

# 1. The Problem

## Introduction

“Domestic national security intelligence” (“domestic intelligence” for short) is intelligence concerning threats of major, politically motivated violence, or of equally grievous harm to national security, mounted within the nation’s territorial limits, whether by international terrorists, homegrown terrorists, or spies or saboteurs employed by foreign nations. The 9/11 attacks reflected a failure of domestic intelligence, having been mounted from within the United States by terrorists who had been in this country for months—some intermittently for years.

The danger of terrorist acts committed on the soil of the United States has not abated despite strenuous efforts to improve homeland security. The hostility of significant segments of the vast Muslim world (including large and restive Muslim minorities in such European nations as the United Kingdom, France, and the Netherlands) toward the United States is unabated. And weapons of mass destruction—atomic bombs, dirty bombs (conventional explosives that scatter radioactive material), chemical agents, lethal pathogens, and deadly-when-abused industrial materials—are ever cheaper and more available. Their cost will continue to decline, and their availability to increase, faster than the defensive measures planned or deployed at present.<sup>1</sup> Nor can

1. On the threat to U.S. national security posed by weapons of mass destruction in the hands of terrorists, see Richard A. Posner, *Catastrophe: Risk and Response* 71–86 (2004), and references cited there.

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it be assumed that the threat of terrorism with weapons of mass destruction comes only from the Muslim world, or indeed only from foreign groups or nations. The Unabomber, Timothy McVeigh, the FALN (a violent Puerto Rican separatist organization), the Weather Underground, and the Black Panthers are historical examples of homegrown U.S. terrorists whose successors may wield enormously greater lethal power.

It is difficult to imagine any major attack on the United States (other than by an enemy nation) that would not have a domestic aspect. Even an attack that consisted of exploding a ship full of ammonium nitrate (or carrying a dirty bomb or a nuclear bomb) in a U.S. port would take place within the defensive perimeter of the Coast Guard, whose intelligence service is a part of the federal intelligence community, and would undoubtedly have been prepared with the help of people living in the United States, if only because the attackers would need information about port security.

The meaningfulness of “domestic intelligence” as a category might be questioned on the ground that borders have no significance when the main threat to national security comes from international terrorism. Certainly domestic and foreign intelligence must be closely coordinated. But there are enough differences to justify preserving the distinction. Domestic intelligence presents civil liberties concerns that are absent or attenuated when intelligence agencies operate abroad, since the Constitution and laws of the United States generally do not have extra-territorial application. And homegrown terrorists—terrorists with no personal, familial, ethnic, or political ties to a foreign country—are a major potential threat in an era of weapons of mass destruction. Recruitment, training, deployment, and security requirements are also different for intelligence officers operating inside and outside national borders. Surveillance methods are apt to differ too. And domestic intelligence officers must work closely

with the nation's public and private police and protection forces to create a nationwide network of eyes and ears.

Despite its importance to national security, domestic intelligence is the weakest link in the U.S. intelligence system. The proximate cause is the entrustment of domestic intelligence to the FBI; a more remote cause is that Americans tend to disregard foreign experience. The final report of the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission) cast only a cursory glance at foreign intelligence systems, even though some of them, notably the British, French, and Israeli, are well regarded. These are also nations that have a longer experience dealing with terrorism than the United States. Each has a domestic intelligence agency that is separate from its national police force, its counterpart to the FBI, and has no power of arrest or other law enforcement powers. In Britain the domestic intelligence agency is called the Security Service, better known as MI5; in France, the Direction de la Surveillance du Territoire (DST); in Israel, Shin Bet. Examples of similar agencies in other nations are the Bundesamt für Verfassungsschutz (BfV) in Germany, the Public Security Investigation Agency in Japan, the Australian Security Intelligence Organisation, the New Zealand Security Intelligence Service, the Intelligence Bureau in India, the National Intelligence Agency in South Africa, and—an agency that I shall especially emphasize as a possible model for a U.S. domestic intelligence agency—the Canadian Security Intelligence Service.<sup>2</sup> There is an international

2. On the various foreign domestic intelligence agencies, see Michael A. Turner, *Why Secret Intelligence Fails*, ch. 4 (2005); Peter Chalk and William Rosenau, *Confronting the 'Enemy Within': Security Intelligence, the Police, and Counterterrorism in Four Democracies* (RAND Corp. 2004); Todd Masse, "Domestic Intelligence in the United Kingdom: Applicability of the MI-5 Model to the United States: Report for Congress" (Congressional Research Service, Order Code RL31920, May 19, 2003). Some of the agencies, though not the British or Canadian, have ancillary law enforcement responsibilities. And some nations, such as

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consensus that a nation's intelligence system should include a domestic intelligence capability that is separate from the police. The consensus includes the nations of "old Europe" admired by American liberals who are in the forefront of opposition to emulating the European approach to domestic security.

Although the United States is an outlier in not having such an agency, the 9/11 Commission gave the back of its hand<sup>3</sup> to proposals<sup>4</sup> that we create one. Members and staff of the commission visited the director-general of MI5, who told them she "doubt[ed] that such an agency could operate under the restrictions of the U.S. Constitution and the traditionally higher American emphasis on civil liberties and the right to privacy. 'Even the Brits think it wouldn't work here,' 9/11 Commission Chairman Thomas Kean said in a news conference shortly after the

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Italy and Spain, combine foreign and domestic intelligence; the Italian agency is the Servizio per la Informazioni e la Sicurezza Democratica (SISDE) and the Spanish agency is the Centro Nacional de Inteligencia (CNI). For an extensive list of the world's intelligence agencies, see [www.globalsecurity.org/intell/world/india/index.html](http://www.globalsecurity.org/intell/world/india/index.html).

3. *Final Report of the National Commission on Terrorist Attacks Upon the United States* 423–424 (July 2004).

4. See, for example, *Protecting America's Freedom in the Information Age: A Report of the Markle Foundation Task Force*, Oct. 2002, [http://markletaskforce.org/documents/Markle\\_Full\\_Report.pdf](http://markletaskforce.org/documents/Markle_Full_Report.pdf); William E. Odom, *Fixing Intelligence: For a More Secure America*, ch. 8 (2003); Odom, "Why the FBI Can't Be Reformed," *Washington Post*, June 29, 2005, p. A21; John Deutch, "Strengthening U.S. Intelligence," testimony before the 9/11 Commission, Oct. 14, 2003, at [www.9-11commission.gov/hearings/hearing4/witness\\_deutch.htm](http://www.9-11commission.gov/hearings/hearing4/witness_deutch.htm); Paul R. Pillar, "Intelligence," in *Attacking Terrorism: Elements of a Grand Strategy* 115, 133–134 (Audrey Kurth Cronin and James M. Ludes, eds., 2004); William Rosenau and Peter Chalk, "Can We Learn from Others?" *Wall Street Journal*, Apr. 15, 2004, p. A14. In 2003, Senator John Edwards made a proposal for a domestic intelligence agency that is similar to the proposal in this monograph; his proposal is described in Fayza Elmostehi and Michael D. Vozzo, "Domestic Intelligence and National Security Reform Proposals," 2004, [www.maxwell.syr.edu/campbell/Library%20Papers/Event%20papers/ISHS/ElmoStehiVozzo.pdf](http://www.maxwell.syr.edu/campbell/Library%20Papers/Event%20papers/ISHS/ElmoStehiVozzo.pdf). See also the statement by Senator Richard Shelby, note 14 below, from which I shall be quoting extensively.

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commission issued its report.”<sup>5</sup> To defer to the opinion of a foreign official concerning the limits that U.S. law and custom would place on a domestic intelligence service makes little sense—and anyway all that the director-general may have meant was that a U.S. service couldn’t be a carbon copy of her agency because the legal framework would be different. It does not follow that the difference (which is anyway slight now that the United Kingdom has signed the European Convention on Human Rights) would render a U.S. agency ineffectual.

The 9/11 Commission’s rejection of the idea of a U.S. counterpart to MI5 was tentative. It said a domestic intelligence agency wasn’t needed *if* the commission’s other recommendations were adopted.<sup>6</sup> Many of them were whittled down by the Intelligence Reform Act and Terrorism Prevention Act of 2004, the legislative response to the 9/11 Commission’s report. Recommendations for reorganizing congressional oversight of intelligence, to which the commission attached great importance, were ignored. So we don’t know what the commission would think of the idea today—or at least we didn’t know until the commission decided to reconstitute itself (albeit as a private, no longer a governmental, commission, the 9/11 Discourse Project).<sup>7</sup> The commissioners have been so taken aback by the FBI’s inability to rectify the errors identified in the commission’s report of July 2004 that they are now wondering whether the creation of a separate domestic intelligence agency mightn’t be the right course of action after all.<sup>8</sup>

5. Scot J. Paltrow, “Secrets and Spies: U.K. Agency Makes Gains in Terror War; Can It Work Here?” *Wall Street Journal*, Oct. 6, 2004, p. A1.

6. *Final Report*, note 3 above, at 423.

7. Philip Shenon, “Sept. 11 Panelists Seeking U.S. Data on Terror Risks,” *New York Times* (final ed.), June 6, 2005, p. A1.

8. “The FBI has stumbled badly in its attempts to remake itself since the Sept. 11, 2001, attacks and is plagued by high turnover, poor training and its continued inability to build a modern computer system, according to a panel

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Amid mounting criticisms, which I summarize below, of the FBI's continuing inability to perform the domestic intelligence role adequately, the President in June of this year ordered the Bureau to build a halfway house to a true domestic intelligence agency by combining its three divisions that have intelligence responsibilities into a new unit to be called the "National Security Service" (NSS).<sup>9</sup> Because two of these divisions have law enforcement as well as intelligence duties (nor is it even clear that the intelligence activities of the new entity will be limited to national security intelligence), it will not be a true domestic intelligence agency, quite apart from its being lodged in a police department.

The United States *may* be right to refuse to create a domestic intelligence agency separate from the police and other countries wrong (or right for them but not for us). We are larger and more diverse, have a more robust civil liberties tradition, and face a wider range of threats. But the fact that we are out of step should give us pause. Although we are different from other countries, they are also different from each other (India versus France or Canada, for example), yet they agree on the need to separate domestic intelligence from law enforcement. It is no surprise,

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convened yesterday by the members of the commission that investigated the terror strikes. The problems are so acute that members of the influential commission may want to reconsider whether the United States needs a separate agency to handle domestic intelligence, one Democratic member said." Dan Eggen, "FBI Fails to Transform Itself, Panel Says: Former Sept. 11 Commission 'Taken Aback' by Personnel, Technology Problems," *Washington Post*, June 7, 2005, p. A4.

9. George W. Bush, Memorandum, "Strengthening the Ability of the Department of Justice to Meet Challenges to the Security of the Nation," White House, June 29, 2005, [www.fas.org/irp/news/2005/06/wh062905-doj.html](http://www.fas.org/irp/news/2005/06/wh062905-doj.html); Douglas Jehl, "Bush to Create New Unit in F.B.I. for Intelligence," *New York Times* (national ed.), June 30, 2005, p. A1; David Johnston, "Antiterror Head Will Help Choose an F.B.I. Official: A Focus on Intelligence: Under Pressure, Bureau Will Cede a Piece of Its Prized Autonomy," *New York Times* (final national ed.), June 12, 2005, § 1, p. 1.

therefore, that criticisms of their approach that are based on the supposedly unique characteristics of the United States turn out to be superficial. One such criticism is that “if the Homeland Security Department and 170,000 people to be integrated is going to take a couple of years, standing up a brand new domestic intelligence agency would take a decade.”<sup>10</sup> Another is that “We’re not England. We’re not 500 miles across our territory. We have thousands of miles to cover. Would you propose to create an organization that had people all over the United States, as the FBI does?”<sup>11</sup> The first criticism overlooks the fact that creating a domestic intelligence agency cannot be compared with the creation of the Department of Homeland Security, a mega-agency that dwarfs the entire domestic intelligence community. We’ll see later that the total number of federal employees exclusively engaged in domestic intelligence probably does not exceed 7,000, which is fewer than 4 percent of the number of employees of DHS. In addition, it is more difficult to consolidate a number of heterogeneous agencies into a single department than to create a new agency that, as outlined in chapter 3 of this monograph, might have as a few as 1,500 employees.

As for the second criticism, although we are indeed not England a domestic intelligence agency would not require much field staff because its creation would not entail removing staff from the FBI. The Bureau would continue to play a large role in domestic intelligence.

10. Excerpts of testimony from Louis J. Freeh and Janet Reno in *The 9/11 Investigations: Staff Reports of the 9/11 Commission, Excerpts from the House-Senate Joint Inquiry Report on 9/11, Testimony from Fourteen Key Witnesses, including Richard Clarke, George Tenet, and Condoleezza Rice* 257, 264 (Steven Strasser, ed., 2004). The correct number of employees for the Department of Homeland Security is 180,000.

11. Remarks of William Webster quoted in Senate Select Committee on Intelligence and House Permanent Select Committee on Intelligence, *Joint Inquiry into Intelligence Community Activities before and after the Terrorist Attacks of September 11, 2001* 351 (Dec. 2002).

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The critics are correct that other nations tend to be more centralized than the United States. The United Kingdom, for example, has only 56 police forces; the United States has more than 20,000. Domestic intelligence has to liaise with local law enforcement, whose personnel may turn up clues to the existence of terrorist or prototerrorist gangs and to the identity of members, sympathizers, and foreign contacts. Also, terrorists sometimes commit quite ordinary crimes to finance their terrorist activities—bank robberies are a traditional example—though this has not been characteristic of recent terrorist activity in this country.

It is easier for thousands of local police departments, many quite small, to communicate with one federal agency than with two. But, at most, all that this would require is that in the division of responsibilities among agencies conducting domestic intelligence, responsibility for liaison with local police forces remain with the FBI. (Even before September 11, 2001, the FBI had established Joint Terrorism Task Forces with local law enforcement authorities; these task forces now exist in scores of cities.) But the qualification “at most” deserves emphasis. Because the FBI’s relations with local authorities in regard to national security intelligence are strained,<sup>12</sup> leaving the liaison responsibility entirely to the FBI would be a mistake.

### The FBI’s Failures

The FBI is not the answer to the problem of domestic intelligence. As demonstrated by the 9/11 Commission’s report, the Bureau turned in the most lackluster performance of any agency

12. The FBI isn’t loved by local law enforcers, and a new intelligence agency would be free from the traditions and rivalries that inhibit day-to-day cooperation now. A “hat in hand” (with money) and “I’m not competing with you, I need you”) attitude of the new agency would make local law enforcement more likely to cooperate in providing information and in making available suspects to be “turned” rather than arrested and prosecuted. For further discussion, see chapter 3.



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in the run-up to 9/11,<sup>13</sup> even though it had (and has) the primary responsibility among police and intelligence services for preventing terrorist attacks on the nation from within. A request by one of the FBI field offices to apply for a warrant to search the laptop of Zacarias Moussaoui (a prospective hijack pilot) was turned down. A prescient report on flight training by Muslims in Arizona was ignored by FBI headquarters. There were only two analysts on the Bin Laden beat in the entire Bureau. Director Louis Freeh's directive that the Bureau focus its efforts on counterterrorism was ignored.

Concerning the Moussaoui episode, Senator Richard Shelby, the vice chairman of the Senate Select Committee on Intelligence, has pointed out that "FBI Headquarters actually *prohibited* intelligence investigators in Minneapolis from notifying the Criminal Division at the Justice Department about the Moussaoui situation, and *prohibited* agents from pursuing a criminal search warrant against him."<sup>14</sup> "The Bureau did not know what information it possessed, it did not approach this information with an intelligence analysis mindset, and it too often neglected to inform

13. For other criticism of the FBI's pre-9/11 performance as an antiterrorist agency, see U.S. Dept. of Justice, Office of the Inspector General, *A Review of the FBI's Handling of Intelligence Information Related to the September 11 Attacks* (Nov. 2004), [www.justice.gov/oig/special/0506/final.pdf](http://www.justice.gov/oig/special/0506/final.pdf), summarized in Eric Lichtblau, "Report Details F.B.I.'s Failure on 2 Hijackers: Follow-Up Is Faulted on 9/11 Intelligence," *New York Times*, June 10, 2005, p. A1; Anonymous (Michael Scheuer), *Imperial Hubris: Why the West Is Losing the War on Terror* 185–191 (2004); *Joint Inquiry*, note 11 above, at 6, 243–246, 357–359 (Dec. 2002); Staff Statement No. 9, "Law Enforcement, Counterterrorism and Intelligence Collection in the United States prior to 9/11," in *The 9/11 Investigations*, note 10 above, at 239–256; Odom, *Fixing Intelligence*, note 5 above, ch. 8; and the Shelby statement, cited in the next footnote.

14. "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," Dec. 10, 2002, pp. 52–53, [www.fas.org/irp/congress/2002\\_rpt/shelby.pdf](http://www.fas.org/irp/congress/2002_rpt/shelby.pdf). All emphases in my quotations from Shelby's statement are his.

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other agencies of what it *did* know or believe.”<sup>15</sup> Senator Shelby concluded that,

though still renowned for its criminal investigative competence, the FBI has shown a disturbing pattern of collapse and dysfunction in its counterintelligence and counterterrorism functions. These recurring problems have, in turn, led many observers—and Members of Congress—increasingly to lose faith in the Bureau’s ability to meet the national security challenges it faces, despite a series of internal reorganizations over the past several years that have failed to rectify the situation.

In light of the FBI’s dismal recent history of disorganization and institutional incompetence in its national security work, many of us in Congress have begun to consider whether it might better serve the interests of the American people to separate the counterintelligence and counterterrorism function of the Bureau into an entirely separate organization—one that would be free of the structural, organizational, and cultural constraints that have greatly handicapped the FBI’s ability to conduct the domestic intelligence work our country depends upon it to perform.<sup>16</sup>

The reasons the Senator gave for the FBI’s dysfunction as an intelligence agency are illuminating:

Fundamentally, the FBI is a law enforcement organization: its agents are trained and acculturated, rewarded and promoted within an institutional culture the primary purpose of which is the prosecution of criminals. Within the Bureau, information is stored, retrieved, and simply *understood* principally through the conceptual prism of a “case”—a discrete bundle of information the fundamental purpose of which is to prove elements of crimes against specific potential defendants in a court of law.

The FBI’s reification of “the case” pervades the entire organization, and is reflected at every level and in every area: in the autonomous, decentralized authority and traditions of the Field Offices; in the priorities and preference given in individual career

15. *Id.* at 67.

16. *Id.* at 61–62.

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paths, in resource allocation, and within the Bureau's status hierarchy to criminal investigative work and *post hoc* investigations as opposed to long-term analysis; in the lack of understanding of and concern with modern information management technologies and processes; and in deeply-entrenched individual mindsets that prize the production of evidence-supported narratives of defendant wrongdoing over the drawing of probabilistic inferences based upon incomplete and fragmentary information in order to support decision-making. . . . Far from embracing probabilistic inference, "knowledge" in a law enforcement context aspires—in its ideal form at least—not only to *certainty* but also to *admissibility*, the two essential conceptual elements of being able to prove someone guilty beyond a reasonable doubt in a court of law. Within such a paradigm, information exists to be *segregated* and ultimately employed under carefully-managed circumstances for the single specific purpose for which it was gathered.<sup>17</sup>

After 9/11 the Bureau, under a new director, Robert Mueller, vowed to do better, but his efforts<sup>18</sup> have fallen far short of success.<sup>19</sup> In part because the Bureau has been plagued by excessive turnover in the executive ranks of its intelligence and antiterrorism sections,<sup>20</sup> and even more so in its information technology staff, it took the Bureau two years after 9/11 just to devise a *plan*

17. *Id.* at 62–63.

18. Summarized in U.S. Department of Justice, Federal Bureau of Investigation, *Report to the National Commission on Terrorist Attacks upon the United States: The FBI's Counterterrorism Program since September 2001* (Apr. 14, 2004).

19. Staff Statement No. 12, "Reforming Law Enforcement, Counterterrorism, and Intelligence Collection in the United States" (National Commission on Terrorist Attacks Upon the United States, Staff Report, Apr. 14, 2004); Testimony of Dick Thornburgh, Chairman, Academy Panel on FBI Reorganization (National Academy of Public Administration, June 18, 2003).

20. Dan Eggen, "FBI Names 6th Antiterrorism Chief since 9/11," *Washington Post*, Dec. 29, 2004, p. A17. "All of the FBI's senior positions have turned over at least once since the Sept. 11 attacks, and many have changed hands numerous times." *Id.*

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to reform its counterterrorism program.<sup>21</sup> We know now that the plan was a failure; for otherwise the President would not be forcing a reorganization on the Bureau.

Three and a half years after acknowledging in the wake of 9/11 the inadequacy of its information technology for intelligence purposes, the Bureau abandoned a \$170 million “Virtual Case File” project intended to enable FBI agents to input intelligence data into their computers without having to undergo “a cumbersome, time-consuming process of preparing a paper record of that information, seeking the necessary approvals, then uploading the document into an existing database.”<sup>22</sup> Because the FBI chose to develop Virtual Case File noncollaboratively, the federal and many of the state agencies with which it works delayed upgrading their own systems in the hope that by waiting until VCF was up and running they could configure their own systems to be compatible with the Bureau’s.

The Bureau plans to take another three and a half to four years to complete the acquisition, at even greater (probably much greater) expense than that of the failed Virtual Case File system, of information technology adequate to the Bureau’s needs.<sup>23</sup>

21. Laurie E. Ekstrand, “FBI Transformation: FBI Continues to Make Progress in Its Efforts to Transform and Address Priorities” 6 (U.S. General Accounting Office GAO-04-578T, Mar. 23, 2004).

22. Statement of Robert S. Mueller III, Director, Federal Bureau of Investigation, before the U.S. Senate Committee on Appropriations, Subcommittee, on Commerce, Justice, State and the Judiciary, Feb. 3, 2005, [www.fbi.gov/congress/congress05/mueller020305.htm](http://www.fbi.gov/congress/congress05/mueller020305.htm). The Virtual Case File fiasco is vividly described in Dan Eggen, “FBI Pushed Ahead with Troubled Software,” *Washington Post*, June 6, 2005, p. A1.

23. Griff Witte, “FBI Outlines Plans for Computer System: Program Will Replace Canceled Project,” *Washington Post*, June 9, 2005, p. A19; Eric Lichtblau, “F.B.I. Ends a Faltering Effort to Overhaul Computer Software,” *New York Times* (late ed.), Mar. 9, 2005, p. A16; Larry Greenemeier, “Tech vs. Terrorism: The FBI Stumbled Badly in Modernizing Its IT to Help Fight Terrorism. Here’s How the Bureau Plans to Get on Track,” *InformationWeek*, June 6, 2005, [www.informationweek.com/story/showArticle.jhtml?articleID=164300083](http://www.informationweek.com/story/showArticle.jhtml?articleID=164300083). The most

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What Senator Shelby said about the Bureau's unhappy experience with information technology in December 2002 remains true today: "In addition to these cultural and organizational problems—or perhaps in large part because of them—the FBI has never taken information technology (IT) very seriously, and has found itself left with an entirely obsolete IT infrastructure that is wholly inadequate to the FBI's current operational needs, much less to the task of supporting sophisticated all-source intelligence fusion and analysis."<sup>24</sup> As recently as June 2005, more than three and a half years after the 9/11 attacks, FBI officials were acknowledging "that they must radically change the agency's culture if the Bureau is ever going to get the high-tech analysis and surveillance tools it needs to effectively fight terrorism. The FBI, they say, must move from a decentralized amalgam of 56 field offices that are deeply distrustful of technology, outsiders and each other."<sup>25</sup>

One reason for the delays in, and inordinate expense of, the FBI's program for upgrading its information technology is that, consistent with the Bureau's emphasis on criminal investigation—its traditional core function—the program is not limited to intelligence. It encompasses the entirety of the FBI's operations, and the resulting scope and ambition of the program endanger its success because criminal investigation and national security intelligence have different methods and priorities, and the com-

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complete account of the FBI's information technology troubles that I have read is Allan Holmes, "Change Management: Why the G-Men Aren't I.T. Men," *CIO Magazine*, June 15, 2005, [www.cio.com/archive/061505/gmen.html](http://www.cio.com/archive/061505/gmen.html).

24. "September 11 and the Imperative of Reform," note 14 above, at 72. For a recent example, see Wilson P. Dizard III, "Justice IG, FBI Spar over IT Management of Terrorist Watch List," *GCN (Government Computer News)*, June 20, 2005, [www.gcn.com/24\\_15/news/36133-1.html](http://www.gcn.com/24_15/news/36133-1.html), reporting that the inspector general of the Justice Department has found that the Terrorist Screening Center, which is operated by the FBI, "has suffered from poor IT management and that its database is riddled with errors."

25. Holmes, note 23 above.

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promises needed to satisfy both sets of users are difficult to devise and carry out. Because investigations of ordinary crimes can yield information of value to national security intelligence collectors, there is value in having a single database for everything in the FBI's files. But that value has to be traded off against the cost, delay, and possible failure of so ambitious a venture.

Not that even the ambitious venture *should* fail; for it is not *that* ambitious, given the vast storage capacity and search capability of today's commercial off-the-shelf computer software. Google enables near-instantaneous searching of eight billion web pages; Amazon.com enables near-instantaneous matching of millions of people with millions of products. The adaptation of these mature technologies to the needs of the FBI for data storage, retrieval, sorting, and matching should be straightforward. Ten thousand FBI special agents doing four reports a day of 250 words each (about 4 pages) 250 days a year for 10 years would produce a total of 100 million pages. That sounds like a lot but is only one-eightieth of the amount of data that can be searched by means of the Google search engine.<sup>26</sup>

### The Failures Are Rooted in Structure

I am generally skeptical of organizational solutions to intelligence problems, most of which are not organizational problems.<sup>27</sup> But the FBI's inadequate performance of the domestic intelligence function is a genuine and serious organizational problem. Placing the domestic intelligence function in a criminal investigation agency ensures, as other nations realize, a poor fit. "Mixing law

26. For examples of the type of commercial software that seem readily adaptable to intelligence needs, see John Markoff, "By and for the Masses," *New York Times* (final ed.), June 29, 2005, p. C1.

27. That skepticism is a major theme of my book *Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11* (2005).

enforcement with counterintelligence' simply cannot work. . . . 'Cops' cannot do the work of 'spies.'"<sup>28</sup>

Criminal investigation is retrospective. A crime has been committed and the investigators go about trying to find the criminal, and when they do they arrest him<sup>29</sup> and continue gathering evidence that will be admissible in court to prove his guilt. If the criminal activity under investigation is by nature ongoing, as in the case of gang activity, the investigator may decide to allow it to continue until the activity generates irrefutable evidence of guilt. But then he will pounce. And at every stage he'll take great care not to commit a procedural violation that might jeopardize a conviction. He will also balk at sharing with others any of the information that he obtains in his investigation, lest a leak tip off a suspect or make it easier for the suspect to defend himself in court should he be prosecuted. All that the sharing of information about a case can do from the FBI agent's perspective (as well as that of the local U.S. Attorney, whose support the agent requires) is to weaken his ability to control the future of the case.

Criminal investigation is case oriented, backward looking, information hugging, and fastidious (for fear of wrecking a prosecution). Intelligence, in contrast, is forward looking, threat oriented rather than case oriented, free wheeling. Its focus is on identifying, and maintaining surveillance of, suspicious characters and on patiently assembling masses of seemingly unrelated data into patterns that are suggestive of an emergent threat but that may be based on speculative hypotheses far removed from

28. "September 11 and the Imperative of Reform," note 14 above, at 74. For other reservations about the use of the criminal law to deal with terrorism, see Keith Johnson and David Crawford, "Do Jails Breed Terrorists? In Europe, Threat Seems to Be Exacerbated, Not Blunted, in Prison," *Wall Street Journal*, June 20, 2005, p. A13.

29. Sometimes the arrest is made by local police officers and the matter is then referred to the Justice Department for prosecution with the aid of the FBI; I shall disregard that detail, which is irrelevant to my analysis.

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probable cause, let alone from proof beyond a reasonable doubt. When intelligence is working well, the spy or traitor or terrorist is detected early, before he does damage, and often he can be turned to our advantage. The orientation of intelligence toward preventing crimes from occurring or even from being contemplated, rather than toward prosecution after they occur, would prevent a domestic intelligence agency from obsessing over procedural missteps that might jeopardize a conviction.

The FBI argues that because terrorist acts are criminal and intelligence is an element of criminal law enforcement—notably in the case of “victimless crimes,” where (by definition) law enforcement authorities cannot sit back and wait for a victim to complain but must penetrate the criminal gang much as in an intelligence operation directed against a terrorist group—counterterrorism intelligence can be assimilated to the FBI’s criminal law enforcement responsibilities. However, the activities with which national security intelligence is concerned differ greatly from ordinary federal crimes. Terrorist activities are politically motivated (in a broad sense of “political” that includes motivations founded on religious, class, racial, or ethnic hostility) and are potentially much more dangerous than nonpolitical crimes because they aim to injure or destroy the nation as a whole, or entire population groups, or vital institutions, or otherwise wreak havoc on a large scale. To counter terrorist activity requires knowledge—of political movements, foreign countries and languages, the operational methods of terrorists, spies, and saboteurs, and the characteristics and availability of weapons of mass destruction—that criminal investigators do not possess. It also requires a different mind-set. Good police officers learn to think like criminals; good intelligence officers learn to think like terrorists and spies. The hunter must be empathetic with (as distinct from sympathetic to) his quarry. Cops and spies have different quarry.



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As explained by intelligence veteran William Odom,

FBI officials want arrests and convictions. They want media attention and lots of it. FBI operatives want to make arrests, to “put the cuffs on” wrongdoers. They have little patience for sustained surveillance of a suspect to gain more intelligence. They prefer to gamble on an early arrest and an intimidating interrogation that might gain a confession. To them, sharing intelligence is anathema. Intelligence is something to be used, not shared. . . . Intelligence officials do not want public attention. They want to remain anonymous. They do not need arrest authority. They want to follow spies and terrorists secretly, allowing them to reveal their co-conspirators. Their reward comes from providing intelligence to others, not hiding it. . . . [They] tend to be more thorough, taking their time to develop evidence both for trials and for operational use. They know that they cannot let spies or terrorists get away without risking considerable danger to the country. Cops worry much less that a criminal will get away. Criminals are abundant and there are plenty more to arrest. Spies and terrorists will almost always defeat police officers. Spies and terrorists are normally backed by large state bureaucracies or non-state organizations with abundant resources and worldwide operational support. Criminals seldom are. Thus FBI techniques of recruiting “stoolies,” tapping phones and conducting rough interrogations often work with mobsters but not with spies and terrorists.<sup>30</sup>

“Cops worry much less that a criminal will get away. . . .”

30. Odom, “Why the FBI Can’t Be Reformed,” note 4 above. In a reply to Odom, the FBI’s deputy director made two points. The first is that terrorists may engage in ordinary crimes in order to finance their terrorist activities. The second is that the FBI “is capable of transforming itself in response to changing threats,” and here he notes the impending creation of the National Security Service within the Bureau. John S. Pistole, “An FBI That Changes with the Times,” *Washington Post*, July 8, 2005, p. A22. But he does not say that the terrorist groups with which we are most concerned today are likely to commit ordinary crimes inside the United States; nor does he explain why, if the FBI is capable of transforming itself, it has failed to do so and indeed strongly resisted the proposal to create the NSS.

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Criminal law enforcement is oriented toward punishment, but punishment cannot undo the consequences of a catastrophic attack.<sup>31</sup> Criminal law aims to deter crime by punishing a large enough fraction of offenders to make the threat of punishment credible, as well as to incapacitate those offenders whom the threat of punishment did not deter from committing crimes, by locking them up or in extreme cases by executing them. Especially because many of the most dangerous modern terrorists are largely undeterrable, notably suicide bombers, who because their first successful attack is their last cannot be incapacitated after that attack to prevent them from repeating it, law enforcement alone cannot defeat terrorism.<sup>32</sup>

It can actually impede the struggle against terrorism: sometimes by prematurely revealing what the government knows, thus giving the terrorists a chance to elude capture by changing their methods or locale; at other times by failing to intervene early

31. Philip B. Heymann, *Terrorism and America: A Commonsense Strategy for a Democratic Society* 129–130 (1998), points out that criminal law enforcers are likely to “have little interest in all but the first two of the following eight questions that are critical to prevention” of terrorism: “[1] Who are the members actively engaged in planning to use violence for political purposes? [2] What is their motivation? [3] Where are they located? [4] Who in the population is likely to join the group or provide forms of support needed for its continued operations? [5] What is the extent and nature of the support the group is receiving from others outside the country, including another state? [6] How does the group handle the problems of remaining clandestine and yet carrying out political violence? What is its *modus operandi*? [7] What type of attacks is the group capable of? [8] What is the strategy behind their planning?”

32. The qualification “largely” is important, however. Even suicide bombers are deterrable in the following sense: if they know they’re highly likely to be intercepted before they can detonate their bombs, they may decide to switch to another activity, because the expected benefit of their suicidal attack will have been reduced. By “expected benefit” I mean the benefit (as the suicide bomber would perceive it) of a successful attack, discounted (multiplied) by the probability that the attack would be successful.

enough (that is, before a crime has been committed). Melissa Mahle points out that

the preparation stage [of terrorist attacks is] . . . the most vulnerable to detection and disruption, and the execution [stage] . . . the most difficult to disrupt. The preparation stage, which includes recruiting, training, casing, and putting support assets in place, requires more people and more movement than the execution phase. . . . All of these activities [undertaken by al Qaeda in preparation for the 9/11 attacks] required the movement of people and money and communication between cells, creating a hum of activity that intelligence assets are trained to pick up. The FBI caught some pieces, but made no attempt to assemble them into a larger picture.<sup>33</sup>

Identifying, assessing, and tracking activities in the preparation stage are quintessential intelligence tasks, but the activities themselves often are too ambiguous to be readily provable as crimes. Some are only minor crimes, some not crimes at all. Prosecuting persons suspected of being involved in the early stages (discussion, target surveillance, etc.) of preparing a terrorist attack may, when feasible, have value in deterring entry into that stage. Yet often the more effective strategy is not to arrest and prosecute at that stage but rather to monitor the suspects in an effort to learn the scope, intentions, membership, and affiliations of the terrorist or prototerrorist cell. A terrorist plot, once detected, can be disrupted without a trip to court. ("Hi, we're the 6 o'clock news team, and we hear you're up to no good.") An agency that is not responsible for bringing criminals to justice can concentrate full time on pursuing terrorists without any of the distractions created by the complex demands of criminal justice (including concerns with discovery and proof). Success from the standpoint of intelligence can be chasing terrorists out of the

33. Melissa Boyle Mahle, *Denial and Deception: An Insider's View of the CIA from Iran-Contra to 9/11* 327–328 (2004).

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country and making sure they don't return, or even leaving them in place but turning them into government informants.

But detecting threats and preempting them before they are carried out may leave no room for successful prosecution—which is a clue to the difficulty of adapting a law enforcement agency to the intelligence role. Prosecutable crime is the life blood of law enforcement. The goal of law enforcement is to prevent crime, but the means is to prosecute criminals.

A classic of domestic intelligence was MI5's "double-cross system" in World War II.<sup>34</sup> MI5 succeeded in obtaining control over all the German spies in England and in using them to feed false and misleading information back to Germany. Prosecuting all of them—the instinctive law enforcement response—would have prevented a triumph of disinformation. Similarly, the proper aim of counterterrorism is to penetrate and control terrorist cells, not to cause their members to scatter as soon as the arrest of one rings a warning bell to the others. Penetration, "turning," control, disinformation are delicate intelligence operations requiring specialized skills, training, and aptitudes unlikely to be acquired and honed by FBI special agents converted temporarily into intelligence operatives.

In 2002, the FBI arrested in Lackawanna, New York, six men of Yemeni descent who had attended an al Qaeda training camp in Afghanistan. Jeff Smith, a former CIA general counsel, "explained how a domestic intelligence service could have done the job differently. An intelligence agency might have infiltrated the group, 'flipped' one or more of its members into double agents, then used them to get closer to higher levels of al Qaeda. . . . Instead, the individuals accused of being part of al Qaeda were arrested and charged in Buffalo in a highly publicized case.

34. J. C. Masterman, *The Double-Cross System in the War of 1939 to 1945* (1972).

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“There is enormous pressure to prosecute these guys. . . . I have reluctantly come to the view that it just doesn’t work to have intelligence and law enforcement within the same agency.”<sup>35</sup>

An exchange between Senator Jay Rockefeller and Richard Clarke during the joint congressional inquiry into the 9/11 intelligence failure flagged the difficulty of fitting national security intelligence into the FBI’s organizational culture:

MR. ROCKEFELLER: One more question, and that is in the FBI where you have people investigating crimes that have taken place traditionally, they don’t put something on the Internet, because their Internet doesn’t work. They can’t communicate with each other even if they did that, but they don’t because they prefer to have case files, and so would I. . . . I am trying to do something, and I carry around my information in a folder, and that is mine, and I have worked on that. And it is not just proprietary, it is good prosecution potential. Now, that is an enormous mind-set which fights against a lot of what you have been talking about. How does that get overcome?

MR. CLARKE: Well, I think there are two problems there that have to be overcome: one, the notion of focusing on prosecution. When I would ask the FBI agents in the field, why aren’t you going after these guys who are here violating their visas or committing petty felonies? You could get them thrown out of the United States because of that. You may not be able to prove in court they are a terrorist, but you could prove they are doing this or that minor infraction and get them thrown out. The answer was, the U.S. attorneys don’t want us to bother with minor things like that. . . . The U.S. attorneys want and the head of the FBI office in our city wants big scalps on the wall, big prosecutions that result in long sentences. . . .

The other thing we have to get over is the notion of with-

35. Martin Kady II, “Lawmakers Put Domestic Spy Agency on Their Agenda, *Congressional Quarterly Daily Monitor*, Oct 15, 2002.

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holding information from headquarters. . . . There was not an understanding of intelligence fusion within the FBI, that the way you really can put a case together across a country is by getting a little fact here and a little fact there and putting it all together.<sup>36</sup>

The law enforcer's approach to terrorism has the further disadvantages of causing intelligence data to be evaluated from the too-limited perspective of its utility in building a criminal case, and of retarding the sharing of information lest full credit for a successful prosecution be denied the field office that began the investigation. These disadvantages illustrate the difference, which is fundamental, between collecting information for the sake of knowledge and collecting it for the sake of building a case. Criminal investigators want to collect enough information to be able to prove their case (and having collected it, they want to hoard it rather than share it) but not to provide ammunition for the defendant's lawyer to use at trial. An impediment to the FBI's embrace of information technology is the Bureau's traditional reluctance to retain complete records (including interview notes and other working papers) of its investigations, lest defendants use them to their advantage. Prosecutors have a legal duty to turn over to defense counsel any exculpatory material in their possession, and the Department of Justice has an "open files" policy intended to induce guilty pleas by allowing a criminal defendant's lawyer to read the Department's entire file on the case.

A recent incident involving the arrests in New York of two Muslim teenage girls whom the FBI suspected of wanting to

36. United States Senate Select Committee on Intelligence and U.S. House of Representatives Permanent Select Committee on Intelligence, *Joint Inquiry Briefing by Staff on U.S. Government Counterterrorism Organizations (before September 11, 2001) and on the Evolution of the Terrorist Threat and U.S. Response: 1986–2001* 61–62 (June 11, 2002).

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become suicide bombers, and held in custody for six weeks, illustrates how emphasis on a criminal law response to terrorism can impair vital “hearts and minds” strategies as well as (as may have happened in the Lackawanna case) shut down inquiry prematurely. The arrest of the two girls caused indignation in the New York Muslim community<sup>37</sup>—whose loyalty and goodwill (as the FBI recognizes) are vital safeguards against domestic terrorism. It is natural for a law enforcement agency to want to arrest a person suspected of criminal activity. An intelligence agency, rather than wanting the girls arrested, would want to discover who had put the idea of becoming suicide bombers in their minds (maybe no one). Its low-key investigation might culminate in simply a chat with the girls’ parents. If the girls had a connection, however indirect, with a terrorist cell, the publicity attendant upon their arrest doubtless caused the members to scatter—and to reconstitute the cell elsewhere, out of sight of the FBI.

Here is a further example of the “two cultures” problem. The performance of criminal investigators, unlike that of intelligence officers, can be evaluated by objective, indeed quantitative, criteria, such as number of arrests weighted by successful convictions, with successful convictions weighted in turn by length of sentence imposed, amount of property recovered, and amount of favorable publicity generated.<sup>38</sup> Intelligence officers cannot be evaluated by such objective criteria; their successes are often invisible, indeed unknowable. For example, the earlier a plot is detected and disrupted, the more difficult it is to know whether it ever had a chance of success. And information obtained by

37. Andrea Elliott, “You Can’t Talk to an F.B.I. Agent That Way, or Can You?” *New York Times* (final ed.), June 4, 2005, p. B1.

38. “The [FBI] rewarded agents based on statistics reflecting arrests, indictments, and prosecutions. As a result, fields such as counterterrorism and counterintelligence, where investigations generally result in fewer prosecutions, were viewed as backwaters.” Staff Statement No. 9, note 13 above, at 239, 241.

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intelligence officers may be only a small part of the total information that enabled a threat to be detected and thwarted.

This asymmetry of performance measurement makes it difficult for a police department to hire and retain able intelligence officers. Able employees prefer objective to subjective performance criteria; they know they'll do better if they are judged by such criteria than if their performance is evaluated by nonobjective, nonquantifiable, criteria that may include personality, appearance, personal connections, and sheer luck.<sup>39</sup> Thus in an agency such as the FBI that combines criminal investigation with intelligence, the abler recruits will gravitate toward criminal investigation. They may be required to undergo some intelligence training and to do stints in intelligence jobs, but always they will be looking to return to the main career track.

Henry Kissinger has remarked that "intelligence personnel in the real world are subject to unusual psychological pressures. Separated from their compatriots by security walls, operating in a culture suspicious of even unavoidable secrecy, they are surrounded by an atmosphere of cultural ambiguity. Their unadvertised and unadvertisable successes are taken for granted, while they are blamed for policies that frequently result from strategic rather than intelligence misjudgments."<sup>40</sup> This does not sound like the description of an FBI agent, and it casts grave doubt on the wisdom of the FBI's method of obtaining intelligence officers, which is to provide intelligence training to its special agents, all of whom are hired and trained as criminal investigators. "The worlds of law enforcement and intelligence are far apart. They

39. Luis Garicano and Richard A. Posner, "Intelligence Failures: An Organizational Economics Approach" (forthcoming in *Journal of Economic Perspectives*).

40. Henry Kissinger, "Better Intelligence Reform: Lessons from Four Major Failures," in Senate Appropriations Committee, *Review of the 9/11 Commission's Intelligence Recommendations: Hearings before the Committee on Appropriations, United States Senate*, 108th Cong., 2d Sess., pp. 7, 9 (Sen. Hearing 108-614, Sept. 21-22, 2004).



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have different roles, different rules, and different cultures, and often they do not speak the same language.”<sup>41</sup> The two “worlds” don’t fit comfortably together in the same agency—let alone in the same individual, the special agent with intelligence training, who shuttles between the two worlds.

Most of the FBI’s employees, including 90 percent of its special agents, as distinct from its support staff, are stationed in the Bureau’s 56 field offices rather than in its Washington headquarters.<sup>42</sup> This geographic dispersal is another reflection of the Bureau’s emphasis on criminal investigation and another impediment to the conduct of national security intelligence. Most federal crime is local and is prosecuted locally by one of the 96 U.S. Attorneys’ offices, which like the FBI’s field offices are scattered across the nation. The FBI agents in these offices essentially work for the U.S. Attorney, who is a prosecutor, not an intelligence official. The reluctance of the field offices to share information with each other (a factor in the Bureau’s resistance to information technology) reflects both the local focus of the special agents and the objective criteria of advancement that I mentioned. No local office wants its cases “stolen,” and its “numbers” thereby reduced, by another office to which it might have conveyed the results of its investigation of a crime. Hence the “office of origin” mentality that treats the field office that originates a case as its owner. But while most federal crime is local, the principal dangers to domestic security at present emanate from international terrorist groups. Clues to their activities may be scattered all over the world. Effective intelligence requires com-

41. Elizabeth Rindskopf, “Comment,” in *U.S. Intelligence at the Crossroads: Agendas for Reform* 256 (Roy Godson, Ernest R. May, and Gary Schmitt, eds., 1995).

42. U.S. Dept. of Justice, Office of the Inspector General, *The Internal Effects of the Federal Bureau of Investigation’s Reprioritization*, ch. 2 (Audit Report 04–39, Sept. 2004), [www.usdoj.gov/oig/reports/FBI/a0439/final.pdf](http://www.usdoj.gov/oig/reports/FBI/a0439/final.pdf).

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binning scraps of information regardless of geographic origin rather than allowing information to be sequestered in local offices.

I use “scraps” advisedly; it brings out still another problem with confiding domestic intelligence to the FBI. Because of the gravity of threats to national security, intelligence officers must track down any lead, however implausible, that might point to an attack that would endanger national security. Most of those leads lead nowhere, let alone to an arrest, prosecution, conviction, and sentence. Chasing such will-o’-the-wisps is alien to the police mentality, for in ordinary crime work police do not chase down every tip, lead, clue, etc. to possible criminal activity. The expected cost of the ordinary crime is, in most cases, too small to make such chases cost-justified. If a crime occurs, the FBI is not blamed; crimes are expected; 15,000 people are murdered in the United States every year. Terrorist attacks are not expected; because of their greater potential gravity, more effort must be expended on preventing them than police expend on preventing the commission of ordinary crimes. Hence the emphasis of national security intelligence on prevention, in contrast to the FBI’s focus on apprehension.

The dominance of the Bureau’s field offices reflects the passivity that characterizes criminal investigation. (This is related to emphasizing apprehension over prevention.) FBI agents are not beat officers, patrolling on foot or in squad cars. They are accustomed to waiting until they receive a complaint of possible criminal activity before swinging into action. They don’t go looking for crimes in the offing. They resent and resist being told by headquarters to focus their resources in a particular area. Indeed, they resist prioritization, which might deprive them of ready targets of opportunity, such as a reference by a local police officer of a gun or narcotics case.

The marriage of criminal investigation and domestic intelligence in the FBI has complicated the coordination of domestic

and foreign intelligence. Often the same suspects are tracked outside the United States by the CIA and inside by the FBI's intelligence divisions. Yet the CIA and FBI have a history of mutual suspicion and antipathy.<sup>43</sup> This had begun to diminish even before 9/11, especially at the top of the two agencies. But the cultural and procedural gulf between criminal investigations and intelligence operations remains, has been aggravated by recent efforts of the Bureau to snatch turf from the embattled CIA, and impairs coordination between the two agencies just as it does within the FBI.

An agency 100 percent dedicated to domestic intelligence would do better at it than the FBI, which is at most 20 percent intelligence<sup>44</sup> and thus at least 80 percent criminal investigation and in consequence is dominated by the criminal investigators. In the wake of 9/11, rather than create a separate national security intelligence service, the Bureau decided to give its special agents training in intelligence as well as in criminal investigation. This is a recipe for underspecialization, unfortunately now codified by the Intelligence Reform Act<sup>45</sup> and therefore probably unaffected by the new reorganization (discussed in chapter 2 of this monograph), making it all the more likely that the ablest recruits will pursue careers as criminal investigators rather than as intelligence officers.

Not all the intelligence *analysts* in the FBI are special agents, it is true; but their selection and utilization are further evidence of the mismatch between intelligence and crime fighting. Many

43. See, for example, Mark Riebling, *Wedge: The Secret War between the FBI and CIA* (1994).

44. See note 7, chapter 3. It is true that one-third of the FBI's budget is allocated to intelligence, but the FBI's financial controls and reporting do not distinguish clearly between national security and ordinary crimes intelligence or between law enforcement and intelligence responses to national security threats.

45. Intelligence Reform and Terrorism Prevention Act of 2004, §§ 2001(c)(2), (3).

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have been recruited from the Bureau's clerical staff, have been given perfunctory training (lasting only five or seven weeks), and, not surprisingly in light of their origin and training, "are still asked to perform duties that are not analytical in nature, such as escort, trash and watch duty. . . . Escort duty is following visitors, such as contractors, around the F.B.I. office to ensure that they do not compromise security. Trash duty involves collecting all 'official trash' to be incinerated. Watch duty involves answering phones and radios."<sup>46</sup>

All this is unlikely to change despite the reorganization ordered by the President. The effective control of an organization requires some uniformity in compensation methods, recruitment, evaluation, promotion, and working conditions in order to minimize conflict, foster cooperation, and avoid confusion and uncertainty. If the missions assigned to the organization are too disparate—if their optimal performance requires different methods, personnel policies, supervisory structures, information technology, etc., if indeed, as in the case of criminal investigation and domestic intelligence, the missions are incompatible—the compromises necessary to impose the requisite minimum uniformity will cause performance of the missions to be suboptimal. If shoes came in only one size, they would be cheap to manufacture but most people would be poorly shod. Because criminal investigation is the dominant mission and prevailing culture of the Bureau, the inherent tensions between criminal investigation and national security intelligence continue, long after the shock of 9/11, to be resolved in favor of the former.

But if the FBI really "wants" to be a criminal investigation agency, how to explain its desire to dominate domestic intelli-

46. Eric Lichtblau, "F.B.I. Gets Mixed Review on Analysis," *New York Times* (national ed.), May 5, 2005, p. A22, quoting a report by the Justice Department's Office of Inspector General. There could be no better evidence of the low status of intelligence in the FBI.

gence? Why isn't it happy to cede that function to a new agency? Why is it adamant in resisting the creation of such an agency even if its own intelligence capabilities are preserved? There are several reasons. A government agency that surrenders turf, even turf it doesn't particularly want, signals weaknesses that may invite further raids by competing agencies, as the CIA is learning to its sorrow. And because counterterrorism is now a national priority, an agency has budgetary and public-relations incentives, as well as reasons of prestige, to be given as large a role as possible in counterterrorism, of which a major tool is domestic intelligence. But because intelligence is an unpopular activity that stirs civil liberties concerns at both the Left and Right ends of the political spectrum and that yields fewer demonstrable successes than criminal prosecution, it is in the Bureau's interest to continue to place greater emphasis on the arrest and prosecution both of terrorist suspects and of ordinary criminals than on intelligence operations.

The FBI cannot be mollified by assurances that it will not be cut out of the intelligence business. A domestic intelligence agency would be competing with the Bureau for funds. Moreover, the Bureau may lack confidence that its intelligence model (combining national security intelligence with criminal investigation) is actually the superior one.

### The WMD Commission's Critique

The objections to combining intelligence and criminal investigations in the same agency are not merely theoretical and comparative (other nations do it differently). They are also empirical. I gave examples earlier. Here I focus on the scathing critique of the FBI by the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction ("WMD Commission" for short) led by former Senator Charles

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Robb and Judge Laurence Silberman. The report, which devotes almost an entire chapter to the FBI's post-9/11 performance,<sup>47</sup> is even more critical of the Bureau than the 9/11 Commission's report had been. The reason may be that by the end of March 2005, when the WMD Commission issued its report, the FBI had had a full three and a half years since the 9/11 attacks to get its act together and, despite Mueller's efforts,<sup>48</sup> had failed to do so. Yet failure had been evident earlier. To quote Senator Shelby again,

Despite repeated reorganizations, the FBI has simply performed too poorly for the American people to have much faith in its ability to meet current and future challenges no matter *how* many aggressive "reform" plans are announced by FBI management. Even a year after September 11, in fact, the FBI's deputy director sent angry e-mail messages to Bureau field offices declaring that he was 'amazed and astounded' that the Special

47. *Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction*, ch. 10 (Mar. 31, 2005).

48. Showcased in the Department of Justice report cited in note 18 above. This document, unsurprisingly, paints the FBI's efforts in the brightest possible hues. But it is unreliable. For example, it promised that the Virtual Case File system would be up and running within a year; within less than a year it was abandoned. Although the sunny report was submitted to Congress in April 2004, Mueller later testified that when the contractor "delivered the product [i.e., Virtual Case File] to us in December 2003, we immediately identified a number of deficiencies in VCF that made it unusable. Upon further examination [prior, however, to April 2004], we discovered nearly 400 problems with the software." Mueller, note 22 above. In like vein the FBI's parent, the Department of Justice, has been detected exaggerating the number of terrorist cases that it brings. U.S. General Accounting Office, "Report to the Honorable Dan Burton, House of Representatives: Justice Department: Better Management Oversight and Internal Controls Needed to Ensure Accuracy of Terrorism-Related Statistics," GAO-03-266, Jan. 2003, [www.gao.gov/new.items/d03266.pdf](http://www.gao.gov/new.items/d03266.pdf); Mark Fazlollah, "Reports of Terror Crimes Inflated," *Philadelphia Inquirer*, May 15, 2003, p. A1. (Notice that more than two years elapsed between these two reports, evidently without any improvement occurring over that interval.) See also Dan Eggen and Julie Tate, "U.S. Campaign Produces Few Convictions on Terrorism Charges: Statistics Often Count Lesser Crimes," *Washington Post*, June 12, 2005, p. A1.

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Agents in Charge (SACS) [of the field offices] *still* refused to commit essential resources to the fight against terrorism and *still* refused to share information properly with Headquarters.<sup>49</sup>

The WMD Commission remarked politely that the FBI had made “significant” (not substantial) progress since 9/11. But it gave no examples, while noting the Bureau’s continued inability to acquire an adequate computer system and its chaotic organization, in which domestic intelligence is split up among three separate sections (intelligence, counterterrorism, and counterintelligence) and no one is in charge.

The commission reported that the FBI hopes to get its intelligence act together—by 2010 *at the earliest*.<sup>50</sup> The FBI’s attitude, reflecting the domination of the Bureau by its scattered field offices, is typified by the remark of one of its officials that “Bin Laden is never going to Des Moines.”<sup>51</sup> So if Bin Laden is smart he’ll attack Des Moines because we now know it’s unprotected. A successful attack on the heartland would be even more damaging to the morale of the American population as a whole than another attack on New York or Washington; no American would feel safe any longer.

The commission discovered that the Bureau had placed 96 percent of its intelligence budget in divisions not subject to the direct authority of the Director of National Intelligence and had given its Executive Assistant Director for Intelligence (a position not even filled until 18 months after the 9/11 attacks awoke the Bureau from its intelligence slumbers), who *is* subject to that authority, no power and virtually no staff. Another game FBI officials play is eliminating job descriptions that would place the

49. “September 11 and the Imperative of Reform,” note 14 above, at 74–75.

50. “Even FBI officials acknowledge that its collection and analysis capabilities will be a work in progress until at least 2010.” *Report of the [WMD] Commission*, note 47 above, at 29. That “at least” is at once astonishing and ominous.

51. *Id.* at 453.

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jobholder under the authority of the Director of National Intelligence. These evasions may now end, with the new reorganization, but they remain illustrative of the FBI mind-set, which is unlikely to change.

The commission noted the FBI's "continued failure"—this after three and a half years of ostensible striving—"to institute the reforms necessary to transform the FBI into the intelligence organization it must become. . . . The FBI has not constructed its intelligence program in a way that will promote integrated intelligence efforts, and its ambitions have led it into unnecessary new turf battles with the CIA."<sup>52</sup> "While the FBI has made steps in the right direction since September 11, it has many miles to travel."<sup>53</sup> (It takes many steps to add up to even one mile.) "Can the FBI's latest effort to build an intelligence capability overcome the resistance that has scuppered past reforms? In our view, the effort this time is more determined, but *the outcome is still in doubt*."<sup>54</sup>

Before the Intelligence Reform Act changed things, the FBI's Office of Intelligence was responsible mainly for training and

52. Id. at 451, 468.

53. Id. at 468. "Reform will require enormous commitment and effort within the FBI, as well as sustained outside coordination and oversight." Id. True; but there is insufficient commitment within the FBI, and, as a result, there will be insufficient effort.

54. Id. at 454 (emphasis added). The WMD Commission further criticized the FBI's efforts to "reinvent" itself as an intelligence agency in a March 29, 2005, letter to President Bush, [www.wmd.gov/report/fbicia.pdf](http://www.wmd.gov/report/fbicia.pdf). The letter remarks, for example, that "the FBI proposes to 'integrate' law enforcement and national security in a way that makes it impossible to establish an integrated national security workforce, which you [i.e., President Bush] called for in November and which we believe is essential to the security of this country" (p. 2). "The FBI recognizes what is needed to integrate these three national security missions [intelligence, counterintelligence, and counterterrorism], *and rejects it*" (id.; emphasis added). The letter thus comes close to accusing the FBI of defying the President. For still other criticism of the FBI as an intelligence agency, see Gabriel Schoenfeld, "How Inept Is the FBI?" *Commentary*, May 2002, p. 53.



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recruitment, but not for operations; they were the responsibility of the Bureau's Counterterrorism and Counterintelligence Divisions. The Act renamed the Office of Intelligence the Directorate of Intelligence and assigned it a variety of important tasks, including "supervision of all national intelligence programs, projects, and activities of the Bureau,"<sup>55</sup> but did not mention the other divisions. Six months after the Act was passed, the Directorate of Intelligence was *still* not in charge of the Bureau's national security intelligence; the heads of the other two divisions didn't report to the Directorate's chief. The Directorate remained an etiolated counterpart to the CIA's Directorate of Intelligence (the analytic branch), while the Counterterrorism and Counterintelligence Divisions corresponded to the CIA's Directorate of Operations.

So until the reorganization is completed, the FBI will not have a domestic intelligence service in any sense, but instead three services each having intelligence responsibilities—and criminal investigation responsibilities to boot. The Directorate of Intelligence is not limited to intelligence concerning terrorist or other threats to national security; it is also responsible for intelligence about ordinary criminal activities within the Bureau's jurisdiction. (Whether the reorganization will change this is unclear.) And the Counterterrorism and Counterintelligence Divisions are engaged in arresting and gathering evidence for prosecuting terrorists and spies, as well as in pure intelligence and counterintelligence. Indeed, the head of the Counterterrorism Division, rather than being an intelligence professional, began his career as a police officer and since becoming an FBI special agent in 1983 had, until 2004, been involved in criminal investigations rather than in intelligence.<sup>56</sup> FBI officials have

55. Intelligence Reform and Terrorism Prevention Act of 2004, Title II, § 2002(c)(1).

56. "About Us: FBI Executives," [www.fbi.gov/libref/executives/hulon.htm](http://www.fbi.gov/libref/executives/hulon.htm).

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acknowledged that the Bureau bases appointments to supervisory positions in intelligence on managerial experience rather than intelligence expertise.<sup>57</sup> This means that criminal investigators will continue to dominate intelligence because few of the Bureau's intelligence specialists have the requisite managerial experience.

57. John Solomon, "Terrorism Expertise Takes a Back Seat," *Inland Valley Daily Bulletin*, June 20, 2005, pp. A1, A5.