

CHAPTER TEN

INTELLIGENCE AT HOME: THE FBI, JUSTICE, AND HOMELAND SECURITY

Summary & Recommendations

Combating chemical, biological, and nuclear terrorism, as well as other foreign intelligence challenges, will require intelligence assets both inside and outside the United States. As the events of September 11 demonstrated, we cannot afford a wall that divides U.S. intelligence efforts at the border. Although the FBI is making progress toward becoming a full member of the Intelligence Community, it has a long way to go, and significant hurdles still remain. In our view, 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.

Meanwhile, the Department of Justice has not yet put its national security components in one office; its anti-terrorism and intelligence support offices are as scattered as they were on September 10, 2001. And the Department of Homeland Security is still following a Treasury Department order from the 1980s that requires high-level approval for virtually all information sharing and assistance to the Intelligence Community.

In light of these problems we recommend that:

- The FBI create a new National Security Service within the Bureau and under a single Executive Assistant Director. This service would include the FBI's Counterterrorism and Counterintelligence Divisions and its Directorate of Intelligence, and would be subject to the coordination and budget authorities of the DNI;
- The DNI ensure that there are effective mechanisms for preventing conflicts and encouraging coordination among intelligence agencies in the United States;
- All intelligence activity within the United States—whether conducted by the CIA, FBI, or Department of Defense—remain subject to Attorney General guidelines designed to protect civil liberties;

Summary & Recommendations (Continued)

- The Department of Justice consolidate its national security elements—the Office of Intelligence Policy Review, and the Counterterrorism and Counterespionage sections—under a new Assistant Attorney General for National Security; and
- The Department of Homeland Security rescind Treasury Order 113-01.

INTRODUCTION

The events of September 11 made clear that terrorists can operate on both sides of the U.S. border. Terrorists are seeking nuclear and biological weapons outside the United States, but they long to use them here.

This new reality requires first that the FBI and other agencies do a better job of gathering intelligence inside the United States, and second that we eliminate the remnants of the old “wall” between foreign intelligence and domestic law enforcement. Both tasks must be accomplished without sacrificing our domestic liberties and the rule of law, and both depend on building a very different FBI from the one we had on September 10, 2001. It is these two tasks to which we now turn.

CHANGE AND RESISTANCE TO CHANGE AT THE FBI

It has now been three and a half years since the September 11 attacks. A lot can be accomplished in that time. Three and a half years after December 7, 1941, the United States had built and equipped an army and a navy that had crossed two oceans, the English Channel, and the Rhine; it had already won Germany’s surrender and was two months from vanquishing Japan.

Change

The FBI has spent the past three and a half years building the beginnings of an intelligence service and striving to transform itself into a hybrid law enforcement and intelligence agency.¹ Field offices now routinely cull intelligence information from operations and investigations, and disseminate Intelligence

Information Reports. An intelligence official from another law enforcement agency praised the FBI's ability to extract pertinent information from cases, pointing out that "[t]hey are doing a better job than anybody could have expected."² The Bureau has developed new intelligence training courses, Field Intelligence Groups to supervise intelligence production, and an expanded analytic cadre. FBI headquarters has hired hundreds of analysts and agents from outside its traditional core competencies (law enforcement, accounting, and the military).³ In 2003 Director Mueller appointed an Executive Assistant Director for Intelligence to preside over these efforts and lead the newly created Office (now Directorate) of Intelligence. These are no small accomplishments.

At the same time, determination at the top of the organization does not always translate into change in the field. FBI Directors, no less than outsiders, must contend with a bureaucratic culture that naturally resists change. We are not the first to see the problem. The 9/11 Commission noted with some concern that it had "found gaps between some of the announced reforms and the reality in the field."⁴

Past efforts to build a strong intelligence capability within the FBI have foundered on this resistance. In 1998 and 1999, similar reforms⁵ failed in quick succession as a result of strong resistance from the FBI's operational divisions and an intelligence architecture that could not defend itself inside the bureaucracy.⁶ Several of the obstacles FBI has faced in reforming itself stem from the Bureau's long and proud law enforcement culture. While the Bureau is making progress toward changing its culture, it remains a difficult task and one that we believe will require more structural change than the Bureau has instituted thus far.

As America's premier federal law enforcement agency, the FBI's law enforcement legacy is strong. Law enforcement work has long been the surest route to professional advancement within the Bureau. Even now, only nine of the heads of the FBI's 56 field offices come from divisions other than the Criminal Division.⁷ And many field offices are still tempted to put law enforcement ahead of intelligence-gathering, betting that "Bin Laden is never going to Des Moines."⁸ This is understandable—local political and other external forces often press the Bureau to focus on its criminal law enforcement responsibilities. As one Special Agent in Charge explained, when a local law enforcement agency calls for help, "you never want to say no."⁹

Resistance to Change

So, the question remains: 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.

Here we highlight three areas critical to intelligence work—analytic capability, validation of human sources of intelligence (*i.e.*, asset validation), and information technology—in which the FBI has made significant but, in our view, insufficient progress.

First, the FBI is still far from having the strong analytic capability that is required to drive and focus the Bureau's national security work. Although the FBI's tactical analysis has made significant progress, its strategic capabilities—those that are central to guiding a long-term, systematic approach to national security issues—have lagged.¹⁰ And while the FBI maintains the ambitious goal of improving its strategic analysis—creating a Strategic Analysis Unit in the Directorate of Intelligence and a strategic analysis function in each Field Intelligence Group by 2005¹¹—every indication is that the Bureau will have difficulty meeting this worthy objective, particularly at the field level. This is because the Bureau has largely been unable to carve out time for its analysts in the field to do long-term, strategic analysis. According to a 2004 evaluation of one Field Intelligence Group, “because of the current structure and manpower constraints, nearly all analysis is limited to the tactical level supporting individual cases.”¹² A 2005 National Academy of Public Administration study on the FBI forecasts that “even after a larger analytical staff is built, the tendency will be for immediate operational demands to push out strategic analyses.”¹³ To place the Bureau's current production in context, consider that the FBI currently publishes approximately a quarter as many long-term (non-current) analytic pieces as CIA does in a given year.¹⁴

This is not to suggest that the Bureau should replicate CIA's model. The Bureau's field office structure makes the FBI unique. One senior official emphasized that FBI has an operational emphasis that disproportionately requires actionable intelligence.¹⁵ But although we are sympathetic to the FBI's particular analytic needs, we remain concerned that the current structure of the FBI's intelligence program, and the relationship between analysts and field operations, will not encourage analysts to rise above individual investigations, develop subject matter expertise, or *drive*—and not merely

inform—counterintelligence, counterterrorism, and foreign intelligence collections, investigations, and operations.

The Bureau must also overcome a long history of treating analysts as “support staff.” In the field offices there have always been two main categories of personnel: agent and non-agent (or “support”), and there is little doubt that agents enjoy preeminent status. As a 9/11 Commission staff statement noted, several field analysts complained that they “were viewed as ‘uber-secretaries,’ expected to perform any duty that was deemed non-investigative, including data entry and answering phones.”¹⁶ Even today, there is still evidence of analysts’ subordinate role. As just one example, according to a 2004 report on one field office, “due to a backlog of telephone numbers to be loaded into telephone applications, the FIG [Field Intelligence Group] has requested overtime and pulled analysts from squads to load and analyze data...[T]he use of [Intelligence Analysts] for clerical duties diminishes the analytical function of an [Intelligence Analyst].”¹⁷ We expect the FBI will struggle to get its analytic cadre where it needs to be, in part because the Bureau must compete with other, better-established analytical entities within the Intelligence Community for analytic resources.¹⁸

A second area that requires further reform is the system by which the FBI attempts to validate human sources of information, commonly referred to as “asset validation.” For any organization that collects human intelligence, having an independent system for asset validation is critical to producing reliable, well-vetted intelligence. Indeed, the Intelligence Community’s failure to validate assets adequately and communicate fabrication notices properly proved especially costly in the Iraq WMD debacle.¹⁹

Over the past several years the FBI’s Counterintelligence Division has instituted a sophisticated and intensive system for asset validation. This initiative deserves praise, but the FBI has not yet instituted this system in its other operational divisions.²⁰ Director Mueller and the head of FBI’s Counterterrorism and Counterintelligence Divisions have both stated their intentions to establish comparable systems in the Counterterrorism and Criminal Divisions, but these plans have yet to be implemented.²¹ When we asked agents in the field about the FBI’s asset validation, we received answers indicating that asset validation remains largely controlled by the field offices.²² Indeed, when we asked the FBI for a summary of how many assets had been terminated in the last year because they had been judged to be fabricators, we were told that an

answer would take time since a request first had to go out to each of the field offices and then analyzed back at headquarters.²³ This response strongly suggests that the FBI still lacks a centrally-managed database of its human assets—an essential element of any objective and systematic approach to asset validation.

Finally, further reforms are also necessary in the FBI's information technology infrastructure, which remains a persistent obstacle to successful execution of the FBI's national security mission. We believe that the Bureau's failure to develop efficient mechanisms for information sharing both inside and outside the FBI seriously undermines the Bureau's ability to perform its intelligence work. As early as 2002, Senator Richard Shelby highlighted the FBI's failure to develop information technology tools adequate to support its national security mission as a serious shortcoming.²⁴ Recently the FBI declared that it will largely abandon the Virtual Case File system it had been developing for the past four years at a cost of \$170 million. Although Director Mueller claimed in May 2004 that the system was expected to be completed by the end of the year,²⁵ at about the same time the National Research Council concluded that the FBI's information technology modernization was "*not* currently on a path to success" and that the Virtual Case File System should not be the foundation for the FBI's "analytical and data management capabilities for the intelligence process"—in part because the system was designed to serve the criminal investigative mission rather than the intelligence mission.²⁶

Beyond the shortcomings of these individual intelligence capabilities, some of the FBI's achievements in gathering intelligence within the United States raise questions about its ability to focus its intelligence efforts effectively. The Bureau has a remarkable ability to amass resources for a particular task, but its efforts may be poorly tuned. For example, in 2002 the FBI undertook a large-scale effort to interview all recent Iraqi immigrants to the United States in hopes of uncovering foreign intelligence and counterterrorism information that might contribute to the war effort.²⁷ This huge effort did produce some useful intelligence, but it required countless FBI investigators and many months. Although the project was coordinated with other intelligence agencies in FBI's Joint Terrorism Task Forces, it is less clear to us whether the effort made effective use of strategic analysis or targeting—and the scale of the interview program produced considerable civil liberties controversy.

INTEGRATING THE FBI INTO THE INTELLIGENCE COMMUNITY

The FBI's intelligence capabilities plainly require continued attention. But strengthening the FBI's national security capabilities is not the only task at hand. The FBI must also interact effectively with the rest of the Intelligence Community. The FBI has 1,720 professional intelligence analysts,²⁸ more than 12,000 agents capable of collecting valuable information in the field,²⁹ and the primary responsibility for counterintelligence and counterterrorism in the United States.³⁰ As such, it is a large and critical contributor to U.S. intelligence efforts.

The need for better intelligence coordination across the foreign-domestic divide was identified by the 9/11 Commission and was a moving force behind the *Intelligence Reform and Terrorism Prevention Act*. Creating a DNI with explicit responsibility for coordinating and managing domestic and foreign intelligence agencies serves as an important step in the right direction. But the legislation cannot create a community by itself. In fact, if nothing is done, a determinedly independent FBI could largely elude the DNI's intended authorities. To understand the risk, it is necessary to understand the mechanisms by which the DNI is expected to lead the Intelligence Community.

In writing the intelligence reform legislation, Congress did not create a Secretary of Intelligence or move all of the intelligence agencies under the direct command of the DNI. Congress left the intelligence agencies where they were—the Defense Department in most cases—but it also granted the DNI substantial authority over those agencies. NSA is typical. Though it is a Defense Department agency, NSA is part of the Intelligence Community. To ensure that NSA is responsive to the DNI, Congress gave the DNI significant authority over both NSA's budget³¹ and a say in the appointment of its director.³² The intelligence reform law applies the same basic authorities to the FBI but, in the case of the FBI, the DNI's principal tools for ensuring influence remain troublingly vague.

The DNI's Budget Authority Over the FBI

As a general matter, the DNI's budget authority over parts of the Intelligence Community is significant. The DNI prepares and has reprogramming authority over the National Intelligence Program (NIP, formerly the National Foreign

Intelligence Program, or NFIP). The DNI also ensures that the NIP budget is effectively executed, and monitors its implementation.³³ This picture is, however, far less clear vis-à-vis the FBI. We fear that the DNI may find it difficult—if not impossible—to impose the level of accountability envisioned by the legislation because the FBI’s budget is not configured to allow effective Intelligence Community oversight.³⁴ And in our view, nothing in the Bureau’s internal reforms since September 11 has altered this fact.

Approximately a third of the Bureau’s total budget is funded through the National Intelligence Program.³⁵ The vast majority of this money is allocated to the FBI’s Counterterrorism and Counterintelligence Divisions.³⁶ In stark contrast, none of the NIP budget goes to the Bureau’s Directorate of Intelligence.³⁷ Thus, if the current arrangement stands, the DNI will have no budget authority over the office that the Bureau has put at the center of its efforts to develop an intelligence capability.

And this curious arrangement appears even odder when one considers where NIP money goes in light of the DNI’s personnel authority over the FBI. In those cases in which an FBI component *does* receive NIP money (*e.g.*, for the Counterterrorism or Counterintelligence Division budgets), the DNI has *no* say in selecting the individual who runs that component. On the other hand, in the one case in which the DNI *does* have a say over an FBI official’s appointment (*i.e.*, the Executive Assistant Director of Intelligence),³⁸ that official’s office (*i.e.*, the Directorate of Intelligence) *doesn’t* get NIP money. This strikes us as a peculiar arrangement, and one that diminishes the DNI’s ability to ensure that the FBI is fully integrated into the Intelligence Community.

This rather confused budgetary situation is further complicated by FBI’s internal budget categories. As required by the intelligence reform act, the FBI parses its budget into four parts: intelligence, counterterrorism/counterintelligence, criminal justice services, and criminal enterprises/federal crimes.³⁹ There is, however, only a small overlap between the National Intelligence Program budget and the Bureau’s internal intelligence budget component—what it calls its “Intelligence Decision Unit.”

Thus, when the FBI says that the Executive Assistant Director of Intelligence—again, the person over whom the DNI has some personnel authority—has “full control” over the “resources” of the Intelligence Decision Unit,⁴⁰ this says very little about the Executive Assistant Director’s authority

over National Intelligence Program funds. This is aptly illustrated by the fact that the Intelligence Decision Unit contains less than a third of the Bureau's NIP funds, and that a significant portion of Intelligence Decision Unit dollars go to parts of the FBI that are wholly unrelated to national intelligence programs.⁴¹ In short, simply because something is in the FBI's "intelligence" budget gives little indication of whether the money is relevant to the Intelligence Community or, more importantly, to the DNI.

Not only is the Bureau's internal "intelligence" budget unit not aligned with the Bureau's NIP appropriations, we also doubt that the head of the Directorate of Intelligence actually has even the limited budget authority claimed by the FBI over what it internally describes as the "intelligence" budget. While the FBI states that the Executive Assistant Director for Intelligence "oversees" the Intelligence Decision Unit,⁴² it remains unclear whether the Executive Assistant Director will actually have direct authority to formulate, direct, or reprogram the Intelligence Decision Unit budget. This is because, according to an official at the Office of Management and Budget, the Directorate of Intelligence only has unilateral authority over that percentage of the Intelligence Decision Unit that goes directly to the Directorate of Intelligence itself.⁴³ This means the Directorate has direct authority over only about *four percent* of the Bureau's own "intelligence" budget.⁴⁴ Fully 96 percent of the Intelligence Decision Unit falls outside the Directorate of Intelligence, in divisions like Counterintelligence and Counterterrorism.⁴⁵

Hence, although the FBI's Executive Assistant Director for Intelligence may provide input into policy-related decisions regarding the Intelligence Decision Unit, the Executive Assistant Director will not, for instance, control the salaries of those included in the unit, or have budget execution authority over the unit as a whole.⁴⁶ So, while the Bureau states that "[a]ll of [its] efforts to create and manage the FBI intelligence budget are directed at ensuring that the DNI is able to exercise oversight of all intelligence spending,"⁴⁷ it is rather doubtful that creating the Intelligence Decision Unit—or providing the Executive Assistant Director for Intelligence general oversight over it—accomplishes this goal.

In our view, the FBI's budget process should be organized in a way that unambiguously ensures the responsiveness of the FBI's national security elements to the DNI. This means two things. First, the National Intelligence Program budget should include the budgets of the Directorate of Intelligence—as well

as the Counterintelligence and Counterterrorism Divisions (perhaps excluding purely domestic terrorism work). Second, the DNI should have personnel authority over the FBI official who is responsible for all National Intelligence Program budget matters within the FBI. The current arrangement is far from this ideal.

Instead, the confused allocation of resources, combined with the questionable budgetary authority of the one FBI official over whom the DNI exercises some personnel authority, threatens to undermine one of the DNI's critical "levers of power." If the DNI does not know how NIP funds are allocated and spent by the FBI, and if the DNI does not have some personnel authority over the FBI official responsible for managing NIP funds, then he runs the risk of losing the very authority that the legislation was intended to confer. In such a case, the DNI will have to revert to other authorities, and it is to these we now turn.

Appointment Authority and the Weakness of the Intelligence Directorate

Another important tool at the DNI's disposal is appointment authority of Intelligence Community officials. Congress grants the DNI concurrent authority over the appointment of the heads of intelligence agencies such as NSA, NGA, and CIA.⁴⁸ In the case of the FBI, however, this authority is diluted. The DNI has no say in the appointment of the Director of the FBI, presumably because the FBI is the "primary criminal investigative agency in the federal government"⁴⁹ and the FBI Director spends considerable time overseeing a large law enforcement staff involved in criminal justice matters. Rather than conferring a role in the appointment of the Director of the FBI, the statute gives the DNI a say in the appointment of the Executive Assistant Director for Intelligence.⁵⁰

This is a workable approach if the Executive Assistant Director for Intelligence can direct the resources necessary to accomplish the Bureau's national security mission. Indeed, that seems to have been Congress's plain intent. The intelligence reform law states that the Executive Assistant Director's office (the Directorate of Intelligence) will be responsible for supervising "all national intelligence programs, projects, and activities of the Bureau" and overseeing all "field intelligence operations."⁵¹ Additionally, the legislation states that the Directorate of Intelligence is responsible for strategic analysis,

the intelligence workforce, and coordinating collection against nationally determined requirements.⁵² On the other hand, if the Executive Assistant Director does *not* have authority over the FBI's intelligence-gathering activities, then the DNI's ability to influence appointments to that position becomes of minimal import.

Unfortunately, that is the case today. The Directorate of Intelligence itself has no authority to direct any of the Bureau's intelligence investigations, operations, or collections. It currently performs no analysis, commands no operational resources, and has little control over the 56 Field Intelligence Groups, which, according to the FBI, "manage and direct all field intelligence operations."⁵³

Instead, the FBI's national security resources, analysts, and collection capabilities are concentrated in the FBI's Counterintelligence and Counterterrorism Divisions and in the field offices. In fact, the FBI is currently configured so that no single individual other than the Director of the FBI (and perhaps his Deputy) has the authority to direct all of the Bureau's national security missions.

Because the DNI's ability to influence the FBI's conduct depends so heavily on the DNI's ability to oversee the Directorate of Intelligence, we looked closely at what authority the directorate has. We conclude that the directorate's *lack* of authority is pervasive. We asked whether the Directorate of Intelligence can ensure that intelligence collection priorities are met. It cannot. We asked whether the directorate directly supervises most of the Bureau's analysts. It does not. We asked whether the head of the directorate has authority to promote—or even provide personnel evaluations for—the heads of the Bureau's main intelligence-collecting arms. Again, the answer was no. Does it control the budgets or resources of units that do the Bureau's collection? No. The DNI's appointment influence over the head of the directorate therefore does little to bring the FBI's national security activities into a fully functioning Intelligence Community.

Setting and enforcing intelligence priorities. The Directorate of Intelligence is responsible for assigning national intelligence priorities to the FBI's field offices. The FBI has officially stated that it both "recognizes and supports the DCI's authority to formulate intelligence collection requirements for the United States Intelligence Community and has issued FBI collection tasking

directives that translate those requirements into actual tasking by the FBI.”⁵⁴ Yet at the working level, we found that national intelligence requirements were not uniformly understood. As one FBI official in the Directorate of Intelligence put it, the FBI sees these requirements “more as an invitation” to fill collection gaps than as directives.⁵⁵ We spoke with agents at the field level who also expressed some confusion about whether these requirements are directive or advisory.⁵⁶ The directorate has recognized this problem in internal reports, noting that interviews with personnel in one field office “demonstrated that individuals were still generally not familiar with the published requirement sets.”⁵⁷ Although a significant part of the problem is that the national requirements system itself does not demand adequate accountability, our concern is that the DNI’s attenuated line of authority vis-à-vis the FBI will make this problem particularly acute.

We do not believe this state of affairs is what the 9/11 Commission envisioned when it stressed the need for the FBI “to be able to direct its thousands of agents and other employees to collect intelligence in America’s cities and towns.”⁵⁸ Without control of collection resources, the Directorate of Intelligence lacks the requisite authorities to direct intelligence gathering. Unlike the Counterterrorism, Counterintelligence, Cyber, and Criminal Divisions, the Directorate of Intelligence currently commands no operational resources and has no authority with respect to field operations; it cannot initiate, terminate, or re-direct any collection or investigative operation in any FBI field office or in any of the four operational divisions at FBI headquarters.⁵⁹ Additionally, the directorate has no direct authority over the heads of the field offices unless it can somehow prompt the intervention of the FBI Director or his deputy.

Although the FBI has established Field Intelligence Groups in all of its field offices to “manage and direct all field intelligence operations,”⁶⁰ the Directorate of Intelligence has little direct control over the field groups either. Nor is it clear that the Field Intelligence Groups will have a real impact on how field offices actually conduct counterintelligence or counterterrorism investigations and activities—the core of FBI’s intelligence collection capabilities.⁶¹

Controlling analysis and related resources. The Directorate of Intelligence also lacks direct supervisory authority over the vast majority of the FBI’s analysts. While there are 1,720 intelligence analysts at the Bureau,⁶² the Directorate of Intelligence contains just 38 of them.⁶³ Although the intelligence reform act designates the Directorate of Intelligence as responsible for strate-

gic analysis,⁶⁴ the directorate currently does no analysis itself;⁶⁵ the 38 analysts in the directorate perform a policy role.⁶⁶ (The directorate does, however, coordinate the Director's Daily Brief to the President—a compilation of analytic products that are produced by the operational divisions and packaged by the intelligence directorate for dissemination.)⁶⁷

Furthermore, related resources that do fall under the control of the intelligence directorate may continue to fluctuate. In at least one case, resources that were initially given to the Directorate of Intelligence were later taken away. In early 2004 the Directorate of Intelligence hired a contractor to design and execute a comprehensive intelligence training program. The directorate's ownership of this intelligence training component ended, however, when the FBI's training headquarters at Quantico, Virginia asserted primacy in training matters and directed that it be given ownership of the program.⁶⁸ Quantico won the battle, and the Directorate of Intelligence, rather than being able to tailor its own program, was forced into the position of customer. Once again, this illustrates why a line of authority that only connects the DNI to the Bureau through the Directorate of Intelligence may result in the DNI having only tenuous authority with respect to the FBI's national security-related resources.

Exercising promotion and evaluation authority. Lacking significant operational and resource authority, the Executive Assistant Director for Intelligence might turn to personnel authority to manage the Bureau's national security effort. Yet the intelligence directorate has little personnel authority with respect to the Bureau's national security elements. The intelligence directorate's primary leverage comes from its semi-annual review of how headquarters and field offices have utilized intelligence resources—a so-called "program" review.⁶⁹ These evaluations do not, however, impose individual accountability for failing to fulfill headquarters-issued requirements, much less control how assets are directed. These after-the-fact reviews therefore have no direct effect on those who lead the execution of the Bureau's national security missions.

With respect to promotions and personnel evaluations, the head of the intelligence directorate is not the performance "rating official" (nor does the head of the directorate share that responsibility) for the component head in any FBI field office or headquarters division. The head of the intelligence directorate is the performance "rating official" for only four people at the Bureau—three special assistants and the Assistant Director of the office.⁷⁰ In turn, the Assis-

tant Director rates only three people outside of the Directorate of Intelligence.⁷¹ And unlike the Assistant Directors in the Counterintelligence, Counterterrorism, and Criminal Divisions, the Assistant Director of the Directorate of Intelligence does not rate the heads of the 56 field offices,⁷² nor does anyone in the Directorate of Intelligence have any personnel rating authority (direct or indirect) over the Field Intelligence Groups or their supervisors.⁷³ At best, the intelligence directorate exercises a series of broken lines of authority over the Bureau's national security functions. In turn, these broken lines also represent a broken chain of influence for the Director of National Intelligence.

“Intelligence Elements” of the FBI

The DNI has one more power over the FBI's intelligence activities—in theory, at any rate. The new intelligence act empowers the DNI to lead the Intelligence Community, which it defines as including the FBI's “intelligence elements.”⁷⁴ What are those elements? Neither the statute nor the FBI has defined the term. In our view, those elements should include the Bureau's principal intelligence-gathering units—the Counterterrorism and Counterintelligence Divisions, as well as the intelligence directorate itself. Once again, because this issue has not been resolved, it is not clear that the FBI's national security-related divisions will in fact be subject to effective oversight and coordination by the DNI.

In reforming its intelligence capabilities since September 11, the FBI opted not to fundamentally reorganize its existing operational structure. Thus while the Bureau has significantly improved (and certainly has further plans to improve) many of its intelligence *capabilities*, it has not integrated these capabilities to ensure that national intelligence requirements and strategic analysis drive counterterrorism, counterintelligence, and foreign intelligence operations, investigations, and collection. And in our view, whether the DNI and the FBI will be able to direct those resources effectively and in meaningful coordination with the rest of the Intelligence Community remains in question so long as the FBI's primary national security components answer to different chains of authority outside of the DNI's aegis.

Realigning the FBI's Intelligence Elements

Recommendation 1

To ensure that the FBI's *intelligence elements* are responsive to the Director of National Intelligence, and to capitalize on the FBI's progress, we recommend the creation of a new National Security Service within the FBI under a single Executive Assistant Director. This service would include the Bureau's Counterterrorism and Counterintelligence Divisions and the Directorate of Intelligence. The service would be subject to the coordination and budget authorities of the DNI as well as to the same Attorney General authorities that apply to other Bureau divisions.

To resolve these issues of coordination and authority and to facilitate further reform, we propose a National Security Service within the FBI. This service would include the FBI's Counterintelligence and Counterterrorism Divisions, as well as its Directorate of Intelligence.

The creation of such a service would bring the FBI's operational divisions with national security responsibilities under the DNI's authority. The service would account for all of the FBI's National Intelligence Program-funded resources, thereby giving the DNI effective budget control as well. The service would be led by an Executive Assistant Director. In order to preserve the intelligence reform act's intent that the DNI have a say in the appointment of the FBI's top intelligence official, this individual would serve in the role of the Executive Assistant Director for Intelligence.

Because of the strength of the FBI's field offices, some link between the head of the service and certain field offices is also needed. For example, the National Security Service could have authority to approve and evaluate Special Agents in Charge of the 15 field offices that have an official foreign diplomatic presence. The service should also have inspection authority to evaluate the work of FBI's field offices. Through these evaluation and appointment authorities, the headquarters elements of the service (and through them, the DNI) would have a lever to ensure that the FBI is accountable for fulfilling national intelligence requirements through its investigatory, operational, and collection capabilities.

Recognizing the danger that field offices may drain National Security Service resources for more immediate law enforcement needs, we recommend the development of a process to prevent excessive diversion of the service's resources. This is not to say that National Security Service resources will never be re-allocated to other missions, but that they should be re-allocated or detailed to other divisions only temporarily, and only with the permission of the head of the National Security Service, under procedures agreed upon by the DNI.

Like the 9/11 Commission, we considered and rejected the creation of a separate agency devoted entirely to internal security without any law enforcement powers.⁷⁵ The FBI's hybrid nature is one of its strengths. In today's world of transnational threats, the line between "criminal activity" and "national security information" is increasingly blurred, as is well-illustrated by the use of illegal drug proceeds to fund terrorist activity. The FBI can quickly bring criminal justice tools, such as search warrants, to bear in its national security mission. In addition, the FBI's criminal justice role demands everyday contact with state and local officials—contact that is invaluable for obtaining information relevant to national security.

We believe it is critical that the National Security Service remain within the FBI. Personnel in the service would take advantage of its specialized career options, but agents in the service would go through law enforcement training along with their counterparts in the FBI's criminal divisions. Agents could laterally transfer between the service and the FBI's other divisions mid-career.

Because the National Security Service will remain part of the FBI, analysts will continue to work in the headquarters components of the non-service divisions and on criminal cases in the field offices. The FBI will continue to hire all of its personnel through a single office; its information technology and information sharing infrastructure will remain combined; and the support service functions will still serve the entire Bureau.

Ensuring continuing coordination between the FBI's two halves is critical for at least two reasons: such coordination is necessary to optimize the FBI's performance in both national security and criminal investigations, and—equally important—it will help ensure continued attention to civil liberties and legal limits on the power of government to intrude into the lives of citizens. Of course, all activities in the National Security Service would be performed consistent with the Attorney General Guidelines for national security investi-

gations and foreign intelligence collection, as well as under Department of Justice and Congressional oversight.

As long as the Bureau continues to expose Special Agents to a tour of criminal work, as it should, its agents will have experience in criminal justice matters and continue to be extensively trained to uphold the Constitution and protect civil liberties. Working in the criminal justice environment sensitizes agents to civil liberties limits on a daily basis, through regular contact with Department of Justice attorneys as well as the courts. The Bureau's national security and criminal justice components can and must continue to work together.

If that is done, we see no civil liberties protections to be gained by requiring that personnel work separately in the Counterterrorism or Counterintelligence Divisions rather than a National Security Service that combines these divisions. In fact, civil liberties protections would if anything be increased if, as we suggest, investigations of purely domestic terrorism were assigned to the FBI's Criminal Division. There is no civil liberties reason to insulate National Intelligence Program funds from the oversight of the DNI. Nor do we believe that civil liberties are diluted if the head of the National Security Service sets intelligence priorities or performs personnel evaluations of Special Agents in Charge.

In short, without creating walls between the FBI's national security and criminal components, the National Security Service would establish a single focal point for the Bureau's national security mission and a series of direct lines connecting the DNI to the national security elements at FBI headquarters and in the field. The proposed service would provide a more defined and prestigious career track for agents focused on national security. It would also enhance the Bureau's intelligence capabilities, providing strategic analysis, asset validation, intelligence career planning, training, and strategic targeting for the FBI's overall national security mission—functions that are now scattered and, in many cases, undeveloped. A National Security Service would protect national security intelligence resources, demand real accountability, and ensure that intelligence requirements are met—all without fundamentally changing the structure or nature of the FBI's 56 field offices that are the hallmark of the organization. In the field offices agents will continue to do both intelligence and criminal work; collectors and analysts will continue to work side by side.

Despite all of these advantages to creating a National Security Service within the FBI, we are compelled to add a note of caution—the same that was eloquently sounded by the 9/11 Commission:

We have found that in the past the Bureau has announced its willingness to reform and restructure itself to address transnational security threats, but has fallen short—failing to effect the necessary institutional and cultural changes organization-wide. We want to ensure that this does not happen again.⁷⁶

Our recommendations attempt to effect this necessary institutional change, and to instill a culture that is truly consistent with the demands of national security intelligence operations. In our view, while the FBI has made steps in the right direction since September 11, it still has many miles to travel. Reform will require enormous commitment and effort within the FBI, as well as sustained outside coordination and oversight. And despite the many benefits associated with having a combined law enforcement and intelligence agency, we recommend that policymakers re-evaluate the wisdom of creating a separate agency—an equivalent to the British “MI-5”—dedicated to intelligence collection in the United States should there be a continued failure to institute the reforms necessary to transform the FBI into the intelligence organization it must become.

ENDING THE TURF WAR BETWEEN THE FBI AND THE CIA

Recommendation 2

The DNI should ensure that there are effective mechanisms for preventing conflicts and encouraging coordination among intelligence agencies in the United States.

Both CIA and the FBI have long had responsibilities for foreign intelligence collection in the United States, subject in both cases to Attorney General oversight.⁷⁷ If anything, the need for continued activity on the part of both agencies will only increase. Valuable foreign assets and lucrative targets can come

and go across our borders practically as they please. The Intelligence Community must be as agile and flexible as their target's travel plans.

The past four years have witnessed many instances of exemplary and ongoing cooperation between CIA and FBI; the two agencies have, among other achievements, increased joint operations and successfully worked together against several hard target countries.⁷⁸ But clashes have become all too common as well, particularly in the context of intelligence gathered in the United States. When sources provide information to both agencies, the FBI complains that conflicting or duplicative reports go up the chain, causing circular or otherwise misleading streams of reporting.⁷⁹ In response, CIA claims that FBI headquarters is more concerned about credit for intelligence production than the quality of its reporting.⁸⁰ If the agencies' fight were limited to disputes about who gets credit for intelligence reports, it would be far less alarming. Unfortunately, it extends beyond headquarters and into the field, where lives are at stake.

Overseas, lack of cooperation between CIA and FBI has resulted in clashes over interaction with foreign liaison services and over coordination of other activities.⁸¹ Both agencies agree that lack of coordination has jeopardized ongoing intelligence activities.⁸²

Moreover, officials from CIA's Counterterrorist Center told us that they have difficulty tracking and obtaining information about terrorist cases after they hand them off to the FBI—as they must do when the focus of a case shifts from overseas to the territorial United States.⁸³ The failure of CIA and FBI to cooperate and share information adequately on such cases could potentially create a gap in the coverage of these threats, like the one the September 11 attack plotters were able to exploit.⁸⁴

These conflicts between agencies that should regard each other as compatriots signal the need for a strong Intelligence Community leader with effective, acknowledged authority over both CIA and FBI—for a DNI, in fact.

In our view, the primary source of friction concerns the FBI's desire to expand its current authorities relative to intelligence activities and production within the United States. The FBI is, of course, the largest and most active collector of intelligence inside the United States, but the CIA has long had officers collecting intelligence in the United States as well. In December 2004, the FBI pro-

posed a new Memorandum of Understanding to govern intelligence coordination between the FBI and CIA.⁸⁵ The FBI's proposed guidelines exhibit the Bureau's desire for new controls over other agencies' activities and intelligence production in the United States. At least some in CIA have interpreted the FBI's recent initiatives as an attempt by the Bureau to gain control over CIA operations in the United States.⁸⁶

The Commission asked the FBI to identify significant risks or problems associated with continuing to allow CIA to carry out non-intrusive foreign intelligence activities inside the United States under existing guidelines and authorities. The Bureau responded that lack of coordination has occasionally resulted in different agencies identifying the same targets, recruiting the same sources, and disseminating circular reporting.⁸⁷ The FBI's draft Memorandum of Understanding appears, however, to be an extreme reaction to these concerns. While we cannot discuss the details of the FBI's proposed Memorandum in an unclassified report, we believe that the Bureau's proposal establishes procedures that are overly burdensome and counterproductive to effective intelligence gathering.

The FBI's generalized statements about the need for coordination do not justify the kinds of restraints that it is seeking to impose. To the extent that the FBI is seeking to impose constraints on the CIA that parallel those that the CIA imposes on FBI operations abroad, the analogy is misguided. Foreign operations often occur in a hostile environment where lack of coordination can be fatal and U.S. embassies provide a logical focal point for coordinating intelligence activities in that country. Neither is true of activities inside the United States.

In claiming new territory, the FBI has argued that it is too hard to define assets or to place them in counterintelligence, counterterrorism, or foreign intelligence "boxes."⁸⁸ We think this is all the more reason to have a fluid system for coordination—where both agencies are involved in the collection of foreign intelligence in the United States and conflicts are resolved by the DNI (or the Attorney General if it is a question of what U.S. law permits). Only increased cooperation, better procedures to accomplish it, and responsiveness to strong national leadership will help to resolve conflicts when they occur. The days of negotiated treaties among sovereign intelligence agencies are over, or should be. This dispute should be resolved by the DNI and monitored to ensure consistent improvement.

Bringing the FBI's national security elements under the direction of the DNI will be a significant step towards achieving this increased agility and simultaneously ensuring that the Intelligence Community agencies act in concert against foreign intelligence targets. In addition to developing effective mechanisms for coordination, the DNI will need authority to arbitrate between agencies in instances of conflict, an authority the DNI will only have if the FBI becomes a fully responsive and accountable member of the Intelligence Community.

A final, and critical, point: in exercising this authority, we expect the DNI to require scrupulous adherence to Attorney General Guidelines designed to protect civil liberties. Nothing in our call for greater coordination between the FBI and CIA is meant to alter *in any way* existing civil liberties protections. The best way to protect civil liberties is not by favoring one agency over another but by ensuring that every agency adheres to the law. That is the purpose of the Attorney General's Guidelines, which establish rules both for FBI national security investigations and foreign intelligence collection,⁸⁹ and for the CIA's foreign intelligence and counterintelligence activities in the United States.⁹⁰ The Guidelines strictly delineate the manner in which each agency can conduct operations, providing the clarity necessary to protect civil liberties. Perhaps most importantly, both sets of Guidelines make clear that the CIA must turn to the FBI, which must in turn obtain either Justice Department or court approval, for *any* remotely invasive or non-consensual activity, such as searches, electronic surveillance, or non-consensual interviews within the United States.⁹¹ Coordination will not change any of these rules; indeed, giving the DNI coordinating authority without revising the Guidelines will likely enhance the protection of civil liberties, for it will ensure that all domestic collection is carefully supervised, coordinated, and directed.

THE DEPARTMENT OF JUSTICE: THE REMAINING REORGANIZATION

Recommendation 3

The Department of Justice's primary national security elements—the Office of Intelligence Policy and Review, and the Counterterrorism and Counterespionage sections—should be placed under a new Assistant Attorney General for National Security.

In the wake of September 11, much criticism rightly focused on legal and procedural impediments to information sharing—the proverbial “wall”—between U.S. law enforcement agents and intelligence officers. As a result, all three branches of government dismantled the dividing elements between these two functions. Major changes were made at the CIA, FBI, and Department of Homeland Security. The core organization of the Justice Department, however, did not change at all.

The Justice Department’s three primary national security components are located in different divisions, with no individual below the Deputy Attorney General who can supervise all three. The Office of Intelligence Policy and Review (OIPR) is responsible for FISA requests, representing the Department of Justice on intelligence-related committees, and advising the Attorney General on “all matters relating to the national security activities.”⁹² It is independent of any division and reports directly to the Deputy Attorney General. In contrast, both the Counterterrorism and Counterespionage sections are located in the Criminal Division, but they each report to two *different* Deputy Assistant Attorneys General. If there is method to this madness, neither we, nor any other official with whom we spoke, could identify it.

There is reason to believe that this awkward (and outdated) organizational scheme has created problems between the Justice Department and the Intelligence Community. In our classified report we describe one such problem that cannot be discussed in our unclassified report.

We believe that bringing the Office of Intelligence Policy and Review closer to its operational counterparts like the Counterespionage and Counterterrorism sections would give the office better insight into actual intelligence practices and make it better attuned to operational needs. Attorneys in the Counterterrorism and Counterespionage sections routinely work alongside FBI agents and other intelligence officers. By contrast, OIPR is largely viewed within the Department as an “assembly line operation not requiring any special grounding in the facts of a particular matter.”⁹³ OIPR’s job is to process and adjudicate FISA requests—not to follow a case from start to completion. One of the advantages of placing all three national security components under a single Assistant Attorney General is that they will see themselves as acting in concert to serve a common mission.⁹⁴

In our view, a more effective construct would place an Assistant Attorney General for National Security in charge of all three national security elements (OIPR, Counterespionage, and Counterterrorism).⁹⁵ This Assistant Attorney General would serve as a single focal point on all national security matters. The Assistant Attorney General would be responsible for reviewing FISA decisions and determining what more can be done to synthesize intelligence and law enforcement investigations. In an era when it is becoming increasingly incumbent upon organizations like the FBI to balance both their law enforcement and intelligence responsibilities, more thoughtful, innovative, and constructive legal guidance is in high demand.

A further possibility would be to create a new Associate Attorney General position that was responsible for both the Criminal Division and our recommended National Security Division.⁹⁶ This construct has the advantage of ensuring that criminal and national security measures are “merged” prior to reaching the Deputy Attorney General, who is responsible for operations within the entire Department of Justice extending far beyond criminal and national security matters. This structure also has the added benefit of providing the Justice Department with management levels more closely aligned with those of other departments (*i.e.*, the cabinet Secretary, a Deputy Secretary, and Under Secretaries).

Furthermore, this construct would align the Justice Department’s national security elements with the Intelligence Community. It would create a structure that is parallel to the one proposed for the FBI, and would highlight that Department of Justice attorneys are not just there to advise the Bureau if a matter becomes a criminal investigation. We believe this integration would make Justice more responsive to the FBI’s needs and perhaps better able to allocate resources to the national security mission in general.

THE DEPARTMENT OF HOMELAND SECURITY: MORE WALLS TO BREACH

The Department of Homeland Security is the primary repository for information about what passes in and out of the country—a critical player safeguarding the United States from nuclear, biological, or chemical attack. Yet since its inception Homeland Security has faced immense challenges in collecting information efficiently, making it available to analysts and users both inside

and outside the department, and bringing intelligence support to law enforcement and first responders who seek to act on such information.

Although we have included Homeland Security in our discussion of intelligence collection within the United States, we have not completed a detailed study of the Department's current capabilities. We will therefore make only one formal recommendation with respect to Homeland Security. Nonetheless, it is plain that Homeland Security faces challenges in all four of the roles it plays in the Intelligence Community—as collector, analyst, disseminator, and customer.

The Department of Homeland Security has no shortage of intelligence collectors. With 22 agencies, Homeland Security commands more than 180,000 personnel from the U.S. Coast Guard, Customs and Border Protection, Secret Service, Immigration and Customs Enforcement (ICE), Transportation Security Administration, and Office of Infrastructure Protection.⁹⁷ ICE has more than 3,000 employees.⁹⁸ ICE collects reams of data on foreigners entering the United States and manages the Student and Exchange Visitor Information System database, which includes information on foreign students studying in the United States. However, whether agencies like ICE are equipped to make this information available to the Intelligence Community in useable form remains unclear. ICE officials explained that they would not give other agencies unfettered access to their databases (despite those agencies' wishes) because of unspecified legal constraints.⁹⁹ We find this September 10th approach to information sharing troubling; it deserves careful scrutiny from the DNI and the new Secretary of Homeland Security, to ensure there is full information sharing consistent with intelligence needs and valid civil liberties concerns.

A critical Homeland Security function is disseminating threat information to law enforcement and other officials at the federal, state, local, and tribal level. The Department of Homeland Security currently faces many difficulties in this regard. According to one Homeland Security official, local law enforcement officials are currently “shotgunned” by the information flow coming from a variety of federal sources, and confused as to who has the lead in supporting their information and intelligence needs.¹⁰⁰ Senior officials at Homeland Security emphasize that the process of declassifying information takes too long and frequently prevents the department from quickly sharing concrete, actionable information with law enforcement.¹⁰¹ Instead, law enforcement officials often receive a steady stream of vague

threat reporting, unsupported by adequate sourcing, and incapable of serving as a basis for action.

Homeland Security's problems with sharing national security information do not end there. Like many other intelligence organizations, Department of Homeland Security officials expressed concerns about the lack of procedures for sharing intelligence across agencies. As an example, Homeland Security officials have expressed concern that they have no mechanism for getting answers to "hot questions" they pose to the FBI and the National Counterterrorism Center.¹⁰² Some of the obstacles to interagency collaboration are even more basic. As one senior Homeland Security official in the Information Analysis section remarked about the FBI, "I still can't send them an e-mail, and they can't send one back."¹⁰³ Finally, in a variation on a familiar theme, some law enforcement agents at Homeland Security have expressed unwillingness to share operational information out of concern that other agencies might seek to "steal" their cases.¹⁰⁴

Recommendation 4

The Secretary of Homeland Security should rescind Treasury Order 113-01 as it applies to Department of Homeland Security elements.

Homeland Security's approach to information sharing unfortunately draws sustenance from rules that Immigration and Customs Enforcement inherited from the Treasury Department. ICE currently operates under an old Treasury order (T.O. 113-01) regarding requests for assistance from the Intelligence Community.¹⁰⁵ Established in the wake of the Iran-Contra affair, this order requires that all requests by the Intelligence Community for assistance be reduced to writing and submitted for approval to the Secretary or Deputy Secretary of the Treasury. The order provides an exception only for "routine exchange between the Intelligence Community and the Department of the Treasury of substantive intelligence information and recurring reports."¹⁰⁶ It leaves the interpretation of what constitutes a "routine" exchange up to the head of the agency involved. The order apparently applies to all information sharing agreements between former Treasury elements of Homeland Security and the Intelligence Community, since they are not considered "routine."¹⁰⁷ When the Department of Homeland Security was created and Immigrations and Customs Enforcement was transferred to its jurisdiction, the order

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remained in effect, although oversight was shifted to the Under Secretary for Border and Transportation Security.¹⁰⁸

We find it highly disappointing that such a barrier to communication between law enforcement and intelligence agencies has survived in a department created to avoid the mistakes and miscommunication that led to the September 11 attacks. It should be rescinded, not extended. The default policy for personnel within Homeland Security component agencies should be to cooperate with requests for assistance and information sharing coming from the Intelligence Community, not to refer such requests to a lengthy and bureaucratic process practically designed to deter collaboration. We strongly recommend that the Secretary of Homeland Security promptly rescind Treasury Order 113-01 and replace it with a new order that ensures greater information sharing and collaboration between all entities of Homeland Security and the Intelligence Community. Similarly, we believe that the Department of the Treasury should evaluate whether its successor to Treasury Order 113-01 (Treasury Order 105-18) should be modified to effect smoother cooperation within the Intelligence Community.

ENDNOTES

¹ The FBI refers to itself in these terms. According to the FBI, “now that the Intelligence Program is established and developing, we are turning to the next stage of transforming the Bureau into an intelligence agency.” FBI, *The FBI’s Counterterrorism Program Since September 2001, Report to the National Commission on Terrorist Attacks upon the United States* (April 14, 2004) at p. 31. Director Mueller also refers to the FBI as “both a law enforcement and an intelligence agency.” *Testimony of Robert S. Mueller, III, Director, Federal Bureau of Investigation, Before the United States Senate Committee on the Judiciary* (May 20, 2004).

² Interview with U.S. Immigration and Customs Enforcement official (Feb. 28, 2005).

³ According to Director Mueller, in 2004, 30 percent of new hires had accounting, law enforcement, and military backgrounds. Interview with Robert Muller, FBI Director (Oct. 20, 2004).

⁴ *Final Report of the National Commission on Terrorist Attacks Upon the United States* (2004) at p. 425 (hereinafter “9/11 Commission Report”).

⁵ As a result of the FBI’s strategic plan of 1998, the Bureau created an Office of Intelligence. One year later, in November 1999, the FBI created an Investigative Services Division that subsumed the Office of Intelligence and was designed to “house a new Information, Analysis and Assessments Branch.” FBI, *Press Release* (Nov. 11, 1999). According to a 1999 FBI press release, the aim of the Investigative Services Division was to extract information from case files “and other existing sources to identify future trends and means of preventing crime and threats to national security. The FBI intends to increase its reliance on information analysts and to devote additional efforts to recruiting highly qualified persons to perform this function.” *Id.*

⁶ According to a 9/11 Commission staff statement, at the time that the Investigative Services Division was set up, an internal FBI review “found that 66 percent of the bureau’s analysts were not qualified to perform analytical duties....The new division did not succeed. FBI officials told us that it did not receive sufficient resources, and there was ongoing resistance to its creation from senior managers in the FBI’s operational divisions. Those managers feared losing control. They feared losing resources. They feared they would be unable to get the assistance they wanted from the new division’s analysts.” 9/11 Commission Staff Statement # 9, *Law Enforcement, Counterterrorism, and Intelligence Collection in the United States Prior to 9/11* (April 13, 2005) at pp. 5-6; see also Alfred Cumming and Todd Masse, *FBI Intelligence Reform Since September 11, 2001: Issues and Options for Congress* (CRS Report RL 32336) (updated Aug. 4, 2004) at p. 58.

⁷ Interview with FBI Directorate of Intelligence official (Jan. 19, 2005).

⁸ Interview with FBI Special Agent in Charge (Dec. 8, 2004) (using this example to describe how the demands on field offices may vary, in part, according to location).

⁹ *Id.*

¹⁰ Simply in quantitative terms, the majority of FBI’s reporting comes in the form of Intelligence Information Reports (IIRs), unfinished intelligence products. In recent years the Bureau has dramatically increased the number of IIRs it produces. Further details are provided in our classified report that we cannot reference here.

¹¹ FBI Directorate of Intelligence, *Report to the President of the United States: Comprehensive Plan for the FBI Intelligence Program with Performance Measures* (Feb. 16, 2005) at p. 28

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(hereinafter “FBI, Comprehensive Plan”).

¹² FBI Directorate of Intelligence, *Cincinnati Division Field Intelligence Group On-Site Review* (Oct. 13, 2004) at p. 6.

¹³ National Academy of Public Administration, *Transforming the FBI: Progress and Challenges* (Jan. 2005) at p. xv. The report notes that “[i]n-depth strategic collection and analysis efforts tend to be deferred at the FBI.” *Id.*

¹⁴ Further details are provided in our classified report that we cannot reference here. In Fiscal Year 2004, the FBI published 250 Intelligence Assessments. FBI, *Office of Intelligence Response to Request # 15* (Jan. 5, 2005).

¹⁵ Interview with FBI official (Oct. 22, 2004).

¹⁶ 9/11 Commission Staff Statement # 9, *Law Enforcement, Counterterrorism, and Intelligence Collection in the United States Prior to 9/11* (April 13, 2004) at p. 9.

¹⁷ FBI Directorate of Intelligence, *Office of Intelligence On-Site Review of Field Intelligence Groups* (Sept. 10, 2004) at p. 6.

¹⁸ Currently 25 percent of the Bureau’s analytic cadre has an advanced degree. Interview with FBI Directorate of Intelligence official (Oct. 18, 2004). In comparison, 60 percent of analysts in CIA’s Directorate of Intelligence have an advanced degree. Interview with CIA Directorate of Intelligence Human Resources official (Jan. 10, 2005).

¹⁹ The failure to communicate fabrication notices properly was, specifically, a problem for Defense HUMINT Service. Chapter One (Iraq).

²⁰ Interview with FBI counterintelligence official (Feb. 18, 2005).

²¹ *Id.*

²² *See, e.g.*, Interview with FBI Field Intelligence Group official (Feb. 3, 2005).

²³ Interview with FBI official (Jan. 24, 2005).

²⁴ Senator Shelby wrote, “The FBI has never taken information technology very seriously, and has found itself left with an entirely obsolete information technology 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.” Richard C. Shelby, Vice Chairman, Senate Select Committee on Intelligence, *September 11 and the Imperative of Reform in the U.S. Intelligence Community* (Dec. 10, 2002) at p. 72.

²⁵ *Testimony of Robert S. Mueller, III, Director, Federal Bureau of Investigation, Before the United States Senate Committee on the Judiciary* (May 20, 2004) (“Our goal is to deliver Virtual Case File capabilities by the end of this year”).

²⁶ National Research Council of the National Academies, James C. McGroddy and Herbert S. Lin (Eds.), *A Review of the FBI’s Trilogy Information Technology Modernization Program* (2004) at pp. 3-4, 26.

²⁷ Interview with FBI official (Dec. 15, 2004).

²⁸ FBI Directorate of Intelligence, *Response to Commission FBI Request # 15* (Jan. 5, 2005).

²⁹ The FBI has a total of 12,254 Special Agents. Interview with FBI Directorate of Intelligence official (Jan. 19, 2005).

³⁰ Executive Order No. 12333 (Dec. 4, 1981) at § 1.14(a).

³¹ Intelligence Reform and Terrorism Prevention Act of 2004 at § 1011, Pub. L. No. 108-

458 (hereinafter “IRTPA”).

³² *Id.*

³³ *Id.*

³⁴ *See, e.g.*, Interview with FBI official (March 7, 2005).

³⁵ *See, e.g.*, Interview with Office of Management and Budget officials (Feb. 8, 2005). While the FBI’s NIP dollars are *appropriated* through the House Subcommittee on Science, State, Justice, and Commerce, and Related Agencies and the Senate Subcommittee on Commerce, Justice, and Science, these dollars are *identified* as part of the NIP budget.

³⁶ FBI, *National Foreign Intelligence Program FY 2005 President’s Request* (Jan. 27, 2004).

³⁷ Interview with Office of Management and Budget officials (Feb. 8, 2005).

³⁸ IRTPA at § 1014(b)(2)(H).

³⁹ *Id.* at § 2001(f); *see also* 9/11 Commission Report at p. 426 (recommending that the FBI “align its budget structure according to its four main programs...to ensure better transparency on program costs, management of resources, and protection of the intelligence program”).

⁴⁰ FBI, Comprehensive Plan at p. 9.

⁴¹ *Id.* at p. 10 (noting that the FY 2005 Intelligence Decision Unit Budget is \$819,108,658 and that 39 percent of the Intelligence Decision Unit Budget goes to the Directorate of Intelligence, Criminal program, and Administrative Support combined). The Directorate of Intelligence, Criminal Division, and Administrative Support are not included in the National Intelligence Program budget. FBI, *National Foreign Intelligence Program FY 2005 President’s Request* (Jan. 27, 2004); *see also* Interview with Office of Management and Budget official (March 16, 2005).

⁴² FBI, Comprehensive Plan at p. 9.

⁴³ Interview with Office of Management and Budget official (March 8, 2005).

⁴⁴ FBI, Comprehensive Plan at p. 10.

⁴⁵ *Id.*

⁴⁶ Interview with Office of Management and Budget official (March 8, 2005) (suggesting, nevertheless, that several of the Executive Assistant Director’s various specific budgetary authorities relative to the Intelligence Decision Unit may be currently undetermined). FBI states that the only individual with budget execution authority is the Director of the FBI. Interview with FBI official (March 7, 2005).

⁴⁷ FBI, Comprehensive Plan at p. 10.

⁴⁸ IRTPA at § 1014.

⁴⁹ *The Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations* (May 30, 2002) at p. ii.

⁵⁰ IRTPA at § 1014(b)(2)(H).

⁵¹ *Id.* at § 2002(c).

⁵² *Id.* at § 2002(c)(1) & (3).

⁵³ FBI, Comprehensive Plan at p. 15. The Directorate of Intelligence indicates that field intelligence operations constitute the process of “identify[ing]” intelligence gaps, “lev[ying]” requirements as “tasks,” providing “support” to the intelligence cycle, “conduct[ing]” intelli-

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gence assessments” and “know[ing] and report[ing] the scope and extent of [Field Office] collection capabilities.” *Id.* at pp. 3-4. In some cases, Field Intelligence Groups are like other FBI field office components, or “squads” (*e.g.*, counterterrorism, counterintelligence, criminal, and cybercrime). In other cases, they are more nascent and embedded in existing operational squads. FBI Directorate of Intelligence, *FBI Field Office Intelligence Operations: Concept of Operations* (Aug. 2003) at p. 2.

⁵⁴ FBI, *Response to Commission FBI Request # 16-1 through 16-10* (Feb. 3, 2005) at pp. 3-4.

⁵⁵ Interview with FBI Directorate of Intelligence officials (Nov. 18, 2004).

⁵⁶ Interview with FBI official (Jan. 18, 2005); Interview with FBI Field Intelligence Group official (Feb. 3, 2005).

⁵⁷ FBI, Directorate of Intelligence, *Columbia Division Field Intelligence Group On-Site Review* (Jan. 3, 2005) at p. 12.

⁵⁸ 9/11 Commission Report at p. 423.

⁵⁹ Interview with Directorate of Intelligence official (Jan. 19, 2005). In contrast, the FBI’s operational divisions are explicitly given authorities to task field offices as well as initiate and terminate cases.

⁶⁰ FBI, Comprehensive Plan at p. 15.

⁶¹ As defined, the Field Intelligence Groups do not have authorities to drive counterintelligence and counterterrorism investigations, collections, and operations. Interview with Directorate of Intelligence official (March 8, 2005).

⁶² FBI Directorate of Intelligence, *Response to Commission FBI Request # 15* (Jan. 5, 2005).

⁶³ FBI Directorate of Intelligence, *Response to Commission FBI Request # 10* (Sept. 30, 2004).

⁶⁴ IRTPA at § 2002(c)(6).

⁶⁵ Interview with Directorate of Intelligence official (Jan. 19, 2005). As noted earlier, the Bureau has stated that it plans on adding a strategic analysis unit to the Directorate of Intelligence. However, it is not clear whether this unit will conduct strategic analysis or instead provide guidance for the field offices on how to produce such reporting. FBI, Comprehensive Plan at p. 28.

⁶⁶ Interview with Directorate of Intelligence official (Jan. 19, 2005).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ They are a Deputy Assistant Director in the Counterterrorism Division (an evaluation that is then reviewed by the head of the Counterterrorism Division) and two section chiefs in the Criminal and Counterintelligence Divisions. In the first case, the Deputy Assistant Director is rated by one component of the FBI and reviewed by another. Even more peculiar, while the Directorate of Intelligence has rating authority for a Deputy Assistant Director in Counterterrorism, in the Criminal and Counterintelligence Divisions the Assistant Director of the Directorate of Intelligence is the rating official for a Section Chief. *Id.*

⁷² Interview with Directorate of Intelligence official (March 8, 2005). Although the Assistant Director of the Directorate of Intelligence does not rate the heads of the field offices like the Assistant Directors in these other divisions, the Assistant Director does provide *input* into these evaluations. *Id.* The Assistant Directors in FBI's Counterintelligence, Counterterrorism, and Criminal Divisions rate the heads of FBI's 56 field offices on a rotating basis.

⁷³ *Id.*

⁷⁴ IRTPA at § 1073.

⁷⁵ This was one proposal that the 9/11 Commission considered. According to the 9/11 Commission Report, "we have considered proposals for a new agency dedicated to intelligence collection in the United States....We do not recommend the creation of a new domestic intelligence agency. It is not needed if our other recommendations are adopted—to establish a strong national intelligence center, part of the NCTC, that will oversee counterterrorism intelligence work, foreign and domestic, and to create a National Intelligence Director who can set and enforce standards for the collection, processing, and reporting of information." 9/11 Commission Report at p. 423.

⁷⁶ *Id.* at p. 425.

⁷⁷ According to Executive Order 12333, CIA shall "[c]ollect, produce, and disseminate foreign intelligence and counterintelligence, including information not otherwise obtainable. The collection of foreign intelligence or counterintelligence within the United States shall be coordinated with the FBI as required by procedures agreed upon by the Director of Central Intelligence and the Attorney General." Executive Order 12333 at § 1.8(a). The FBI shall "[c]onduct within the United States, when requested by officials of the Intelligence Community designated by the President, activities undertaken to collect foreign intelligence or support foreign intelligence collection requirements of other agencies within the Intelligence Community, or, when requested by the Director of the National Security Agency, to support communications security activities of the United States Government; produce and disseminate foreign intelligence and counterintelligence." *Id.* at § 1.14 (c)(d). According to the Intelligence Reform and Terrorism Prevention Act of 2004, the CIA shall "provide overall direction for and coordination of the collection of national intelligence outside the United States through human sources by elements of the Intelligence Community authorized to undertake such collection." *Id.* at § 1011. The act is silent on CIA's domestic responsibilities for foreign intelligence.

⁷⁸ Classified CIA report.

⁷⁹ Interview with senior FBI officials (Dec. 22, 2005).

⁸⁰ Classified CIA report.

⁸¹ *Id.*

⁸² *Id.*; FBI, *Response to Commission FBI Request # 16* (Feb. 3, 2005).

⁸³ Interview with Counterterrorist Center WMD Unit official (Oct. 22, 2004).

⁸⁴ 9/11 Commission Report at p. 263.

⁸⁵ FBI, *Draft Memorandum of Understanding Between the Central Intelligence Agency and the Federal Bureau of Investigation Concerning the Coordination of CIA Activities in the United States and FBI Activities Abroad* (Dec. 13, 2004) (hereinafter "FBI Draft MOU").

⁸⁶ Classified CIA report.

⁸⁷ FBI, *Response to Commission FBI Request # 16* (Feb. 3, 2005).

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⁸⁸ Interview with FBI official (Dec. 22, 2004).

⁸⁹ *The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection* (Oct. 31, 2003).

⁹⁰ CIA, *Guidance for CIA Activities Within the United States* (HR 7-1) (Dec. 23, 1987) at Annex B.

⁹¹ *Id.* In a submission to the Commission, the Center for National Security Studies expressed serious concerns about the degree to which the CIA's domestic activities were regulated. See generally Letter to the Commission from Kate Martin, Center for National Security Studies, *Re: Intelligence Activities in the U.S.: Current Proposals' Risks to Civil Liberties* (Feb. 16, 2005). More specifically, the Center recommended that the CIA's activities "be carried out pursuant to guidelines that are written by the Attorney General." *Id.* at p. 8. As we have just noted, this is already the case. And although we cannot, due to classification, discuss details of the current Attorney General-approved guidelines that regulate the CIA's activities in the United States, we can say that the guidelines are highly detailed and significantly *more* restrictive than those applicable to the FBI. Furthermore, the Department of Defense is subject to similar Attorney General guidelines for Defense Department intelligence activities affecting U.S. persons. Department of Defense, DoD Regulation 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons* (Dec. 1982).

⁹² Department of Justice, *Office of Intelligence Policy and Review* (Dec. 12, 2003) available at <http://www.usdoj.gov/oipr> (accessed March 12, 2005).

⁹³ *Final Report of the Attorney General's Review Team on the Handling of the Los Alamos National Laboratory Investigation* (May 2000) at p. 767 (hereinafter "Bellows Report").

⁹⁴ The Bellows Report identifies a further reason to have a single individual below the Deputy Attorney General to supervise OIPR: the need to have a single individual who is knowledgeable about FISA to review FISA applications that are rejected by OIPR. *Id.* at pp. 767-768. The lack of such an individual in the Wen Ho Lee investigation caused serious problems. An Assistant Attorney General for National Security would fit the bill perfectly.

⁹⁵ Prior to the Church and Pike investigations, the Department of Justice had such a unit. Since September 11, Justice officials have considered, but not pressed forward, with such a reorganization. Interview with former Assistant Attorney General (Nov. 30, 2004).

⁹⁶ The Department currently has a single Associate Attorney General who supervises the Civil Rights, Antitrust, Tax, Civil, and Environmental Divisions, along with several other smaller offices. Department of Justice Organizational Chart (July 14, 2003). There is no such intermediary between the Criminal Division (and several other offices) and the Deputy Attorney General.

⁹⁷ Interview with Department of Homeland Security Information Analysis and Infrastructure Protection official (Oct. 7, 2004).

⁹⁸ *Id.*

⁹⁹ Interview with Immigration and Customs Enforcement officials (Sept. 27, 2004).

¹⁰⁰ Interview with Department of Homeland Security Office of State and Local Coordination official (Dec. 9, 2004).

¹⁰¹ Interview with Department of Homeland Security Information Analysis and Infrastructure Protection official (Jan. 6, 2005).

¹⁰² Interview with Department of Homeland Security Information Analysis and Infrastruc-

ture Protection official (Dec. 17, 2004)

¹⁰³ Interview with Department of Homeland Security Information Analysis and Infrastructure Protection official (Oct. 7, 2004).

¹⁰⁴ Interview with Department of Homeland Security official (Jan. 6, 2005).

¹⁰⁵ Treasury Order 113-01 (Dec. 19, 2002) (superseding provision of same order).

¹⁰⁶ *Id.* at § 4.

¹⁰⁷ Interview with Department of Homeland Security Office of General Counsel official (March 2, 2005).

¹⁰⁸ Homeland Security Act of 2002 § 1512, Pub. L. No 107-296 (providing that the orders of an agency transferred to DHS shall remain in effect according to their terms until lawfully amended, superseded, or terminated).

