

213. VAN DEN BERGHE, *supra* note 12.

214. Perea, *supra* note 10.

215. Bryant v. Bell Atlantic Maryland, Inc., 288 F.3d 124, 132 n.5 (4th Cir. 2002).

216. The bracketed information modifies 42 U.S.C.A. § 2000e-2(e) (alteration in original).

statute of the United States,” and the individual fails to meet the “requirement imposed.”<sup>217</sup>

The Intelligence Reform and Terrorism Prevention Act of 2004 could satisfy these four elements. First, the 2004 Act imposes a diversity requirement because it states the Director of National Intelligence “shall prescribe . . . personnel policies and programs . . . that . . . ensure that the personnel of the intelligence community are sufficiently diverse . . . through the recruitment . . . of . . . minorities . . . with diverse ethnic, cultural, and linguistic backgrounds.”<sup>218</sup> Second, this diversity requirement is in the interest of national security because diversity improves the capabilities and effectiveness of the intelligence community.<sup>219</sup> Third, the 2004 Act can be considered a security program because it seeks to secure the United States against terrorists through a reform program for the intelligence community. Finally, the 2004 Act is a statute of the United States.

The problem with the national security provision is that it is limited to not hiring and firing situations and fails to include hiring situations. The provision states that “it shall not be an unlawful employment practice for an employer to fail or refuse to hire [or] . . . to discharge any individual” if there is a requirement imposed for national security reasons under a statutory security program, and the applicant does not meet the requirement imposed.<sup>220</sup> To correct the hiring omission, Congress could simply add hiring language. The revised national security provision would have an added section stating “it shall also not be an unlawful employment practice for an employer to hire any individual” if there is a requirement imposed for national security reasons under a statutory security program, and the applicant meets the requirement imposed.<sup>221</sup> The requirement imposed by the 2004 Intelligence Reform Act is ethnic and cultural diversity, and diverse applicants would meet this requirement.

The proposed modifications to the “national security” and “national origin” provisions will assist intelligence agencies in hiring diverse personnel. One rejoinder, however, to hiring diverse personnel is that they pose a greater security risk. Presumably, a first-generation (i.e., naturalized) American with family living abroad that has trav-

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217. 42 U.S.C.A. § 2000e-2(g)(1)-(2) (emphases added).

218. Intelligence Reform Act, *supra* note 3, at § 1011(f)(3)(A)(iv) (emphasis added).

219. S. REP., *supra* note 205, at 30.

220. 42 U.S.C.A. § 2000e-2(g)(1)-(2) (emphases added) (alteration in original).

221. The proposed revision modifies 42 U.S.C.A. § 2000e-2(g)(1)-(2).



elled abroad might have divided loyalties.<sup>222</sup> Research of 150 American spies from 1947 to 2001 revealed that the dominant motive for becoming a spy was the lure of money and not divided loyalties, and it was revealed that more spies were native born (83%) than naturalized American citizens (17%).<sup>223</sup> Subsequent research into the 11 most recent American spies purportedly showed reversed patterns: more were naturalized citizens, more had foreign attachments, and divided loyalties was the most common motivation.<sup>224</sup> Research Herbig cautions, though, that one should consider these patterns while “[k]eeping in mind the instability of any conclusions based on only 11 cases . . . .”<sup>225</sup> What is conclusive, however, is espionage risks are always present when recruiting new hires, whether they are native or foreign born. Accordingly, foreign born Americans with their unique advantages should be recruited.<sup>226</sup> The past practice of screening out first generation Americans must end because those departing distant shores seeking America have language and cultural awareness advantages sought by U.S. intelligence agencies.<sup>227</sup>

Foreign born and other diverse Americans should be recruited without undue delay using bona fide occupational qualifications and other means to establish a diverse intelligence community. Using race-related qualifications to promote a diverse workforce has been described as “instrumental affirmative action.”<sup>228</sup> “Instrumental affirmative action” seeks to promote a “good thing,” whereas “traditional affirmative action” sought to “rectify historical or prevent current discrimination.”<sup>229</sup> In the case of diversity in the intelligence community, the “good thing” is improved intelligence. More of this “good thing” is needed if the United States wishes to avoid another surprise terrorist attack.

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222. Scott Shane, *A Spy's Motivation: For Love of Another Country*, N.Y. TIMES, April 20, 2008, available at <http://www.nytimes.com/2008/04/20/weekinreview/20shane/html>.

223. Katherine L. Herbig & Martin F. Wiskoff, *Espionage Against the United States by American Citizens 1947-2001*, xii-xiii (July 2002), available at <http://www.dhra.mil/perserec/reports/tr02-05.pdf>.

224. Katherine L. Herbig, *Changes in Espionage by Americans: 1947-2007*, xi-xii (March 2008), available at <http://www.dhra.mil/perserec/reports/tr08-05.pdf>.

225. *Id.* at xi (alteration in original).

226. See 1994 House Hearing, *supra* note 47, at 11 (statement of R. James Woolsey, Director, Cent. Intelligence Agency).

227. McConnell, *supra* note 138, at 5.

228. Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 681 (2004).

229. *Id.*

*D. Increasing Educational Opportunities to Students of Color*

Currently, only five of the seventeen intelligence agencies have the Undergraduate Training Program (also known as the Stokes Scholarship Program) — the CIA,<sup>230</sup> DIA,<sup>231</sup> NSA,<sup>232</sup> FBI,<sup>233</sup> and National Geospatial-Intelligence Agency.<sup>234</sup> Diversity would likely increase if all seventeen intelligence agencies had this recruitment program because it targets minority youths at a young age and channels them into future positions within the intelligence community. For example, the NSA's undergraduate program states: "The purpose of [the program] is to . . . facilitate the recruitment of individuals, particularly minority high school students, with a demonstrated capability to develop skills critical to the mission of the National Security Agency . . . ." <sup>235</sup> In practical terms, a minority college student would attend college full time and then work at the NSA during the summer. The college student would receive a salary while obtaining real-world experience in the intelligence field.<sup>236</sup> It would be a simple task to expand this program to all of the intelligence agencies. In fact, there is a bill to expand the program by authorizing "other intelligence agencies to establish undergraduate or graduate training programs . . . ." <sup>237</sup> The bill also authorizes the Intelligence Officer Training Program, which would provide scholarships to individuals and grants to colleges, to "help ensure that the Intelligence Community can better recruit and retain a workforce that is ethnically and culturally diverse . . . ." <sup>238</sup> This bill should be made law because recruiting students of color helps ensure a diverse intelligence community, and this is a "good thing" that enhances national security.

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230. 10 U.S.C.A. § 1623(a).

231. *Id.*

232. Nat'l Security Agency, *Opportunities for You: Stokes Educational Scholarship Program*, [http://www.nsa.gov/careers/opportunities\\_4\\_u/students/stokes.shtml](http://www.nsa.gov/careers/opportunities_4_u/students/stokes.shtml) (last visited Sept. 9, 2010).

233. 28 U.S.C.A. § 532 note (FBI Critical Skills Scholarship Program).

234. 10 U.S.C.A. § 462.

235. 50 U.S.C.A. § 402 note (Nat'l Security Agency Act of 1959).

236. Nat'l Security Agency, *supra* note 231.

237. S. REP., *supra* note 205, at 10.

238. *Id.*

V. INTELLIGENCE COMMUNITY DIVERSITY AND  
INSIGHTS INTO U.S. SOCIETY

So far, this article has focused on the intelligence community — the history of, need for, and steps to achieve diversity in the intelligence community. But the intelligence community is a microcosm of U.S. society, and as such, the dynamics of diversity reform within the intelligence community can provide insights about the larger society of which it is a part.

A. *Insights on the three branches of government*

The passage of the Thirteenth Amendment abolishing slavery bestowed on Congress an affirmative role to “protect fundamental rights throughout the nation.”<sup>239</sup> These “fundamental rights” include equality under the law.<sup>240</sup> In the intelligence field, Congress has attempted to ensure equality prevails. Of the three branches of government — legislative, executive, and judicial — the legislative branch has been the most effective in encouraging equality within the intelligence community. As chair of the House Committee on Intelligence, Representative Stokes used his oversight authority to focus on diversity reform in the intelligence community. Other congressional members who followed also maintained this focus including Representatives Julian Dixon, Nancy Pelosi, Tim Roemer, and Sherwood Boehlert.<sup>241</sup> The congressional spotlight on diversity prompted the intelligence community to undertake efforts to address its minority underrepresentation problem.<sup>242</sup>

The executive branch is not well placed to reform the intelligence community because allowing executive branch agencies to reform themselves is akin to letting the “fox guard the henhouse.”<sup>243</sup> Intelligence agencies tend towards secrecy and thus resist change that might lift the veil of secrecy, especially if the resulting exposure might reveal embarrassing internal deficiencies.<sup>244</sup> In the matter of diversity,

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239. Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916, 1938 (1987).

240. *Id.* at 1938-39.

241. 2003 House Hearing, *supra* note 86, at 4 (statement of Representative Hastings, Member, House Permanent Select Comm. on Intelligence).

242. 1995 House Hearing, *supra* note 8, at 2 (statement of Representative Combest, Chair, House Permanent Select Committee on Intelligence).

243. See 150 CONG. REC. S8538 (daily ed. July 21, 2004) (statement of Senator Graham), 2004 WL 1630366.

244. *Id.*

the intelligence community has been deficient for decades in addressing the problem of minority underrepresentation within its ranks.

The judicial branch is also not well placed to reform the intelligence community. Courts are incapable of instituting wholesale reform because they are limited to addressing only issues brought before them by the litigants.<sup>245</sup> Further, courts are limited by the state secrets privilege which is a “common law evidentiary rule that allows the government to withhold information from discovery when disclosure would be inimical to national security.”<sup>246</sup> An intelligence agency could use the state secrets privilege to halt a minority employee’s discrimination lawsuit. This occurred in the case of Jeffrey Sterling, a black CIA agent who sued the CIA for racial discrimination in 2001. He was an Operations Officer in the Near East and South Asia division from 1993 to 2001. He alleged being denied advantageous opportunities, being provided with more rigorous requirements, and subjected to disparate treatment because he was African American.<sup>247</sup> The Fourth Circuit dismissed his lawsuit because proof of racial discrimination “would require inquiry into state secrets such as the operational objectives and long-term missions of different agents . . . and the organizational structure of CIA intelligence-gathering.”<sup>248</sup>

Congress, then, is best situated to advance diversity in the intelligence community and has consistently done so in recent decades. Congress should be credited with pushing the intelligence community — arguably the last federal enclave of racial homogeneity — towards greater diversity. However, public perception of Congress is hardly favorable. A 2010 Gallup Poll questioning Americans on their confidence in sixteen U.S. institutions placed Congress at the very bottom, even lower than Health Maintenance Organizations (HMOs).<sup>249</sup> This is regrettable because for all the imperfections of Congress, it remains a co-equal third branch of government with critical oversight functions.<sup>250</sup> Congressional oversight of the intelligence community has made it more diverse and thus more effective in protecting the American public, the same public that ironically holds Congress in such low regard.

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245. *Root Refining Co. v. Universal Oil Products Co.*, 169 F.2d 514, 521 (3d Cir. 1948).

246. *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991).

247. *Sterling v. Tenet*, 416 F.3d 338, 341 (4th Cir. 2005).

248. *Id.* at 348.

249. Gallup, Congress Ranks Last in Confidence in Institutions, <http://www.gallup.com/poll/141512/congress-ranks-last-confidence-institutions.aspx#1> (last visited Sept. 4, 2010).

250. MARTIN O. JAMES, CONGRESSIONAL OVERSIGHT 5-6 (2002).

*B. Insights on the Ongoing Quest For Equality*

The quest for equality in America has been and continues to be a struggle because of white backlash.<sup>251</sup> This is no less true in the intelligence community. DIA Director Clapper provided congressional testimony on white males in the DIA who criticized diversity initiatives and complained of being disenfranchised and not being promoted on merit.<sup>252</sup> In one instance, after Director Clapper reprimanded a DIA employee for sending an ethnically disparaging joke through email, a DIA employee wrote to *The Washington Times* the following: "Don't you think with the looming crisis in North Korea that the director of the DIA (a three-star general) would have more important things to worry about than scanning the electronic mail for nasty little jokes?"<sup>253</sup>

The quest for equality is a struggle not only because of backlash by those who oppose diversity efforts, but also because of ambivalence from even those who support such efforts. The ambivalence of those who argue for a diverse intelligence community can be detected in their statements seeking to justify diversity on practical as well as principled grounds. CIA Director Woolsey shared, "I believe that this goal [of equality] is important not only in the interest of fairness, but because as intelligence agencies it enables us to do our jobs better as well."<sup>254</sup> DIA Director Clapper asserted, "[d]iversity is just plain right; and . . . it is critical for doing intelligence well."<sup>255</sup> Representative Michael N. Castle opined, "[i]t seems to me that this [effort to diversify the CIA] is not just an issue of legal diversity or of dealing with . . . racial issues, but an issue of ability to carry out your business in the best way possible."<sup>256</sup>

These statements show ambivalence towards diversity because they reveal a lack of confidence in justifying diversity solely on principle. Instead of arguing for diversity based solely on the principle of equality, these statements express a felt need to shore up the principled equality rationale with the practical security rationale. These statements reveal a perception that although diversity efforts have

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251. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 529 (3d ed. 2007).

252. 1994 House Hearing, *supra* note 47, at 35 (statement of James R. Clapper, Director, Def. Intelligence Agency).

253. *Id.* at 35, 59-60.

254. *Id.* at 11 (statement of R. James Woolsey, Director, Cent. Intelligence Agency) (emphases added) (alteration in original).

255. 1994 House Hearing, *supra* note 47, at 33 (statement of James R. Clapper, Director, Def. Intelligence Agency) (emphases added) (alteration in original).

256. 1995 House Hearing, *supra* note 8, at 22 (statement of Representative Castle, Member, House Permanent Select Comm. on Intelligence) (emphases added).

sprouted roots, the roots are not deep. To deepen the roots, an appeal is made to people's self-interest by telling them that diversity is practical because it produces better intelligence that can better protect Americans.

Other statements do more than promote the practical rationale — they also diminish the principled rationale. CIA Director Tenet instructed, "Forget for a moment the ethical reason for diversity. More than any other entity, the intelligence community has a business need to have its workforce reflect a broad cross section of our populace."<sup>257</sup> Senator Shelby contended, "I do not believe the language in the Joint Inquiry's 'Recommendations' concerning [the recruitment of diverse personnel] is meant to represent our collective endorsement of workplace diversity for its own sake."<sup>258</sup> Instead, Senator Shelby elaborated, the objective is "understanding and penetrating international terrorist organizations . . . ."<sup>259</sup> Miguel Diaz of the Center for Strategic and International Studies expressed, "[f]irst, we should encourage diversity within the Intelligence Community because it is the right thing to do. . . . Second, and perhaps more importantly, we should pursue diversity within the intelligence community because it is the smart thing to do."<sup>260</sup>

These statements, though inadvertent, effectively downgrade the principle of equality. This principle is intrinsically valuable and it should not be forgotten, but it should be pursued for its own sake and should not be considered less important. No doubt, arguing the practical effects of diversity is persuasive in a time of war. Moreover, it is true that both practical and principled justifications exist for diversity, and the practical justification should elaborate further to inform those unaware of this aspect of diversity. The danger, however, is in elevating the practical justification at the expense of the principled justification. Diversity efforts should not be undertaken only during wartime or when there is a practical need for a pluralistic population to defend the state. Rather, equality should be pursued for its own sake,

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257. TENET & HARLOW, *supra* note 79, at 23 (emphasis added).

258. Shelby, *supra* note 185, at 127 (author's comment for clarity).

259. *Id.*

260. 2003 House Hearing, *supra* note 86, at 66-67 (statement of Miguel Diaz, Director of South America Project, Center for Strategic and International Studies) (emphases added) (alteration in original).

whether in wartime or peacetime,<sup>261</sup> because people are not means but are ends unto themselves.<sup>262</sup>

### C. *Insights on a Wartime Paradox*

Times of war are paradoxical in that they produce both racial division and integration.<sup>263</sup> For example, during World War II, there was racial division as seen in the internment of Japanese Americans.<sup>264</sup> But, there was also the admission of blacks, Japanese Americans, and other minorities into the military during World War II,<sup>265</sup> and integration of minorities in the military continued during the Korean War.<sup>266</sup> Racial integration in the armed forces helped pave the way for wider racial integration within U.S. society.<sup>267</sup>

Likewise, during the current War on Terror, there is racial division in the racial profiling of Arabs and Muslims and in the calls to seal the border against “illegal aliens.”<sup>268</sup> But, there is also integration as seen in the statements of intelligence agency heads arguing for diversity in the intelligence agencies and in the express language of the 2004 Intelligence Reform Act prescribing a diverse intelligence community. As the intelligence community becomes more diverse, consequently U.S. society (of which the intelligence community is a part) becomes more diverse. The historical process of increased societal integration through wartime integration of the military now continues through wartime integration of the intelligence community.

This does not mean the United States should seek war as a means to further domestic diversity goals. As stated by Colin Powell, former Chairman of the Joint Chiefs of Staff, “[w]ar is a deadly game” and “American GIs [are] not toy soldiers to be moved around on some

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261. See Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 *YALE L.J.* 227, 232 (1972).

262. See Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 *GEO. L.J.* 245, 312 (2003).

263. Anson Phelps Stokes, *American Race Relations in War Time*, 14 *J. NEGRO EDUC.* 535, 535 (1945).

264. Seth Haines, *Rounding up the Usual Suspects: The Rights of Arab Detainees in a Post-September 11 World*, 57 *ARK. L. REV.* 105, 105-06 (2004).

265. Melissa Murray, *When War is Work: The G.I. Bill, Citizenship, and the Civic Generation*, 96 *CAL. L. REV.* 967, 984 (2008).

266. PIERCE C. MULLEN, *The Korean Conflict and the Cold War*, in John Martin Carroll & Colin F. Baxter, *The American Military Tradition* 213, 235 (2d ed. 2007).

267. *Id.*

268. Raquel Aldana & Sylvia R. Lazos Vargas, “Aliens” in our Midst Post-9/11: *Legislating Outsiderness Within the Border*, 38 *U.C. DAVIS L. REV.* 1683, 1701-02 (2005).

sort of global game board.”<sup>269</sup> Nonetheless, wars will occur, and when they do, we should comprehend that there is both peril and promise during wartime. We comprehend the peril of war-induced discrimination to better guard against it, and the promise of increased integration to better further it along.

## VI. CONCLUSION

The principle of racial equality is more fully realized when all segments of U.S. society are part of the equality effort. As the intelligence community segment becomes more diverse and heterogeneous, the principle of racial equality becomes more fully realized. A long history of minority underrepresentation in the intelligence community need not present an insurmountable obstacle to this realization. Congressional oversight, the 2004 Intelligence Reform Act, and intelligence agency initiatives all contribute to the diversity that will lead to the removal of the homogeneity handicap.

Moreover, equality and diversity in the intelligence community is achievable because Americans of color do desire to serve their country in times of war. They have done so since the colonial period<sup>270</sup> and should be equally able to do so now in all fields including those in the intelligence community. Lowering barriers to the intelligence field will better achieve equality and better defend America. A better defended America is not the *sine qua non* for racial equality, but in war where all Americans are at risk, all Americans should be given an equal opportunity to share the privilege and burden of serving their country at the “tip of the spear.”<sup>271</sup>

Robert Callum predicted that the intelligence community might find diversity thrust upon it in the wake of failure. He also warned that if ethnocentrism and homogeneity persist, future intelligence failures are assured.<sup>272</sup> What must be done, then, is to displace ethnocentrism with equality, and homogeneity with heterogeneity. Voices within and without the intelligence community say this must be done. It remains

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269. COLIN POWELL & JOSEPH E. PERSICO, *MY AMERICAN JOURNEY* 480, 576 (1995) (alteration in original).

270. Brenda L. Moore, *Race in the United States Military, in ARMED FORCES AND INTERNATIONAL SECURITY: GLOBAL TRENDS AND ISSUES* 241, 242 (Jean Callaghan & Franz Kernic ed., 2003).

271. The “tip of the spear” refers to the intelligence community. 153 Cong. Rec. H4882 (daily ed. May 10, 2007) (statement of Rep. Hoekstra), 2007 WL 1381324.

272. Callum, *supra* note 2, at 34, 39.



only to do what must be done. When done, the principle of equality will be more fully affirmed and the protection of the citizenry will be more fully achieved.