

3. A Better Solution

A new domestic intelligence agency is needed; but reform cannot stop there.

Coordination and Command

There are 17 federal intelligence agencies, scattered among different Cabinet-level departments, with the principal exception of the CIA, whose director reports to the President and the Director of National Intelligence rather than to a Cabinet member.¹ Before the Intelligence Reform Act, the different agencies, except those responsible for domestic intelligence (primarily the

1. The canonical figure for the number of separate agencies is 15, but is incomplete. There are five military intelligence agencies (one for each of the four uniformed services, plus the Defense Intelligence Agency), three technical intelligence agencies (the National Reconnaissance Office, the National Security Agency, and the National Geospatial-Imaging Agency), three domestic intelligence agencies (the FBI—treating its three intelligence-related divisions as one—plus two separate intelligence agencies in the Department of Homeland Security: the Directorate of Information Analysis and Infrastructure Protection and the Coast Guard's intelligence service); three foreign intelligence services (the CIA, the National Intelligence Council, and the State Department's Bureau of Intelligence and Research), and three that straddle domestic and foreign intelligence (the intelligence services of the Treasury and Energy departments and the National Counterterrorism Center). The NIC (National Intelligence Council) and the NCTC (National Counterterrorism Center), like the CIA, report to the President directly rather than to a department head. There will soon be an eighteenth intelligence agency—the National Counter Proliferation Center, authorized by the Intelligence Reform Act. On June 29, 2005, in the same memorandum directing the creation of the National Security Service, the President directed the DNI to establish the NCPC.

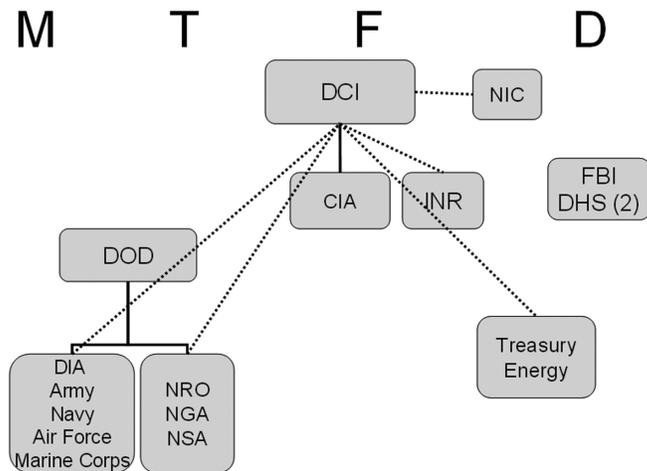


Fig. 1. The Intelligence System before the Intelligence Reform Act²

FBI), were loosely coordinated by the Director of Central Intelligence, who by law was also the Director of the CIA. The Intelligence Reform Act both separates the two jobholders and augments the duties and, less clearly, the powers of the Director of Central Intelligence, renaming the post “Director of National Intelligence.”

Figure 1 depicts the structure of the intelligence system before the Act was passed, and Figure 2 the altered structure that the Act ordains. Solid lines indicate full control (“line authority”); broken lines indicate limited control, influence, general supervision, or coordination. The agencies can be divided roughly into four groups: from left to right in the two charts they

2. The acronyms in the charts, apart from those already familiar to the reader, are DIA (Defense Intelligence Agency), NRO (National Reconnaissance Office), NGA (National Geospatial-Intelligence Agency), NSA (National Security Agency), and INR (State Department Bureau of Intelligence and Research). The “2” after DHS in the charts signifies the two intelligence agencies within the Department of Homeland Security; actually the picture is more complex, as explained in the text below.

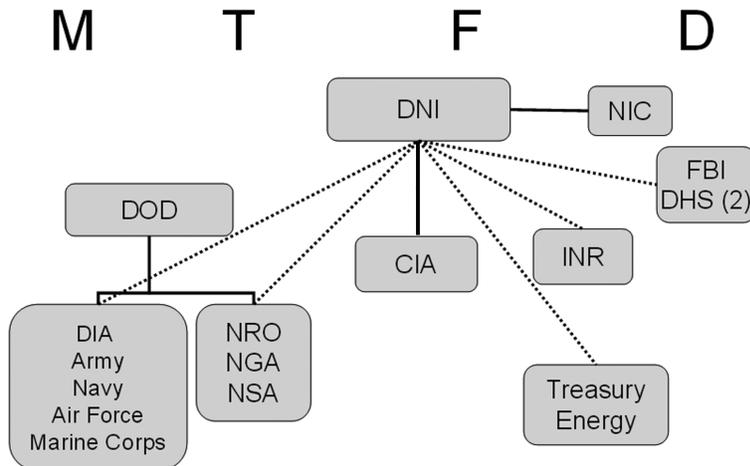


Fig. 2. The Intelligence System after the Intelligence Reform Act²

are military intelligence (labeled “M”), technical intelligence (T), foreign intelligence (F), and domestic intelligence (I), with the intelligence services of the Treasury and Energy departments, plus the National Intelligence Council, straddling the foreign-domestic divide. Omitted from the charts for the sake of simplicity is the National Counterterrorism Center (created by Presidential executive order in August of 2004), which includes representatives from the other intelligence agencies as well as its own staff and thus, before the Intelligence Reform Act, provided the only formal linkage between foreign and domestic intelligence.

The absence of effective coordination between domestic intelligence and foreign intelligence and among the various agencies involved in domestic intelligence was a weakness of the old regime. International terrorists operate both outside and inside the United States, moving back and forth across our porous borders.³ The tracking of these terrorists requires close cooperation

3. By emphasizing international terrorism, I do not mean to depreciate the

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among the CIA, the FBI, local police forces, private companies (including security consulting firms), and various agencies now lodged in the Department of Homeland Security. The necessary cooperation was impeded because the Director of Central Intelligence lacked authority over domestic intelligence, a deficiency remedied by the Intelligence Reform Act.

But to dismantle a barrier to cooperation is not to assure cooperation. The Director of National Intelligence should appoint a deputy for domestic intelligence to coordinate the domestic intelligence services⁴ with each other and with the other federal intelligence services.⁵ Such an official will be particularly needful if a domestic intelligence agency separate from the FBI is created, because, as we know, the agency and the Bureau must work closely together and there is bound to be resistance on the Bureau's side.

I must be more precise about what "coordination" entails. It cannot mean just calling meetings at which representatives of different agencies give their views, the coordinator decides what should be done—and the agencies treat his decision as nonbinding advice. Effective coordination requires a measure of command authority—the power to compel the sharing of information by requiring the different agencies to adopt compatible information technology and standards for access to each other's data-

potential threat posed by homegrown terrorists; the prospect of a biological Unabomber, for example, is terrifying.

4. It is an open question whether the authority of such an official should extend to the Treasury and Energy intelligence services, which conduct both domestic and foreign intelligence, though of a limited and specialized character.

5. The DNI has already used up the four deputy slots authorized to him by Congress—and the Intelligence Reform Act is explicit that "there may be not more than four Deputy Directors of National Intelligence." Intelligence Reform and Terrorism Prevention Act of 2004, § 1011(a), adding section 103A(b) to the National Security Act of 1947. The President may have inherent authority to create another deputyship. (I discuss his inherent authority over national security in the text below.) Anyway the title is not critical, since the Intelligence Reform Act authorizes the DNI to appoint "other . . . officials." *Id.*, § 103(c)(9).

bases, and the power to create and supervise the necessary interagency intelligence task forces, establish an integrated national intelligence network of federal, state, local, and private intelligence services, and forge links to the other parts of the federal intelligence community. Command authority is not line authority, however; the employees of the intelligence agencies would not become employees of the Office of the Director of National Intelligence.

The agencies that do domestic intelligence are quite different from one another. This is obvious in the case of the Coast Guard, the Treasury Department, and the Department of Energy, but it is also true of DHS's other intelligence agency (besides the Coast Guard)—the Information Analysis Division in the Directorate of Information Analysis and Infrastructure Protection.⁶ The division mainly gathers warning intelligence, assesses it, either declassifies it or scrubs the classified portions from it, and communicates threat warnings based on it to state and local agencies, such as police departments, that are in a position to prevent, or mitigate the effects of, an attack. The division also does some conventional intelligence analysis. The work of the division needs to be carefully integrated with the collection and analytical activities of the FBI and the other intelligence agencies. There are also, as we'll see, other intelligence units in the Department of Homeland Security. The task of coordinating all the nation's domestic intelligence assets is a formidable one, which should not be left to chance.

A New Agency

Chapters 1 and 2 of this monograph demonstrated that the FBI's intelligence failures have been serious, are inherent in confiding

6. The other and larger division in the Directorate—the Infrastructure Protection Division—assesses the vulnerability of potential terrorist targets. The Directorate is to be broken up as part of the reorganization of DHS discussed below.

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domestic intelligence responsibility to a criminal investigation agency, and will not be cured by the consolidation of the Bureau's three intelligence-related divisions. In elaborating these points I presented most of the reasons for creating a domestic intelligence agency outside the FBI. The Bureau is well aware of these reasons, and its resistance to the proposal for consolidation was due in part to fear that it might be the prelude to lifting domestic intelligence right out of the Bureau, which would be easier to do with all the Bureau's intelligence assets in one place. The fear may be realistic—recall how the security service of the Royal Canadian Mounted Police was lifted out of the RCMP and made its own separate agency. But it would be a mistake to create a U.S. domestic intelligence agency in that fashion. Apart from points made earlier, we don't have enough domestic intelligence officers. We need more (and better), and forming a new agency would be an opportunity to obtain them. In contrast, rapid expansion of the FBI in the midst of its reorganization would be a recipe for disaster.

Although the total personnel of the five federal agencies with primarily domestic intelligence responsibilities (the FBI, the two intelligence agencies in DHS, and the intelligence units of the Treasury and Energy Departments) is not a published figure, it probably does not exceed 7,000, of whom probably no more than 5,000 are in the FBI.⁷ Remarkably, MI5, though tiny (2,000

7. A recent audit report on the FBI by the Justice Department's Office of the Inspector General, *The Internal Effects of the Federal Bureau of Investigation's Reprioritization*, exh. 2-6 (Audit Report 04-39, Sept. 2004), www.usdoj.gov/oig/reports/FBI/a0439/final.pdf, reveals that 2,811 of the FBI's agents assigned to field offices are engaged in terrorism-related work. About 200 headquarters agents are also engaged in such work, and about 500 headquarters support staff are engaged in counterterrorism and counterintelligence activities (computed from exh. 2-11). If the number of field support staff is proportional to the number of field agents, this would imply that there are about 4,000 support personnel in the field offices who are supporting counterterrorism (calculated from exh. 2-2). That makes a total of some 7,500 (roughly a quarter of the entire staff of the FBI), but overstates the number of FBI employees engaged in domestic intelligence; for many of the

employees), is almost 30 percent the size of the U.S. domestic intelligence community, although the United States has more than four times the population of the United Kingdom and much less control over its borders yet faces graver, more varied, and more numerous threats. Even more striking is the fact that the Canadian Security Intelligence Service also has 2,000 employees. Although its population is much smaller than the United Kingdom's, its much greater land area is thought to require additional staff;⁸ the inhabited land area of the United States is much greater than that of Canada.

Creating a new agency without displacing the intelligence element of the FBI would secure any efficiencies that FBI intelligence may be able to achieve by virtue of the Bureau's relations with local police forces, its experience in terrorist prosecutions—for that matter, its experience, checkered as it is, in national security intelligence—and the occasional overlaps of terrorist activity with ordinary crime. The need is to supplement the

analysts are engaged in ordinary-crimes intelligence and many of the special agents are engaged in criminal investigations of terrorist activities. I am guessing that only two-thirds—5,000—of the 7,500 are engaged in “pure” domestic intelligence, and this may well be an overestimate. As I noted in the text, moreover, much of the Bureau's counterterrorism activity, even some of its counterintelligence activity, may be concerned with only minor threats to national security.

Another and probably more accurate method of estimation proceeds from three rules of thumb used by the Bureau: ratio of intelligence special agents to intelligence analysts (2 to 1), of special agents to support staff (1 to .66), and of intelligence analysts to support staff (1 to .34). Then if (from the preceding paragraph) roughly 3,011 special agents (field, 2,811, plus headquarters, 200—the latter, however, a rough estimate) are engaged in intelligence-related work, there are 1,506 intelligence analysts, 1,987 special-agent support staff ($3,011 \times .66$), and 512 intelligence-analyst support staff ($1,506 \times .34$), for a grand total of 7,016, which is slightly lower than my previous estimate. Again, it is a substantial overestimate of “pure” national security intelligence personnel, because it includes special agents assigned to counterterrorism prosecutions and intelligence analysts assigned either to such prosecutions or to ordinary-crimes intelligence.

8. David Collins, “Spies Like Them: The Canadian Security Intelligence Service and Its Place in World Intelligence,” 24 *Sydney Law Review* 505, 512 (2002).

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Bureau's intelligence components with a new agency that will have a distinctive focus and culture, not to break up the Bureau.

But although the FBI should continue to play a major role in federal intelligence liaison with local police, a domestic intelligence agency could play an equal or even more important role. The rivalries among law enforcement agencies are acute because of competition for funds, overlapping authority, different cultures, the FBI's traditional hauteur, and fear of a rival agency's "stealing" one's cases. Many local law enforcers feel deserted by the federal government in general, and the FBI in particular, in regard to national security intelligence. The Bureau does not treat them as its partners or even its customers. FBI agents have been known to brush off attempts by local police, and even by other federal officers, to obtain the Bureau's aid in intelligence matters.⁹ I am told that the FBI turned down an offer of a simple computer-communications system that would have linked the

9. Here is a typical anecdote. I cannot vouch for, but have no reason to doubt, its accuracy. A customs officer stopped a truck driver who was crossing the border from Canada to the United States. The driver appeared to be of Arab ethnicity and had a license to carry hazmat (hazardous materials), although the load he was carrying on this occasion did not include any such materials. In conversation with the officer, the driver described himself as a "salifist." The officer called the special agent in charge of the nearest FBI field office and asked him what the word meant. The agent replied that unless the customs officer was planning to make an arrest, he (the agent) wasn't interested in answering the officer's questions. In fact, "salifist" or "salafist" is a term used by radical Islamists to denote a person who believes in the fundamental beliefs of Mohammad. Although members of al Qaeda call themselves salifists, not all salifists are terrorists. But a truck driver crossing a border into the United States who has a license to carry hazmat merits careful scrutiny. An intelligence-minded officer would either have answered the customs officer's question or told him "I don't know but I'll find out and get back to you." A Google search would have yielded a serviceable answer within seconds.

I recognize the limited probative value of anecdote. A thorough study of the FBI's relations to local law enforcement in regard to national security intelligence would be an excellent project for the Justice Department's Inspector General, the General Accountability Office, congressional oversight committees, or the Office of the Director of National Intelligence.

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Joint Terrorism Task Forces directly to squad cars so that police officers could send and receive timely information concerning possible terrorist activities.

A domestic intelligence agency not linked to any law enforcement agency would stand above the fray and be trusted as an honest broker—especially if it were authorized to reimburse some of the intelligence-related costs of state and local law enforcement agencies, such as costs of information technology, of training intelligence officers, and of paying informants. In effect, the domestic intelligence agency would be buying intelligence data from the many police departments that, with proper incentives, can gather abundant data. The agency would be in a good position to take the lead in creating the coordinated nationwide intelligence network that we need and don't have.

An initial way to fulfill the lead role might be for members of the agency's staff to visit all 20,000 state and local police forces. That would not be so formidable an undertaking as it may seem; 200 officers, each visiting two police forces a week, could complete the project in a year. The visits, and follow-up communications, would be intended, along with short training programs for those police officers (usually in the larger cities) who are actually assigned to do intelligence work, to indicate activities and persons that the police should be on the alert for, and on how and with whom in the agency the police should exchange information.

As a new entrant to the intelligence scene, a domestic intelligence agency separate from the FBI would be in a good position to experiment with improved intelligence practices, such as a shorter replacement cycle for information technology, greater receptivity to commercial off-the-shelf technology, greater use of statistical and economic techniques for prioritization (such as cost-benefit analysis), greater reliance on open-source materials,

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more flexible hiring practices, and increased investment in artificial-intelligence aids to translation and data analysis.

The idea of creating a U.S. domestic intelligence agency is commonly called the “MI5 solution.” MI5 is the best known of the foreign domestic intelligence agencies, and the United Kingdom is our closest ally. But a better model for a U.S. domestic intelligence agency from a public-relations standpoint (and the importance of good public relations for a domestic intelligence agency should not be underestimated, given civil liberties concerns and FBI opposition) is the Canadian domestic intelligence agency. MI5, throughout most of its long history, which began in 1909, operated without any judicial control. That would be unthinkable in the United States but seemed natural in the United Kingdom, which had no tradition of separation of powers. Violations of civil liberties were common.¹⁰ Merely the use of a military acronym for a domestic intelligence agency (“MI” stands for “military intelligence”)—even though MI5 has long been a civilian agency—strikes an ominous note. The Canadian Security Intelligence Service (CSIS),¹¹ though modeled on MI5, does not have these drawbacks. It has no military origins or overtones and is subject to an elaborate set of controls¹² designed to prevent it from infringing civil liberties.

10. See, for example, Center for Democracy and Technology, “Domestic Intelligence Agencies: The Mixed Record of the UK’s MI5” 3–6 (Jan. 27, 2003).

11. I quote its mission statement in the appendix. Two of the missions assigned to CSIS are conducting background investigations of applicants for government employment and screening immigrants. These are intelligence, rather than law enforcement, functions that in the United States are currently lodged in the FBI and in DHS’s Immigration and Customs Enforcement agency, respectively. They could be transferred to a domestic intelligence agency, but that is a peripheral issue that I shall not try to resolve.

12. See the CSIS home page under “Accountability and Review,” at www.csis-scrs.gc.ca/eng/backgrnd/back2_e.html; also Daniel Cuyley Chung, “Internal Security: Establishment of a Canadian Security Intelligence Service,” 26 *Harvard International Law Journal* 234 (1985).

CSIS cannot be a complete model for a U.S. domestic intelligence agency. There are too many differences, particularly in population and perceived threats, between the United States and Canada. And I cannot vouch for the adequacy of CSIS's funding or the quality of its management, its personnel, or its operational methods.¹³ But the concept and basic design of the agency provide an attractive template for a U.S. domestic intelligence agency. The history of CSIS is, moreover, further evidence of the need for our own SIS. It was dissatisfaction with the performance of the Royal Canadian Mounted Police—the Canadian counterpart of the FBI—in domestic intelligence that prompted the creation of CSIS.¹⁴

Siting the New Agency: The DHS Option

So we need a new agency outside the FBI. But where outside? It could be a stand-alone like the CIA—that is, not part of any Cabinet-level department—reporting to the DNI as the CIA now does except for covert operations (the CIA reports on those directly to the President), which anyway would not be a proper activity for a domestic intelligence agency.¹⁵ But fear of empowering the President to spy on his political enemies in the manner

13. For criticism, see "Epidemic of Espionage," *Newsbeat 1*, June 19, 2005, newsbeat1.com/2005/06/epidemic-of-espionage.html.

14. Chung, note 12 above, at 235.

15. The term "covert operations" refers to operations, often involving physical force, which because of their illegality or violation of moral principles are considered permissible only when used against foreigners in foreign countries, and even then must be kept in deep enough secrecy to enable the President and other policymakers to plausibly deny knowledge of the operations. An intelligence agency would not be permitted to use such tactics on American soil, though it would be permitted to use methods of surveillance and penetration lawfully used in criminal investigations, and nonviolent disruptive activities such as disinformation and other deceptive practices, exposure, and bribery, subject to appropriate safeguards to ensure the protection of privacy, free speech, and other legal rights.

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of Nixon’s “plumbers” argues for lodging such an agency instead in a department, so that there is a Cabinet officer who is not himself an intelligence officer between the agency and the President. The Department of Homeland Security is the logical choice. Locating the agency there would conform to the practice of foreign nations. For example, MI5 reports to the Home Secretary, who corresponds to our Secretary of Homeland Security, and the director of the Canadian Security Intelligence Service reports to the Minister for Public Safety and Emergency Preparedness. The planned reorganization of DHS announced recently by Secretary Chertoff will, as we’ll see, simplify the creation of a domestic intelligence agency within the department.

Locating the agency in DHS would have the following advantages besides interposing an official who is not an intelligence official between the agency and the President:

1. Unlike the FBI, DHS has no J. Edgar Hoover legacy. This should further reassure civil libertarians.

2. The coordination of DHS’s immense information sources—including Immigration and Customs Enforcement, the Transportation Security Administration, the Border Patrol, and the Secret Service—would be facilitated. These agencies take in an enormous amount of information every day, much of which may have value to an intelligence agency. A domestic intelligence agency within DHS would have readier access to this information than an outside agency would.

3. The agencies mentioned in the preceding paragraph are all “prevention” agencies, just as DHS as a whole is a prevention department. Intelligence fits better with prevention than with prosecution. Think how closely related inspecting cargo for radioactivity (prevention) is to collecting information on persons who have tried to obtain radioactive materials for questionable purposes (intelligence). The preventers will be obtaining information that the intelligence agency wants, and vice versa.

Stated otherwise, placing a domestic intelligence agency in DHS would bring domestic intelligence closer to its customers. An agency responsible for preventing dangerous cargoes from entering U.S. ports wants to know what ports, shippers, carriers, types of ship, crewmembers, longshoremen, etc. to concentrate on—just the sort of information that a domestic intelligence agency would want to have. Separating domestic intelligence from prevention of domestic attacks is like taking military intelligence out of the armed forces, and is objectionable for the same reason: it separates the suppliers of intelligence from their principal customers.¹⁶

4. If sited in DHS, the new agency, though genuinely new, would not be starting from scratch. It would build on the Information Analysis Division and on the Coast Guard's intelligence service, both of which are members of the intelligence community, and also on intelligence units in other DHS agencies; these include the field intelligence units of Immigration and Customs Enforcement, the field intelligence center in the Border Patrol, and some of the very able intelligence specialists in the Secret Service. Incorporating these intelligence units,¹⁷ along with the Coast Guard's intelligence service, into the new agency¹⁸ would answer any complaint that we have enough intelligence agencies already and shouldn't create another one. Since the Information

16. Cf. John Deutch, "The Smart Approach to Intelligence," *Washington Post*, Sept. 9, 2002, p. A17.

17. The suggestion is not to reduce the resources that the Secret Service devotes to the protection of the President and others whom the service protects, but to divert some of the intelligence capabilities that tend between Presidential election campaigns (which is when the service's protective duties are most extensive) to be devoted to counterfeiting, cellphone fraud, and other crimes unrelated to protection.

18. Intelligence personnel from the Coast Guard would remain Coast Guard service members. They would merely be detailed to the new agency, just as members of the armed services are detailed to the National Security Agency, a large fraction of whose staff is military.

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Analysis Division and the Coast Guard's intelligence service are two of the existing 17 (soon to be 18) federal intelligence agencies, were they both incorporated into a domestic intelligence agency the total number of intelligence agencies would fall by one. Anyway the idea that 17 or 18 is "too many" intelligence agencies is unsupported. Think of them as the 18 divisions of a \$40 billion company with 100,000 employees; it is not an excessive number.

5. Although the size of the Department of Homeland Security may seem to argue against placing still another agency in it, there would be offsetting advantages. The department is large enough that it should be possible to relocate a sufficient number of its employees to free up the necessary office space for the new agency (although secure and hardened office space is actually rather scarce in the department). The department could also provide basic administrative staff and seed money, and in this and other ways shorten the period necessary for the new agency to become fully operational. Indeed, at a guess the total annual budget of the new agency would not exceed \$250 million (above the amount the department now spends on intelligence), which is only two-thirds of 1 percent of the department's total budget and so might be financed by cuts elsewhere in it; in that event no net increase in appropriations would be required.

Two disadvantages of the DHS siting option should be noted. The first is that the department is still suffering from acute growing pains; working for DHS is not considered a good way of polishing one's résumé. But this disadvantage can be overcome by stressing the autonomy of the new agency. The Secret Service has not lost its prestige by being transferred from the Treasury Department to DHS, even though the Treasury Department is the more prestigious department.

A related disadvantage concerns the bureaucratic structure

of DHS. There is an Undersecretary for Information Analysis and Infrastructure Protection but also an Assistant Secretary for Information Analysis, and it is the latter whom the Intelligence Reform Act designates as the head of DHS intelligence. To place the new agency under that assistant secretary, who in turn reports to the undersecretary, would unduly complicate the command/control structure (for remember that all federal intelligence agencies now also report to the DNI).

This problem, however, will be solved by the reorganization announced by Secretary Chertoff. Here are the key passages from his speech announcing it:

The fact is that systematic intelligence lies at the heart of everything that we do. Understanding the enemy's intent and capabilities affects how we operate at our borders, how we assess risk in protecting infrastructure, how we discern the kind of threats for which we must be prepared to respond.

Right now, there are more than 10 separate components or offices of the Department of Homeland Security, which are intelligence generators, and all of us in the Department are consumers and users of intelligence information. We need to have a common picture across this Department, of the intelligence that we generate and the intelligence that we require. We need to fuse that information and combine it with information from other members of the intelligence community, as well as information from our state and local and international partners.

And as I said earlier, DHS can also do a better job of sharing the intelligence we're gathering and the intelligence we're analyzing with our customers inside the Department, with the intelligence community as a whole, and with our frontline first responders at the state and local level.

Therefore, today, I am announcing that the Assistant Secretary for Information Analysis will be designated as the Chief Intelligence Officer for the Department of Homeland Security. The Chief Intelligence Officer will head a strengthened Intelli-

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gence and Analysis division that will report directly to me. This office will ensure that intelligence is coordinated, fused and analyzed within the Department so that we have a common operational picture of what's going on. It will also provide a primary connection between DHS and the intelligence community as a whole, and a primary source of information for state, local and private sector partners.¹⁹

Thus, under the reorganization the Assistant Secretary for Information Analysis—who would be the logical person to head up a domestic intelligence agency within the Department—will be reporting directly to the Secretary of Homeland Security, a welcome simplification of the command structure. Also welcome is the fact that he will be in charge of all intelligence in the Department, and hence of the intelligence units of the Coast Guard, Immigration and Customs Enforcement, and the other agencies in the department. The Office of Information and Analysis could thus be the nucleus of a Security Intelligence Service. The nucleus—not the service itself, because it will have, if one may judge from Secretary Chertoff's description (which may be abbreviated), no operating officers. Also, though this may seem a trivial point, from a recruiting standpoint “Office of Intelligence and Analysis” is not a good name for an elite, autonomous intelligence agency; it has no pizzazz. (The logical name for the agency would be “Security Intelligence Service.”) Nevertheless, the reorganization could be the first step to the creation of a genuine, “full service” domestic intelligence agency.

The head of the agency could double as the DNI's deputy for domestic intelligence if such a deputy were to be appointed. The 9/11 Commission had proposed that the chief intelligence officer of either the Department of Homeland Security or the FBI be dual hatted as the DNI's deputy for domestic intelligence.

19. Michael Chertoff, “Second Stage Review Remarks,” July 13, 2005, www.dhs.gov/dhspublic/interapp/speech/speech_0255.xml.

Giving the same person line authority over the domestic intelligence agency and coordination authority over the other elements of domestic intelligence would replicate the dual hatting of the CIA's director (remember that he was both DCI and DCIA), but it would do so on a much smaller, and therefore a manageable, scale. It would be a scale comparable to the dual hatting of the DNI's deputy for intelligence analysis, who doubles as the director of the National Intelligence Council.

Granted, competing agencies would fear that the dual hatter would favor "his" agency, in much the same way that the DCI was suspected of favoring the CIA and so encountered resistance to his efforts to manage the intelligence community as a whole. But it would probably be better on balance to have the same person both direct the new agency and be the DNI's deputy for domestic intelligence (and thus exercise, by delegation from the DNI, the command/coordination authority that I described earlier), at least in the early stages of the new agency. This would give the official greater clout in his dealings with the FBI (and he would need that) and also minimize friction and hierarchy.

Finding a Role; Relation to Other Agencies

The structure of the U.S. intelligence system that is emerging from the Intelligence Reform Act and its implementation by the Director of National Intelligence may seem to leave no room for a domestic intelligence agency separate from the newly hatched (or hatching) National Security Service and the specialized intelligence services of Homeland Security, Energy, and Treasury. The Director of National Intelligence has deputies for analysis and collection, not limited to foreign intelligence, while the National Counterterrorism Center (NCTC) is flexing its muscles and has recently been described as "the nation's primary agency

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for analyzing terrorist threats and planning counterterrorism operations *at home* and abroad.”²⁰

What is left for a domestic intelligence agency to do? A *great* deal:

(a) collecting intelligence data directly, by human and technical means (and also from open-source materials),²¹ within the United States, and doing so more adroitly than the FBI, handicapped by its criminal-investigation mentality, is capable of doing (the NCTC is not a collection agency);

(b) gathering such data indirectly from federal, state, local, and private agencies that collect or can be encouraged to collect intelligence data, including the prevention agencies within DHS, such as the Border Patrol, the Coast Guard, Immigration and Customs Enforcement, and the Transportation Security Administration;

(c) in support of (b), establishing through a training center, personal contacts, financial assistance, and a digitized communications system a nationwide network for the collection of domestic intelligence data;

(d) pooling the data collected directly and indirectly by the agency with data from other federal intelligence agencies (another job such an agency should be able to do better than the IT-challenged FBI) and with open-source data;

(e) sharing data with other intelligence agencies on demand (including the FBI, which would be an important customer);

(f) analyzing data and using the analyses together with analyses of infrastructure vulnerabilities to make threat assessments;

20. Walter Pincus, “Counterterrorism Center Awaits Presidential Action: Director and Chain of Command Are Needed by June 17,” *Washington Post*, June 3, 2005, p. A21 (emphasis added).

21. Already being urged by Congressman Rob Simmons as an appropriate task for DHS. Caitlin Harrington, “Former CIA Man Simmons Shoots Again for Unclassified Intelligence Unit at DHS,” *Congressional Quarterly*, June 22, 2005, www.johnbatchelorshow.com/article.cfm?id=1170.

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(g) issuing threat warnings to first responders and other concerned agencies;

(h) establishing cooperative counterterrorism relationships with the U.S. Arab and Muslim communities;

(i) conducting, through undercover officers and paid or otherwise induced informants, surveillance and penetration of suspected terrorist cells (not limited to cells of Islamic or other foreign terrorist groups), and of groups suspected of providing financial aid, recruits, information, or other assistance to terrorists;

(j) conducting the very limited, nonviolent disruption operations that would be proper for a domestic intelligence agency to conduct;²²

(k) conducting counterintelligence, for example against attempted penetration of the agency itself, or other components of the Department of Homeland Security, by agents of terrorist groups or of foreign states.

All this would be done under the general supervision of both the Office of the Director of National Intelligence and the National Counterterrorism Center, except that the NCTC is prohibited by the Intelligence Reform Act from analyzing and integrating “intelligence pertaining exclusively to domestic terrorists,”²³ that is, homegrown terrorists, though these are a major potential threat. So here is a yawning gap for a domestic intelligence agency to fill. But with that exception, the ability of the director of the domestic intelligence agency to initiate timely intelligence operations, whether to collect intelligence or to disrupt terrorist plots, may be impaired by his having to obtain clearances from multiple levels of higher authority—a formula for delay and for diffusion of responsibility. Were the head of a new

22. Note 15 above.

23. Intelligence Reform and Terrorism Prevention Act of 2004, § 1021, adding section 119(d)(1), to the National Security Act of 1947.

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domestic intelligence agency to be a different person from the deputy DNI for domestic intelligence, this would add another layer of control; so here is another argument for the dual hatting that I have suggested.

Getting Started

The system of domestic intelligence sketched above could be largely or perhaps even entirely created by Presidential executive order. The largest of the nation's intelligence agencies, the National Security Agency, was created by Presidential executive order rather than by an Act of Congress.²⁴ Most U.S. intelligence services were first created that way, a recent example being the creation in August 2004 of the National Counterterrorism Center.²⁵ Even an order by the Secretary of Homeland Security might suffice to transform the department's Office of Intelligence and Analysis (successor to the Information Analysis Division) into a full-fledged domestic intelligence agency, much as the Defense Intelligence Agency was created by order of the Secretary of Defense.

24. *The Intelligence Community: History, Organization, and Issues* 351 (statement of Lt. Gen. Lew Allen Jr., Director, National Security Agency), 519 (Tyrus G. Fain, ed., 1977). See also John D. Bansemer, "Intelligence Reform: A Question of Balance" (Harvard University Center for Information Policy Research, Program on Information Resources Policy, Apr. 18, 2005), http://pirp.harvard.edu/pubs_pdf/banseme/banseme-draft-05.pdf, at 36, describing significant changes in the organization of the intelligence system made in 1972 by President Nixon without congressional authorization. For helpful introductions to the legal issues mentioned in the text, see Russell J. Bruemmer, "Intelligence Community Reorganization: Declining the Invitation to Struggle," 101 *Yale Law Journal* 867 (1992); David Everett Colton, Comment, "Speaking Truth to Power: Intelligence Oversight in an Imperfect World," 137 *University of Pennsylvania Law Review* 571 (1988).

25. On the scope of the authority that Presidents have exercised through executive orders and cognate devices, see Phillip J. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action* (2002).

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It is even possible that a domestic intelligence agency could be created by the Director of National Intelligence by interpretation of the Intelligence Reform Act. Take so trivial-seeming a provision of that Act as “the Director of National Intelligence shall ensure the elimination of waste and unnecessary duplication within the intelligence community.”²⁶ This seems a fatuous exhortation. Yet on the plausible theory that legislation, like the Constitution itself, implicitly confers on an agency the powers “necessary and proper” to enable it to fulfill the duties expressly imposed upon it by the legislation, the provision could be interpreted to authorize the DNI to exercise such authority as may be necessary (required) and proper (lawful) to eliminate waste and unnecessary duplication.

In any event, the authority conferred on the President by Article II of the Constitution to command the armed forces and direct foreign policy, and thus to take charge of national defense and national security, of which intelligence was a recognized component long before the drafting of the Constitution,²⁷ should empower the President to create, combine, separate, and reconfigure components of the intelligence system without congressional authorization. Conceivably his authority in these respects may not even be subject to congressional override, beyond what is implicit in Congress’s control of the federal budget. And what is implicit in that control may be less than what we have become accustomed to. “As President of the United States from 1789 to 1797, [George] Washington took personal responsibility for foreign intelligence. . . . Congress required him to certify what sums he had spent, but allowed him to conceal both the purposes and

26. Intelligence Reform and Terrorism Prevention Act of 2004, § 1011(a), adding section 102(a)(f)(5) to the National Security Act of 1947.

27. It is on a similar theory that the President’s power to authorize covert operations by the CIA has been found in Article II. *The Intelligence Community*, note 24 above, at 9.

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recipients of payments from the fund.”²⁸ Domestic intelligence may seem too sensitive a subject for the President to assert control over without congressional authorization. But, if so, Congress has made clear in the Intelligence Reform Act that it *wants* domestic intelligence to be an integrated component of the intelligence community administered by the President and his subordinate officials.

Questions of legal authority to one side, the creation of a new national security agency (other than by the simple combinatorial method that is giving us the National Security Service) may seem a daunting undertaking. But that depends on the size of the agency, on the degree to which its operation depends on complex and expensive technologies, and, as I have emphasized, on where it is placed in the government structure. Given the existence of other federal domestic intelligence agencies (for remember that I am not suggesting curtailment of the FBI’s intelligence operations), the aid in collection, analysis, and technical services that the new agency would receive from other federal intelligence agencies, and the intelligence resources of the nation’s numerous police forces both public and private, the new agency would not have to be large. And its only major nonpersonnel expenses would be the rent of secured and hardened office space and the purchase of communications equipment and computer hardware and software

A total staff as small as 1,500, beyond the existing intelligence personnel in the Department of Homeland Security, might suffice, certainly at the start. An agency of such modest dimensions might, under forceful leadership, be operational within a few months because placing it in DHS would facilitate a prompt launch.

28. Christopher Andrew, *For the President’s Eyes Only: Secret Intelligence and the American Presidency from Washington to Bush 11* (1995).

Civil Liberties

Any strengthening of domestic intelligence capabilities is bound to draw complaints from civil liberties advocates because surveillance of groups and individuals gives rise to concerns about possible infringements of privacy and of freedom of speech. In evaluating such complaints, one must separate two issues. One is where to draw the boundary between security and liberty concerns, a question that I have addressed elsewhere.²⁹ Here I will merely note two points concerning that boundary-drawing issue: that the public safety is as much a constitutional value as personal liberty is, and that security and liberty are inseparable because another terrorist attack on the scale of 9/11 would be the greatest possible setback to civil liberties in the United States, since the reflex reaction—we saw it after 9/11—to such an attack is to curtail those liberties.³⁰

The other issue is whether, wherever the line is drawn, a domestic intelligence agency is likely to cross it. The agency should not cross it because that would be illegal and expose the agency's personnel to civil and even criminal sanctions; no agency is exempt from the Constitution and laws of the United States. Probably the agency would not cross the line in any event because to do so would be profoundly imprudent from the agency's own standpoint. Given the civil liberties concerns to which the creation of such an agency would give rise, and the fragility of any new, small agency, any infraction of constitutional liberties could well doom the experiment. Moreover, the last thing a domestic intelligence agency would want to do would be

29. Posner, note 6 above, at 185–196; Richard A. Posner, *Catastrophe: Risk and Return* 224–243 (2004); Richard A. Posner, *Law, Pragmatism, and Democracy* 293–317 (2003).

30. See, for example, Alan Cowell, "British Seek New Laws to Confront Terror," *New York Times* (national ed.), July 18, 2005, p. A8.

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to alienate the large Arab and Muslim communities in the United States by infringing the civil liberties of their members. The agency would depend critically on their cooperation in informing on any terrorists or terrorist sympathizers in their midst; and if they became disaffected to the point of actively assisting terrorist activities, the nation's terrorist problem would be compounded enormously. That is a lesson of the recent suicide bombings in London, which were carried out by British citizens.

Moreover, from the standpoint of civil liberties the overall scale of domestic intelligence activity is more important than how that activity is parceled out among different agencies. To the extent that domestic intelligence places pressure on civil liberties, that pressure is greater the more domestic intelligence officers there are. But the number is going to grow, one way or another, because domestic intelligence is undermanned. Whether it grows by expansion of the FBI or by creating a brand-new agency or by expanding the intelligence capabilities of the Department of Homeland Security is probably unrelated to the ultimate number, though if anything the former route will conduce to a greater overall growth in domestic intelligence—precisely because there is less opposition by civil libertarians to expanding the FBI than to creating a separate agency.

There should not be. It requires a lapse of historical memory to think that an FBI monopoly of domestic intelligence is a guarantee of respect for civil liberties. As revealed by the Church Committee, until the mid-1970s the FBI, despite being a part of the Justice Department and therefore nominally subordinate to the nation's chief legal officer, repeatedly committed serious infractions of civil liberties in pursuit (sometimes misguided) of its domestic intelligence mission, such as its relentless electronic surveillance of the private life of Martin Luther King Jr.³¹

31. The report of the Church Committee is *Intelligence Activities and the Rights of Americans: Final Report of the U.S. Senate Select Committee to Study Government Operations with Respect to Intelligence Activities*, bk. 2, S. Rep. No.

In fact, to quote Senator Richard Shelby, a domestic intelligence agency “might offer advantages over our current structure even in terms of civil liberties. . . . I suspect that most Americans . . . would feel safer having [domestic intelligence] collection performed by intelligence officers who do *not* possess coercive powers—and who can only actually take *action* against someone through a process of formal coordination with law enforcement officials.”³² Americans don’t want someone whose job is to arrest and convict acting on what he imagines is going on in an individual’s place of worship, business, or bedroom, but we do want those who are charged with protecting the country to look for indications that the individual is up to no good with that bioengineering equipment he’s been shipping into the sacristy. “If we don’t want a secret police, maybe we should put the secrets and the police in different agencies.”³³

The fear and indignation that the arrests of the two Muslim teenagers engendered in their families and ethnic community were augmented by their being imprisoned and the further fact that because the investigation was intelligence-related, the FBI, to protect its sources, could not give a full and convincing account of the reasons for its actions.³⁴ The priority of a domestic intelligence agency would be to construct cooperative relationships with members of the Muslim communities in the United States³⁵—not on making arrests in those communities, which has

755, 94th Cong., 2d Sess. (1976). For a summary of its findings, see *The Intelligence Community*, note 24 above, ch. 12.

32. “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, p. 75, www.fas.org/irp/congress/2002_rpt/shelby.pdf.

33. Stuart Taylor Jr., “Spying on Terrorists,” *Government Executive*, Jan. 13, 2003, www.govexec.com/dailyfed/0103/011303ff.htm.

34. Nina Bernstein, “Questions, Bitterness and Exile for Queens Girl in Terror Case,” *New York Times* (national ed.), June 17, 2005, pp. A1, A20.

35. That is why a domestic intelligence agency must have operating officers, though they cannot be anywhere near as freewheeling as CIA operating officers.

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been the focus of the Joint Terrorism Task Forces, dominated by the FBI.

There is a history of the FBI's redefining criminal investigations as intelligence operations in order to use FISA warrants and NSA intercepts to obtain information for use in drug or other ordinary-crimes investigations.³⁶ This bothers civil libertarians. It would not be a temptation for a domestic intelligence agency, the only concern of which would be national security.

In arguing that the FBI's lodgment in the Justice Department sensitizes the Bureau to civil liberties, civil libertarians ignore the opposite possibility—that the FBI's growing involvement in intelligence will desensitize the Department to civil liberties. Would civil libertarians want an intelligence officer to be appointed Attorney General or Deputy Attorney General because the FBI had given priority to intelligence?

Europeans, who believe that in the USA Patriot Act and elsewhere the United States has gone too far in curtailing civil liberties because of fears for national security, consider their approach of separating domestic intelligence from law enforcement to be less invasive of civil liberties than the American approach, with its emphasis on arrest and prosecution that results from the FBI's paramount role in domestic intelligence. Despite the recent bombings in London (which prove merely that no police or intelligence system can provide a 100 percent guaranty against terrorist attacks), British "intelligence has been very good at keeping tabs on Muslim radicals inside Britain and has succeeded in foiling earlier terrorist plots. 'MI5 has very good relations with the British Muslim community, and it's developed a good network of informants, and they've penetrated the radical groups.'"³⁷ The British may well be placing insufficient emphasis

36. Stewart A. Baker, "Should Spies Be Cops?" *Foreign Policy*, Dec. 22, 1994, p. 36.

37. Richard Bernstein, "Rights vs. Security: Despite Terror, Europeans Seem Determined to Maintain Civil Liberties," *New York Times* (national ed.), July 9, 2005, p. A8.

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on police methods to combat terrorism,³⁸ but my point is only that they correctly perceive less tension between MI5-style domestic intelligence and civil liberties than between police measures and civil liberties.

Civil libertarians thus are wrong to think that because the FBI is part of the Justice Department it is less likely to infringe civil liberties than a domestic intelligence agency would be. They may be on somewhat firmer ground in thinking that the Bureau's concern that the prosecutions it assists stand up in court makes it more fastidious about avoiding rights violations that would jeopardize a conviction than an agency having no law enforcement responsibilities would be. But this fastidiousness will carry over to the Bureau's pure intelligence activities only if the Bureau is indeed unable to shake off its culture of law enforcement—and if it is unable to do that it will be ineffectual in the intelligence role.

One wonders whether the real reason that civil libertarians want the FBI to continue to dominate domestic intelligence is that to the extent that the Bureau's conduct of intelligence is ineffectual the threat to civil liberties is reduced (though the threat to public safety is increased). This suspicion is supported by the chorus of civil liberties complaints that greeted the announcement of the creation of the National Security Service.³⁹ The NSS is not intended to expand the FBI's intelligence operations or to give the Bureau additional powers, but merely to make those operations more effective.

If no domestic intelligence agency is created, and if the FBI, preoccupied with its reorganization, does not expand its intelli-

38. Elaine Sciolino and Don Van Natta Jr., "For a Decade, London Thrived as a Busy Crossroads of Terror," *New York Times* (final national ed.), July 10, 2005, §1, p. 1.

39. Dan Eggen and Walter Pincus, "Spy Chief Gets More Authority over FBI: Negroponte Will Control Bureau's Intelligence Side," *Washington Post*, June 30, 2005, p. A1.

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gence staff rapidly, other agencies will rush in to fill the void; for as I have said, there is a shortage of domestic intelligence officers—and government abhors a bureaucratic vacuum. The Pentagon is one such agency. Already it is moving to expand its role in domestic security, including domestic intelligence.⁴⁰ Is *this* what civil libertarians want?

What is important from the standpoint of protecting civil liberties is not that domestic intelligence be controlled by the FBI but that it be subject to legal and administrative controls intelligently designed to check abuses. There are many possibilities, quite apart from the measures legislated in the Intelligence Reform Act (the creation of the position of Civil Liberties Protection Officer in the Office of the DNI and the creation of a Privacy and Civil Liberties Oversight Board in the Executive Office of the President):

(a) lodging the new agency in the Department of Homeland Security, so that, as I mentioned earlier, there would be an official who was not an intelligence officer between the agency and the White House;

(b) creating a domestic intelligence oversight board composed primarily of lawyers with civil liberties expertise;

(c) assigning special oversight responsibilities for domestic intelligence to the Privacy and Civil Liberties Oversight Board;

(d) subjecting the domestic intelligence agency to the guidelines promulgated by the Attorney General to regulate the FBI's intelligence operations;

(e) creating a steering committee for the agency composed of the Attorney General, the Director of National Intelligence, and the Secretary of Homeland Security;

(f) incorporating controls similar to those that Canada has placed on CSIS;

40. Bradley Graham, "Military Expands Homeland Efforts: Pentagon to Share Data with Civilian Agencies," *Washington Post*, July 6, 2005, p. A1.

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(g) suggesting that Congress lodge oversight responsibility for domestic intelligence either in the Senate Homeland Security and Government Affairs Committee (and its House counterpart)—which presumably would be the automatic consequence of placing the agency in the Department of Homeland Security—rather than in the intelligence committees;

(h) appointing as the agency's director someone from outside the intelligence and national security communities;

(i) limiting the jurisdiction of the new agency to the collection and analysis of intelligence relating to activities that threaten to cause *major* loss of life, or comparable harm to the public welfare (that is, defining national security narrowly).