

CRS Report for Congress

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FBI Intelligence Reform Since September 11, 2001: Issues and Options for Congress

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FBI Intelligence Reform Since September 11, 2001: Issues and Options for Congress

Summary

The Intelligence Community, including the Federal Bureau of Investigation (FBI), has been criticized for failing to warn of the attacks of September 11, 2001. In a sweeping indictment of the FBI's intelligence activities relating to counterterrorism and September 11, the Congressional Joint Inquiry Into the Terrorist Attacks of September 11, 2001, singled out the FBI in a significant manner for failing to focus on the domestic terrorist threat; collect useful intelligence; analyze strategic intelligence; and to share intelligence internally and with other members of the Intelligence Community. The Joint Inquiry concluded that the FBI was seriously deficient in identifying, reporting on, and defending against the foreign terrorist threat to the United States.

The FBI is responding by attempting to transform itself into an agency that can prevent terrorist acts, rather than react to them as crimes. The major component of this effort is restructuring and upgrading of its various intelligence support units into a formal and integrated intelligence program, which includes the adoption of new operational practices, and the improvement of its information technology. FBI Director Robert S. Mueller, III, has introduced reforms to curb the autonomy of the organization's 56 field offices by consolidating and centralizing FBI Headquarters control over all counterterrorism and counterintelligence cases. He has also established (1) an Executive Assistant Director for Intelligence (EAD-I); (2) an Office of Intelligence to exercise control over the FBI's historically fragmented intelligence elements; and (3) field intelligence groups to collect, analyze, and disseminate intelligence.

Reactions to these FBI reforms are mixed. Critics contend the reforms are too limited and have implementation problems. More fundamentally, they argue that the gulf between law enforcement and intelligence cultures is so wide, that the FBI's reforms, as proposed, are unlikely to succeed. They believe the FBI will remain essentially a reactive law enforcement agency, significantly constrained in its ability to collect and exploit effectively intelligence in preventing terrorist acts.

Supporters counter that the FBI can successfully address its deficiencies, particularly its intelligence shortcomings, and that the Director's intelligence reforms are appropriate for what needs to be done. They argue that the FBI is unique among federal agencies, because it supplies the critical ingredient to a successful war against terrorism in the U.S. — unmatched law enforcement capabilities integrated with an improving intelligence program.

The congressional oversight role includes deciding on whether to accept, modify, or reject the FBI's intelligence reforms currently underway. Congress may consider several options, ranging from support of the FBI's current reforms, to establishing a stand-alone domestic intelligence service entirely independent of the FBI. Congress may also reevaluate how it conducts oversight of the FBI. Pending legislation on FBI intelligence reform includes, but is not limited to, S. 410, The

Foreign Intelligence Collection Improvement Act of 2003, and S. 1520, The 9-11 Memorial Intelligence Reform Act.

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FBI Intelligence Reform Since September 11, 2001: Issues and Options for Congress

Introduction¹

The September 11, 2001 terrorist attacks on the United States have been labeled as a major intelligence failure, similar in magnitude to that associated with the Japanese attack on Pearl Harbor.² In response to criticisms of its role in this failure, the Federal Bureau of Investigation (FBI) has introduced a series of reforms to transform the Bureau from a largely reactive law enforcement agency focused on criminal investigations into a more mobile, agile, flexible, intelligence-driven³ agency that can prevent acts of terrorism.

FBI Director Robert S. Mueller, III initiated changes that were sparked by congressional charges that the Intelligence Community (IC),⁴ including the FBI, missed opportunities to prevent, or at least, disrupt the September 11 attacks on New York City and Washington. In a sweeping indictment of the FBI's intelligence activities relating to counterterrorism, the Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001,⁵ (JIC)

¹ While the FBI initially provided the authors access to FBI officials and documents, it later declined to do so, despite numerous requests. Although this paper would have benefitted from continued cooperation, the authors note with gratitude that some FBI officials continued to share their insights into the current reforms. Numerous current and former employees of the FBI and Central Intelligence Agency (CIA), as well as state and local law enforcement entities, were interviewed for this report. Some sources wish to remain anonymous and, therefore, have not been identified by name in this report.

² William E. Odom, *Fixing Intelligence for a More Secure America* (New Haven, CT: Yale University Press, 2003), p. 187.

³ For purposes of this report, intelligence is defined to include foreign intelligence, counterintelligence and criminal intelligence. For a statutory definition of each see **Appendix 1**. For a brief summary of the FBI's traditional role in intelligence, see **Appendix 2**. Finally, **Appendix 3** provides a brief history of FBI intelligence.

⁴ The IC is comprised of 15 agencies: the Central Intelligence Agency; the National Security Agency, the Defense Intelligence Agency; the National Geospatial-Intelligence Agency; the National Reconnaissance Office; the intelligence elements of the Army, Navy, Air Force, and Marine Corps; the Federal Bureau of Investigation; the Department of the Treasury; the Department of Energy; the Coast Guard; the Bureau of Intelligence and Research of the Department of State; and; the Department of Homeland Security.

⁵ See *Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001*, a report of the U.S. Congress, Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence, S.Rept. 107-351; (continued...)

criticized the FBI for failing to focus on the terrorist threat domestically; collect useful intelligence; strategically analyze intelligence,⁶ and to share intelligence internally, and with the rest of the IC. According to the congressional inquiry, the FBI was incapable of producing significant intelligence products, and was seriously handicapped in its efforts to identify, report on⁷ and defend against the foreign terrorist threat to the United States.⁸

Observers believe successful FBI reform will depend in large measure on whether the FBI can strengthen what critics have characterized as its historically neglected and weak intelligence program, particularly in the area of strategic analysis. They contend the FBI must improve its ability to collect, analyze and disseminate domestic intelligence so that it can help federal, state and local officials stop terrorists before they strike. If the FBI is viewed as failing this fundamental litmus test, they argue, confidence in any beefed up intelligence program will quickly erode.

Critics contend the FBI's intelligence reforms are moving too slowly⁹ and are too limited.¹⁰ They argue that the FBI's deeply rooted law enforcement culture and its reactive practice of investigating crimes after the fact,¹¹ will undermine efforts to transform the FBI into a proactive agency able to develop and use intelligence to prevent terrorism (for a more detailed discussion of the FBI's reactive "case file"

⁵ (...continued)

H.Rept. 107-792, Dec. 2002, pp. xv, xvi, 37-39, 337-338. (Hereafter cited as *JIC Inquiry*)

⁶ An analyst conducts counterterrorism strategic intelligence analysis in order to develop a national and international understanding of terrorist threat trends and patterns, as well as common operational methods and practices. An analyst conducts tactical counterterrorism analysis in order to support specific criminal or national security-oriented cases and operations. While not mutually exclusive, each type of analysis requires a unique set of analytical methodologies and research skills.

⁷ See the *JIC Inquiry*, p. 37.

⁸ *Ibid.*, p. 39.

⁹ See "Statement of John MacGaffin to the National Commission on Terrorist Attacks Upon the United States," Dec. 8, 2003. MacGaffin testified, "In the domestic context, it is clear that the FBI needs to improve greatly its intelligence collection so that there are meaningful "dots" to connect and analyze. Some observers believe the FBI since 9/11 has made real progress in this direction. I and many others do not."

¹⁰ A former senior FBI official stated in an Aug. 21, 2003 interview that if FBI Director Mueller was serious about achieving more than a limited reform, he would establish an intelligence career path. To date the Director has not implemented fully an intelligence career path for special agents.

¹¹ Fourth Annual Report to the President and Congress of the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction, *Implementing the National Strategy*, Dec. 15, 2002, pp. 43-44. (Hereafter cited as Gilmore Commission, *Fourth Annual Report to the President and Congress*.) Organizational culture is a product of many factors, including, but not limited to, an organization's history, mission, self-image, client base and structure. According to William E. Odom, former Director of the National Security Agency, however, organizational culture is principally the product of structural conditions. See William E. Odom, *Fixing Intelligence for a More Secure America*, p. 3.

approach, see **Appendix 4**). While the British Security Service (MI-5) may or may not be an appropriate organizational model for U.S. domestic intelligence for myriad reasons, the primacy it accords to intelligence functions over law enforcement interests may be worthy of consideration.¹² In justifying their pessimism, critics cite two previous failed attempts by the FBI to reform its intelligence program (for a more detailed discussion, see **Appendix 5**).

Critics also question whether Director Mueller, who has an extensive background in criminal prosecution but lacks experience in the intelligence field,¹³ sufficiently understands the role of intelligence to be able to lead an overhaul of the FBI's intelligence operation.¹⁴

Supporters counter that they believe the FBI can change, that its shortcomings are fixable, and that the Director's intelligence reforms are appropriate, focused and will produce the needed changes.¹⁵ They also argue that a successful war against terrorism demands that law enforcement and intelligence are closely linked. And they maintain that the FBI is institutionally able to provide an integrated approach, because it already combines both law enforcement and intelligence functions.¹⁶

A major role for Congress is whether to accept, modify or reject the FBI's intelligence reforms. Whether lawmakers believe the FBI to be capable of meaningful reform, and the Director's reforms to be the correct ones, could determine whether they accept or modify his changes, or eliminate them altogether in favor of a new separate domestic intelligence agency entirely independent of the FBI, as some have advocated.¹⁷

This report examines the FBI's intelligence program and its reform. Specifically, the section covers a number of issues that Congress might explore as part of its oversight responsibilities, to develop and understanding of how well the FBI is progressing in its reform efforts. The following section outlines the advantages and disadvantages of several congressional options to make further

¹² For an analysis of the applicability of Great Britain's MI-5 model to the U.S., see CRS Report RL31920, *Domestic Intelligence in the United Kingdom: Applicability of the MI-5 Model to the United States*, by Todd Masse.

¹³ Director Mueller has headed the Department of Justice Criminal Division, served as U.S. Attorney in San Francisco, and generally focused on criminal prosecution during his career.

¹⁴ Interview with a former senior FBI official, with an extensive intelligence background, Aug. 21, 2003.

¹⁵ See statement of William P. Barr, Former Attorney General of the United States, in U.S. Congress, House Permanent Select Committee on Intelligence, Oct. 30, 2003, p. 14.

¹⁶ *Ibid.*, pp. 16-17.

¹⁷ See the Gilmore Commission, *Fourth Annual Report to the President and Congress*. pp. 43-44.

changes to the FBI's intelligence program.¹⁸ Finally, a number of appendices concerning contextual issues surrounding FBI intelligence reform are provided.

FBI Intelligence Reforms

The FBI is responding to the numerous shortcomings outlined by the JIC by attempting to transform itself into an agency that can prevent terrorist acts, rather than react to them as criminal acts. The major component of this effort is the restructuring and upgrading of its various intelligence support units into a formal and integrated intelligence program, which includes the adoption of new operational practices, and the improvement of its information technology. FBI Director Robert S. Mueller, III, has introduced reforms to curb the autonomy of the organization's 56 field offices by consolidating and centralizing FBI Headquarters control over all counterterrorism and counterintelligence cases. He has also established (1) an Executive Assistant Director for Intelligence (EAD-I); (2) an Office of Intelligence to exercise control over the FBI's historically fragmented intelligence elements; and (3) field intelligence groups to collect, analyze, and disseminate intelligence. The FBI also has reallocated its resources in an effort to establish an effective and efficient intelligence program.

The reforms are intended to address the numerous perceived shortcomings, including those outlined by the *JIC Inquiry*, which concluded the FBI failed to

- *Focus on the domestic threat.* “The FBI was unable to identify and monitor effectively the extent of activity by al-Qaida and other international terrorist groups operating in the United States.”¹⁹
- *Conduct all-source analysis.*²⁰ “... The FBI's traditional reliance on an aggressive, case-oriented, law enforcement approach did not encourage the broader collection and analysis efforts that are critical to the intelligence mission. Lacking appropriate personnel, training, and information systems, the FBI primarily gathered intelligence to support specific investigations, not to conduct all-source analysis for dissemination to other intelligence agencies.”²¹
- *Centralize a nationally-coordinated effort to gain intelligence on Osama Bin Laden and al-Qaida.* “... The FBI's 56 field offices enjoy a great deal of latitude in managing their work consistent with the dynamic and reactive nature of its traditional law enforcement

¹⁸ The Congressional Research Service has recently published a related report on the FBI. For a history of the FBI, see CRS Report RL32095, *The FBI: Past, Present and Future*, by Todd Masse and William Krouse.

¹⁹ See the *JIC Inquiry*, p. xv.

²⁰ All-source intelligence analysis is that analysis which is based on all available collection sources.

²¹ See the *JIC Inquiry*, p. 37.

mission. In counterterrorism efforts, however, that flexibility apparently served to dilute the FBI's national focus on Bin Laden and al-Qaida."²²

- *Conduct counterterrorism strategic analysis.* “Consistent with its traditional law enforcement mission, the FBI was, before September 11, a reactive, operationally-driven organization that did not value strategic analysis ... most (FBI consumers) viewed strategic analytical products as academic and of little use in ongoing operations.”²³
- *Develop effective information technology systems.* The FBI relied upon “... outdated and insufficient technical systems...”²⁴

Business Process Changes

In an attempt to transform and upgrade its intelligence program, the FBI is changing how it processes intelligence by formally embracing the traditional intelligence cycle, a long-time practice followed by the rest of the IC. It also is centralizing control over its national security operations at FBI Headquarters.

The Intelligence Cycle. FBI is attempting to formalize and discipline its approach to intelligence by embracing the traditional intelligence cycle, a process through which (1) intelligence collection priorities are identified by national level officials, (2) priorities are communicated to the collectors who collect this information through various human and national technical means, (3) the analysis and evaluation of this raw intelligence are converted into finished intelligence products, (4) finished intelligence products are disseminated to consumers inside and outside the FBI and Department of Justice, and (5) a feedback mechanism is created to provide collectors, analysts and collection requirements officials with consumer assessment of intelligence value. (See **Figure 1**, below). To advance that effort, the Executive Assistant Director for Intelligence (EAD-I) has developed and issued nine so-called concepts of operations, which essentially constitute a strategic plan identifying those areas in which changes must be made. These changes are seen as necessary if the FBI is to successfully establish an effective intelligence program that is both internally coordinated and integrated with its Intelligence Community counterparts.

²² Ibid., pp. 38-39.

²³ Ibid., pp. 337-338.

²⁴ Ibid., p. xvi.

Figure 1: The Intelligence Cycle



Source: [<http://www.fbi.gov>], as altered by the Congressional Research Service

The FBI also is trying to improve and upgrade its functional capabilities at each step along the cycle. Success may turn, in part, on the performance of the new Office of Intelligence, which has the responsibility to "... manage and satisfy needs for the collection, production and dissemination of intelligence" within the FBI and to

ensure requirements “levied on the FBI by national, international, state and local agencies” are met.²⁵

FBI officials say their objective is to better focus intelligence collection against terrorists operating in the U.S. through improved strategic analysis that can identify gaps in their knowledge. As will be addressed later in the “Issues for Congress” section, the FBI faces numerous challenges as it formalizes its activities in each element of the intelligence cycle.

Centralized Headquarters Authority. Following September 11, Director Mueller announced that henceforth, the FBI’s top three priorities would be counterterrorism, counterintelligence and cyber crime, respectively.²⁶ He signaled his intention to improve the FBI’s intelligence program by, among other measures, consolidating and centralizing control over fragmented intelligence capabilities, both at FBI Headquarters and in the FBI’s historically autonomous field offices.²⁷ He restated that intelligence had always been one of the FBI’s core competencies²⁸ and organic to the FBI’s investigative mission,²⁹ and asserted that the organization’s intelligence efforts had and would continue to be disciplined by the intelligence cycle of intelligence requirements, collection, analysis, and dissemination.

Organizational Changes

The FBI is restructuring to support an integrated intelligence program. The FBI director has also created new intelligence-related positions and entities at FBI Headquarters and across its 56 field offices to improve its intelligence capacity.

²⁵ See Concept of Operations, *FBI Intelligence Requirements and Collection Management Process*, prepared jointly by FBI Headquarters divisions, reviewed by FBI field office representatives and coordinated by the FBI’s Office of Intelligence, Aug. 2003. The Assistant Director, Office of Intelligence, reports to the Executive Assistant Director for Intelligence.

²⁶ According to the FBI’s 1998-2003 Strategic Plan, issued in May 1998, the FBI, prior to Sept. 11, had established three tiers of priorities: (1) National and Economic Security, aimed at preventing intelligence operations that threatened U.S. national security; preventing terrorist attacks; deterring criminal conspiracies; and deterring unlawful exploitation of emerging technologies by foreign powers, terrorists and criminal elements; (2) Criminal Enterprise and Public Integrity; and (3) Individuals and Property. Countering criminal activities was a prominent feature of each tier. See Department of Justice, Office of Inspector General, *Federal Bureau of Investigation: Casework and Human Resource Allocation*, Audit Division, Sept. 2003, pp. 03-37.

²⁷ See statement of Robert S. Mueller, III, Director, Federal Bureau of Investigation, in U.S. Congress, House Committee on Appropriations, Subcommittee on the Departments of Commerce, Justice, State, the Judiciary and Related Agencies, June 18, 2003.

²⁸ Core competencies are defined as a related group of activities central to the success, or failure, of an organization. In the private sector, core competencies are often the source of a company’s competitive advantage. See C. K. Prahalad and Gary Hamel, “The Core Competency of the Corporation,” *Harvard Business Review*, Apr. 1, 2001.

²⁹ See statement of Robert S. Mueller, III, Director, Federal Bureau of Investigation, in U.S. Congress, Senate Judiciary Committee, July 23, 2003.

New Position of Executive Assistant Director for Intelligence (EAD-I) and the Office of Intelligence. As part of his effort to centralize control, Director Mueller established a new position — the EAD-I.³⁰ The EAD-I manages a single intelligence program across the FBI's four investigative/operational divisions — counterterrorism, counterintelligence, criminal, and cyber. Previously, each division controlled and managed its own intelligence program. To emphasize its new and enhanced priority, the Director also elevated intelligence from program support to full program status, and established a new Office of Intelligence (OI). The OI is responsible for implementing an integrated FBI-wide intelligence strategy, developing an intelligence analyst career path, and ensuring that intelligence is appropriately shared within the FBI as well as with other federal agencies.³¹ The Office also is charged with improving strategic analysis, implementing an intelligence requirements and collection regime, and ensuring that the FBI's intelligence policies are implemented. Finally, the office oversees the FBI's participation in the Terrorist Threat Integration Center (TTIC).³²

The OI, headed by an Assistant Director who reports to the EAD-I, is comprised of six units: (1) Career Intelligence (works to develop career paths for intelligence analysts), (2) Strategic Analysis (provides strategic analyses to senior level FBI executives), (3) Oversight (oversees field intelligence groups), (4) Intelligence Requirements and Collection Management (establishes and implements procedures to manage the FBI intelligence process), (5) Administrative Support, and (6) Executive Support.³³

New Field Office Intelligence Groups. The FBI has established field intelligence groups in each of its 56 field offices to raise the priority of intelligence and ultimately to drive collection, analysis and dissemination at the local level. Each field intelligence group is responsible for managing, executing and coordinating their

³⁰ The FBI established the position of EAD-I in early 2003, and the position was filled in April 2003, when Maureen Baginski, the former Director of Signals Intelligence, National Security Agency, was appointed. It was another four months before EAD-I Baginski began working in her new capacity, and an additional four months before Congress approved the reprogramming action formally establishing the EAD-I position. Some critics date whatever progress the FBI has made in upgrading intelligence to Baginski's arrival, but contend that because this critical position was left vacant for an extended period of time, the FBI made little, or no progress, between September 11 and Baginski's arrival almost one-and-a-half years later.

³¹ See statement of Robert S. Mueller, III, Director, Federal Bureau of Investigation, before *the Joint Inquiry*, Oct. 17, 2002.

³² The establishment of TTIC, and its mission, is addressed later in this section.

³³ The Office of Intelligence has had an uneven, albeit short, leadership history since its establishment. Although Director Mueller announced OI's established in Dec. 2001, the position of OI Assistant Director was vacant for one-and-a-half years, until Apr. 2003. The selected individual served four months before being appointed to another FBI position. The position then was vacant for almost five additional months before Michael Rolince, Special-Agent-in-Charge of the FBI's Washington Field Office, was appointed to lead the office on an acting basis in mid-Dec. 2003.

local intelligence resources in a manner which is consistent with national priorities.³⁴ A field intelligence group is comprised of intelligence analysts,³⁵ who conduct largely tactical analyses; special agents, who are responsible for intelligence collection; and reports officers, a newly created position.³⁶ Reports officers are expected to play a key role by sifting raw, unevaluated intelligence and determining to whom it should be disseminated within the FBI and other federal agencies for further processing.

With regard to counterintelligence, which is any intelligence about the capabilities, intent, and operations of foreign intelligence services, or those individuals or organizations operating on behalf of foreign powers, working against the U.S., the FBI has established six field demonstration projects led by experienced FBI retirees. These teams are responsible for assessing intelligence capabilities at six individual field offices and making recommendations to correct deficiencies.³⁷

New National (and More Regional) Joint Terrorism Task Force (s).

In July 2002, the FBI established a National Joint Terrorism Task Force (NJTTF), which coordinates its nation-wide network of 84 Joint Terrorism Task Forces (JTTFs).³⁸ The NJTTF also coordinates closely with the FBI's newly established Counterterrorism Watch, a 24-hour operations center, which is responsible for tracking terrorist threats and disseminating information about them to the JTTFs, to the Department of Homeland Security's Homeland Security Operations Center and, indirectly, to state and local law enforcement. CT Watch is located at the FBI's 24-hour Strategic Intelligence Operations Center (SIOC).³⁹ With respect to regional

³⁴ See FBI Field Office Intelligence Operations, *Concept of Operations*, Aug. 2003.

³⁵ For the purposes of this report, intelligence analysts are defined as all-source analysts who conduct tactical and strategic analysis. Until recently, the FBI had two categories of analysts — Intelligence Research Specialists, who were responsible for all-source analysis, and Intelligence Operations Specialists, who provided tactical analytic support for cases and operations. The FBI is merging these two positions with the newly created “Reports Officer” position, and re-titling the consolidated position as “intelligence analyst.” The FBI says its purpose in doing so is to standardize and integrate intelligence support for the FBI's highest priorities. Within the intelligence analyst position, there are four “areas of interest” — counterterrorism, counterintelligence, cyber, and criminal; and three specific work “functions” — all source, case support, and reports.

³⁶ The number of individuals in a field intelligence group varies, depending upon the size of the field office. See “FBI Field Office Intelligence Operations,” *Concept of Operations*, Aug. 2003.

³⁷ Funding was authorized under the FY2004 Intelligence Authorization Act (P.L. 108-177). The legislation permits the FBI Director to “... enter into personal services contracts if the personal services to be provided under such contracts directly support the intelligence or counterintelligence missions of the Federal Bureau of Investigation.”

³⁸ JTTFs are FBI-led and are comprised of other federal, state and local law enforcement officials. JTTFs serve as the primary mechanism through which intelligence derived from FBI investigations and operations is shared with non-FBI law enforcement officials. JTTFs also serve as the principal link between the Intelligence Community and state and local law enforcement officials.

³⁹ See statement of Larry A. Mefford, Executive Assistant Director — Counterterrorism and (continued...)

JTTFs, the Bureau has increased their number from 66 to 84, and the number of state and local participants has more than quadrupled — from 534 to over 2,300, according to the FBI.

Participation in the New Terrorist Threat Integration Center. President Bush in his January 2003 State of the Union address announced the establishment of the Terrorist Threat Integration Center (TTIC), which is to issue threat assessments based on all-source intelligence analysis.⁴⁰ The TTIC is a joint venture comprised of a number of federal agencies with counterterrorism responsibilities, and is directed by a CIA-named official, and a deputy director named by the FBI.

The Center, formally established in May 2003, employs 150, eight of whom are FBI analysts. When fully operational, in May 2004, the Center anticipates employing 300 professionals, approximately 65 (22%) of whom will come from FBI ranks. Of 300 total staff, 56 are expected to be strategic analysts.

New Position of Executive Assistant Director for Law Enforcement Services. As will be discussed in more detail below, the FBI has been criticized for failing to effectively share information with numerous consumer sets, including other members of the Intelligence Community, and state and local law enforcement authorities. In order to address these concerns Director Mueller established the EAD for Law Enforcement Services and under this new position, created an Office of Law Enforcement Coordination. Staffed by a former state police chief, the Office of Law Enforcement Coordination, working with the Office of Intelligence, ensures that relevant information is shared, as appropriate, with state and local law enforcement.

Resource Enhancement and Allocation Changes

There are numerous changes the FBI has made or is in the process of making to realize its intelligence goals. With the support of Congress, the FBI's budget has increased almost 50% since September 11, from \$3.1 billion in FY2000 to \$4.6 billion in FY2004.⁴¹ The recently proposed FBI budget for FY2005 is \$5.1 billion, including an increase of at least \$76 million for intelligence and intelligence-related items.⁴² According to Maureen Baginski, EAD for Intelligence, this year the FBI

³⁹ (...continued)

Counterintelligence, Federal Bureau of Investigation, before the Subcommittee on Cybersecurity, Science, Research and Development; and the Subcommittee on Infrastructure and Border Security of the U.S. Congress, House Select Committee on Homeland Security, Sept. 4, 2003.

⁴⁰ See CRS Report RS21283, *Homeland Security: Intelligence Support*, by Richard A. Best, Jr.

⁴¹ See [<http://www.usdoj.gov/jmd/2003summary/html/FBIcharts.htm>] and *Where the Money Goes: Fiscal 2004 Appropriations*, — House Commerce, Justice, State Subcommittee, Committee on Appropriations, House of Representatives (House Conf. Rept. 108-401).

⁴² See U.S. Department of Justice, Justice Management Division, "2005 Budget and (continued...)"

plans to hire 900 intelligence analysts, mostly in FBI field offices.⁴³ With the existing infusion of resources, the FBI is beefing up its intelligence-related staff, as well as functions which are integral to intelligence — such as intelligence training, language translation, information technology, and intelligence sharing.

More Special Agent Intelligence Collectors. The FBI has increased the number of field agents it is devoting to its three top priorities — counterterrorism, counterintelligence and cyber crime. According to the General Accounting Office (GAO),⁴⁴ in FY2004 the FBI allocated 36% of its agent positions to support Director Mueller’s top the three priorities — counterterrorism, counterintelligence and cyber crime — up from 25% in FY2002. This represents an increase of approximately 1,395 agent positions, 674 of which were permanently reprogrammed from existing FBI drug, white collar, and violent crime programs.⁴⁵ From a recruitment

⁴² (...continued)

Performance Summary,” winter 2004, pp.113-122. Elements of this request include 1) \$35 million in non-personnel funding to support collocation of a portion of the FBI’s Counterterrorism Division with the CIA’s Counterterrorism Center and the interagency Terrorist Threat Integration Center; 2) \$13.4 million to launch the Office of Intelligence; 3) \$14.3 million to Counterterrorism FBI Headquarters program support, including intelligence analysis; and 4) \$13 million to launch the National Virtual Translation Center. Some elements of the \$46 million request for Counterterrorism Field Investigations and the \$64 million request for various classified national security initiatives, also likely will be dedicated to intelligence.

⁴³ See Michelle Mittelstadt, “FBI Set to Add 900 Intelligence Analysts,” *The Dallas Morning News*, Feb. 17, 2004. The near doubling of intelligence analysts in one year could present the FBI with a significant absorption challenge.

⁴⁴ The GAO has drafted two reports (GAO-03-759T, June 18, 2003 and GAO-04-578T, Mar. 23, 2004) on the FBI reform efforts cited in this report. These GAO reports assess the FBI’s transformation from a program management and results perspective, that is, the extent to which the FBI is expending its resources and dedicating its management in a manner consistent with its stated priorities. This CRS report focuses on the more policy-oriented question of FBI intelligence reform and related policy options, as well as the ability of the FBI to implement successfully its strategic plans related to intelligence.

⁴⁵ *FBI Reorganization: Progress Made in Efforts to Transform, but Major Challenges Continue*, GAO-03-759T, June 18, 2003. The U.S. Department of Justice, Office of the Inspector General (OIG), periodically audits resource allocations, to determine if human resources are being committed in a manner consistent with stated priorities and strategies. In a recent report, the OIG found that since Sept. 11, the FBI “... continued to devote more of its time to terrorism-related work than any other single area,” consistent with its post-Sept. 11 terrorism priority. To ensure that the FBI systematically and periodically analyzes its programs, the OIG recommended that the FBI Director “... regularly review resource utilization reports for the Bureau as a whole, as well as for individual investigative programs, and explore additional means of analyzing the Bureau’s resource utilization among the various programs.” See *Federal Bureau of Investigation: Casework and Human Resource Allocation*, U.S. Department of Justice, Office of Inspector General, Audit Division, Audit Report 03-37, Sept. 2003. While the quantity of human resources must be adequate, appropriate quality is essential. One asset developed by an experienced, well-trained FBI special agent could have a significant effect on U.S. national security.

perspective, the FBI recently established “intelligence” as a “critical skill need” for special agent recruitment.⁴⁶

More Intelligence Analysts. The FBI estimates that of the 1,156 analysts employed as of July 2003, 475 of them were dedicated to counterterrorism analysis.⁴⁷ Prior to September 11, the FBI employed 159 counterterrorism analysts.⁴⁸ The FBI requested and received an additional 214 analytical positions as part of its FY2004 funding.⁴⁹ As mentioned above, in calendar year 2004, the FBI intends to hire 900 analysts, many of whom will be stationed across its 56 field offices. In an effort to convey that the FBI is attaching greater importance to the role analysts play, the Office of Intelligence has signaled to the FBI that analysts have a valid and valuable role to play within the organization.⁵⁰ The FBI, for the first time, is also attempting to establish a dedicated career path for its intelligence analysts, and for the purposes of promotion is now viewing its three types of analysts (formerly the Intelligence Research Specialists and Intelligence Operations Specialists, with the addition of a new category of employee, Reports Officers) all as generic intelligence analysts. As will be discussed more in-depth below, theoretically, all intelligence analysts, whether assigned to Headquarters or to a field office, will have promotion potential to the grade of GS-15 (non-managerial). Until now, generally, at the non-managerial level, analysts assigned to Headquarters had a promotion potential to the GS-14 level, and those in the field were only allowed to reach the GS-12 level. New recruitment standards, including the elimination of a requirement for a bachelor’s degree⁵¹ and a new cognitive ability testing process, have been developed.

⁴⁶ As currently structured, the FBI special agent recruitment procedure has five entry programs, with numerous other areas defined as “critical skill needs.” Agents must be hired under one of the five programs (law, accounting/finance, language, computer science/information technology and diversified); yet, the FBI will establish priorities for those having expertise in the critically needed skills. Unlike intelligence analysts, who are not required to possess a bachelor’s degree, candidates for FBI special agent positions “must possess a four-year degree from an accredited college or university” See [<https://www.fbijobs.com/jobdesc.asp?requisitionid=368>].

⁴⁷ See Concept of Operations, *Human Talent for Intelligence Production*, Federal Bureau of Investigation, Aug. 2003.

⁴⁸ See statement of Richard Thornburgh, Chairman, Academy Panel on FBI Reorganization, National Academy of Public Administration, before the Subcommittee on Commerce, State, Justice, the Judiciary and Related Agencies, Committee on Appropriations, House of Representatives, June 18, 2003, p. 3.

⁴⁹ See *Making Appropriations for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies for the Fiscal Year Ending Sept. 30, 2004, and For Other Purposes*, U.S. House of Representatives, Conference Report (H.Rept. 108-401).

⁵⁰ See “Human Talent for Intelligence Production,” FBI Concept of Operations, Aug. 2003.

⁵¹ In place of a bachelors degree, the FBI now allows a candidate for intelligence analyst to substitute a minimum of one year of related law enforcement or military experience.

Revamped Intelligence Training.⁵² The FBI is revamping its training to reflect the role of intelligence. The FBI has revised its new agent training, established a College of Analytical Studies to train both new and more experienced analysts and has plans to re-engineer its overall training program.⁵³

Specifically, the FBI is providing more intelligence training for new special agents. New special agents undertake a 17 week, 680 hour training program when they enter the FBI. The amount of time agents devote to studying National Foreign Intelligence Program (NFIP) topics⁵⁴ — principally Counterintelligence and Counterterrorism⁵⁵ — in new agent training has increased from 28 hours (4.1% of total training) to 80 hours (11.8% of total training).⁵⁶ As part of this updated 680 hour curriculum for new agents, the FBI has instituted a two-hour block of training devoted solely to intelligence. Notwithstanding these changes, FBI officials recognize they have made relatively little progress in integrating intelligence into all aspects of new agent training.

The new training is intended to expose new employees to the intelligence cycle — requirements, collection, analysis, reporting and dissemination — and to how intelligence advances national security goals. Agents also are taught how to use strategic and tactical analysis effectively.⁵⁷

All new analysts, or those new to the analytical function, are required to take an introductory analytical training course when they assume analytical responsibilities at the FBI. Historically, the curriculum for this course — recently renamed the Analytical Cadre Education Strategy-I (ACES) so as to be “... more descriptive and create a positive image for the training effort”⁵⁸ — included a substantial amount of

⁵² The authors were unable to compare training, before and after Sept. 11, because the FBI’s Office of Congressional Affairs denied requests for a copy of the training curriculum.

⁵³ See statement of David M. Walker, Comptroller of the United States, General Accounting Office, in U.S. Congress, Committee on Appropriations, House Subcommittee on Commerce, Justice, State and the Judiciary, June 18, 2003, p. 14.

⁵⁴ The National Foreign Intelligence Program (NFIP) budget includes a number of national-level intelligence programs, which are approved by the Director of Central Intelligence and submitted to the President and Congress as a single consolidated program. The NFIP budget funds those departments and agencies constituting the U.S. Intelligence Community. Historically, the FBI’s NFIP has included the headquarters and field elements associated with the following programs: 1) international terrorism, 2) counterintelligence, 3) security countermeasures, and 4) dedicated technical activities.

⁵⁵ Some observers have suggested that as part of its intelligence reform, the FBI should consider re-integrating counterterrorism and counterintelligence. For an assessment of these arguments, see **Appendix 6**.

⁵⁶ Notwithstanding this increase in intelligence training, a new special agent collector, at least early in his career, still is at a disadvantage, compared to a foreign intelligence officer, or terrorist, who has likely received intensive clandestine operations training.

⁵⁷ Interview with an FBI official, Jan. 15, 2004.

⁵⁸ See “Human Talent for Intelligence Production,” the Federal Bureau of Investigation, (continued...)

time dedicated to orienting the new analyst to the FBI. According to FBI officials, this course has recently been re-engineered to focus more directly on intelligence, asset vetting, reporting writing, the Intelligence Community, and various analytical methodologies. According to FBI officials, more advanced intelligence analysis courses — ACES II — are in development.

Finally, the FBI plans to enhance training standardization and efficiency by consolidating all training in the FBI's Training Division. Historically, the FBI's National Foreign Intelligence Program has developed and provided its own substantive intelligence training programs. FBI analysts are also encouraged to avail themselves of the many geographic and functional analytic courses taught by other elements of the Intelligence Community.

Improved Technology. The FBI says it recognizes the critical importance of improving its antiquated information technology system,⁵⁹ so that it can more effectively share information both internally and with the rest of the Intelligence Community, and Director Mueller has made it one of his top ten priorities. But the FBI's technological center-piece — the three-stage Trilogy Project — continues to suffer from delays and cost overruns. Although the FBI has installed new hardware and software, and established local and wide area communications networks,⁶⁰ Trilogy's third, and perhaps most important component — the Virtual Case File system (intended to give analysts access to a new terrorism database containing 40 million documents, and generally an improved ease of information retrieval) — remains behind schedule and over budget.⁶¹

More Intelligence Sharing Within the FBI. In the wake of the 1960s domestic intelligence scandals (for further discussion, see **Appendix 3**) various protective “walls” were put in place to separate criminal and intelligence investigations. As a result of these walls, information sharing between the two sets of investigators was “sharply limited, overseen by legal mediators from the FBI and

⁵⁸ (...continued)
Sept. 2003.

⁵⁹ Numerous GAO studies, including the recent *Information Technology: FBI Needs an Enterprise Architecture to Guide Its Modernization Activities* (GAO Report 03-959, Sept. 25, 2003) have found substantial deficiencies in the FBI's formal procedures to implement recommended information technology changes. See also *The Federal Bureau of Investigation's Implementation of Information Technology Recommendations*, U.S. Department of Justice, Office of Inspector General, Audit Division (Audit report 03-36, Sept. 2003).

⁶⁰ See “FBI Director Says Technology Investments Are Paying Off,” *Government Executive*, Apr. 10, 2003.

⁶¹ According to the Department of Justice Inspector General (IG), FBI officials originally estimated the cost of the Virtual Case File system to be \$380 million. The current actual cost, according to the IG, exceeds \$596 million. See also Wilson P. Dizard, “FBI's Trilogy Rollout Delayed; CSC Misses Deadline,” *Government Computer News*, Nov. 4, 2003. Critics have attributed the FBI's chronic information management problems to, among other factors, deficient data mining capabilities, and the FBI's continuing inability to effectively upload information collected by field offices onto accessible FBI-wide databases.

Justice Department, and subject to scrutiny by criminal courts and the secret Foreign Intelligence Surveillance Court.”⁶² The FBI recently eliminated an internal barrier to communication by allowing its criminal and intelligence investigators to physically work together on the same squads. As part of a new so-called Model Counterterrorism Investigations Strategy (MCIS), all counterterrorism cases will be handled from the outset like an intelligence or espionage investigation.⁶³

Improved Intelligence Sharing with Other Federal Agencies and State and Local Officials. The FBI also has taken steps to improve its intelligence and information sharing with other federal agencies as well as with state and local officials. It has established an Executive Assistant for Law Enforcement Services, who is responsible for coordinating law enforcement with state and local officials through a new Office of Law Enforcement Coordination. The FBI also has increased dissemination of weekly intelligence bulletins to states and localities as part of an effort to educate and raise the general awareness of terrorism issues. And the FBI is increasing its use of the National Law Enforcement Telecommunications System and the National Criminal Information Center databases to disseminate threat warnings and the identities of individuals the FBI has listed on its Terrorist Watch List.⁶⁴ Other information sharing enhancements — each addressed earlier — include increasing the number of JTTFs and establishing the new position of Reports Officer.

Issues for Congress

Assessing the effectiveness of the FBI’s intelligence reforms raises several potential issues for Congress. These include

- The FBI’s new focus on centralized headquarters decision-making;
- Implementation challenges, including those in each area of the Intelligence Cycle;
- Adequacy of resources to support reforms; and
- Congressional oversight.

⁶² Dan Eggen, “FBI Applies New Rules to Surveillance,” *Washington Post*, Dec. 13, 2003, p. A1.

⁶³ In addition to easing constraints on intelligence sharing, this change will allow investigators to more easily employ secret warrants and other intelligence collection methods permitted by the Foreign Intelligence Surveillance Act, as amended. Those foreign intelligence gathering tools cannot be used in traditional criminal probes. The change stems from a Nov. 2002 intelligence appeals court ruling that upheld the USA PATRIOT Act provisions that provided more latitude for the sharing of foreign intelligence between criminal prosecutors and intelligence/national security personnel. See *United States Foreign Intelligence Surveillance Court of Review*, In re: Sealed Case 02-001, Decided Nov. 18, 2002.

⁶⁴ For information on terrorist watch lists, see CRS Report RL31019, *Terrorism: Automated Lookout Systems and Border Security Options and Issues*, by William Krouse and Raphael Perl.

The Role of Centralized Decision-Making in Strengthening FBI Intelligence⁶⁵

Some observers believe a major issue is whether the FBI's new centralized management structure will provide the organization with the requisite formal and informal authority to ensure that its intelligence priorities are implemented effectively and efficiently by FBI field offices. Historically, and particularly with respect to the FBI's law enforcement activities, field offices have had a relatively high degree of autonomy to pursue locally determined priorities. A related issue is whether FBI employees will embrace, or resist, FBI Headquarters' enhanced management role and its new emphasis on intelligence.

Supporters Contend Centralized Management Will Help Prevent Terrorism by Improving FBI's Intelligence Program. Supporters argue that a centralized management structure is an essential ingredient of a counterterrorism program, because it will enable the FBI to strengthen its intelligence program, establish intelligence as a priority at FBI field offices and improve headquarters-field coordination.

According to proponents, FBI Director Mueller has centralized authority by making four principal structural changes. He has established (1) a new position of Executive Assistant Director for Intelligence (EAD-I); (2) created a new Office of Intelligence to exercise control over the FBI's historically fragmented intelligence program; (3) established a National Joint Terrorism Task Force; and (4) established intelligence units in each field office to collect, analyze and disseminate intelligence to FBI Headquarters.

Supporters contend that by centralizing decision-making, the FBI will be able to address several critical weaknesses which the *JIC Inquiry* attributed to decentralized management. First, a central management structure will enable the FBI to more easily correlate intelligence, and thereby more accurately assess the presence of terrorists in the U.S. Second, the FBI will be able to strengthen its analysis capabilities, particularly with regard to strategic analysis, which is intended to provide a broader understanding of terrorist threats and terrorist organization. Third, FBI Headquarters will be able to more effectively fuse and share intelligence internally, and with other IC agencies. Finally, centralized decision-making will provide FBI Headquarters a means to enforce intelligence priorities in the field. Specifically, it provide a means for FBI Headquarters to ensure that field agents spend less time gathering information to support criminal prosecutions — a legacy

⁶⁵ An organization's structure and business processes influence its performance. Large organizations with dispersed operations continually assess the appropriate balance between decentralized and centralized elements of their operations. Although the mission of National Aeronautics Space Administration (NASA) is unrelated to that of the FBI, it too has dispersed operations. In a review of the causes of the 1986 Columbia shuttle accident, the board investigating the accident found that "The ability to operate in a centralized manner when appropriate, and to operate in a decentralized manner when appropriate, is the hallmark of a high-reliability organization." See *Columbia Accident Investigation Report, Volume I*, Aug. 2003. [<http://www.caib.us/news/report/volume1/default.html>]

of the FBI's law enforcement culture — and more time collecting and analyzing intelligence that will help prevent terrorist acts.

Supporters contend that employees are embracing centralized management and the FBI's new intelligence priorities, but caution it is premature to pronounce centralized management a success. Rather, they suggest that, “with careful planning, the commitment of adequate resources and personnel, and hard work, progress should be well along in three or four years,”⁶⁶ but concede that, “we're a long way from getting there.”⁶⁷

Skeptics Agree Strong Intelligence Essential, But Question Whether Centralized Decision-Making Will Improve Program. Skeptics agree that if the FBI is to prevent terrorism, it must strengthen its intelligence program, establish intelligence as a priority at FBI field offices and improve headquarters-field coordination. But they question whether centralizing decision-making at FBI Headquarters will enable the FBI to accomplish these goals, and they cite two principal factors which they suggest will undermine the impact of centralized decision making. They question whether any structural management changes can (1) change a vested and ingrained law enforcement culture, and (2) overcome the FBI's lack of intelligence experience and integration with the Intelligence Community.

Skeptics Believe FBI's Law Enforcement Culture Will Prove Impervious to Centralized Decision-Making. Skeptics assert that the FBI's entrenched law enforcement culture will undermine its effort to establish an effective and efficient intelligence program by centralizing decision-making at FBI Headquarters. They point to the historical importance that the FBI has placed on convicting criminals — including terrorists. But those convictions have come after the fact, and skeptics argue that the FBI will continue to encounter opposition within its ranks to adopting more subtle and somewhat unfamiliar intelligence methods designed to prevent terrorism. Former Attorney General Janet Reno, for example, reportedly “leaned toward closing down surveillance under the Foreign Intelligence Surveillance Act (FISA) if they hindered criminal cases.”⁶⁸ As one observer said, “law enforcement and intelligence don't fit ... law enforcement always wins.”⁶⁹

Some observers speculate that one reason law enforcement priorities prevail over those of intelligence is because convictions that can disrupt terrorist planning in advance of an attack often are based on lesser charges, such as immigration violations. FBI field personnel therefore may conclude that they should focus more

⁶⁶ See statement of Richard Thornburgh, Chairman, Academy Panel on FBI Reorganization, National Academy of Public Administration, U.S. Congress, House Committee on Appropriations, Subcommittee on Commerce, State, Justice, the Judiciary and Related Agencies, June 118, 2003, p. 3.

⁶⁷ Interview with an FBI official, Jan. 6, 2004.

⁶⁸ See the *JIC Inquiry*, p. 224.

⁶⁹ Interview with a former senior intelligence official, Oct. 15, 2003.

effort on prosecuting criminal cases that result in longer jail terms.⁷⁰ Observers also suggest that because of the importance attached to successful criminal prosecutions, to the extent intelligence is used, it will be used to support criminal investigations, rather than to learn more about potential counterterrorism targets.⁷¹

Skeptics are convinced that the FBI's law enforcement culture is too entrenched, and resistant to change, to be easily influenced by FBI Headquarters directives emphasizing the importance of intelligence in preventing terrorism. They cite the Gilmore Commission, which concluded:

... the Bureau's long-standing traditional organizational culture persuades us that, even with the best of intentions, the FBI cannot soon be made over into an organization dedicated to detecting and preventing attacks rather than one dedicated to punishing them.⁷²

Skeptics Also Question Whether Centralized Decision-Making Can Overcome FBI's Lack of Intelligence Experience. Skeptics assert that the FBI's inexperience in the intelligence area has caused it to misunderstand the role intelligence can play in preventing terrorism, and they question whether centralized decision-making can correct this deficiency.

Specifically, they contend the FBI does not understand how to collect intelligence about potential counterterrorism targets, and properly analyze it. Instead, skeptics argue that notwithstanding the FBI's current efforts to develop detailed collection requirements, FBI agents will likely continue to "gather" evidence to support criminal cases. Moreover, skeptics argue, the FBI will undoubtedly "run faster, and jump higher," in gathering even more information at the urging of FBI Headquarters to "improve" intelligence.⁷³ Missing, however, according to critics, is the ability to implement successfully a system in which intelligence is collected according to a strategically determined set of collection requirements that specifically target operational clandestine activity. These collection requirements in turn must be informed by strategic analysis that integrates a broader understanding of terrorist threats and known and (conceptually) unknown gaps in the FBI's intelligence base. Critics fear that FBI analysts, instead, will continue to spend the bulk of their time providing tactical analytic support to FBI operational units pursuing cases, rather than systematically and strategically analyzing all-source intelligence and FBI intelligence gaps.

⁷⁰ See the *JIC Inquiry*, p. 224.

⁷¹ See testimony of John MacGaffin, III, before the National Commission on Terrorist Attacks Upon the United States, Dec. 8, 2003, p. 4.

⁷² See the Gilmore Commission, *Fourth Annual Report to the President and Congress*, pp. 43-44.

⁷³ Interview with a former senior FBI official, Aug. 21, 2003.

Implementation Challenges

The FBI is likely to confront significant challenges in implementing its reforms. Its most fundamental challenge, some assert, will be to transform the FBI's deeply entrenched law enforcement culture, and its emphasis on criminal convictions, into a culture that emphasizes the importance that intelligence plays in counterterrorism and counterintelligence. Although observers believe that FBI Director Mueller is identifying and communicating his counterterrorism and intelligence priorities, they caution that effective reform implementation will be the ultimate determinant of success. The FBI, they say, must implement programs to recruit intelligence professionals with operational and analytical expertise; develop formal career development paths, including defined paths to promotion; and continue to improve information management and technology. These changes, they say, should be implemented in a timely fashion, as over two and a half years have passed since the attacks of September 11, 2001. They also contend the FBI must improve intelligence sharing within the FBI and with other IC agencies, and with federal, state and local agencies.

Technology. Inadequate information technology, in part, contributed to the FBI being unable to correlate the knowledge possessed by its components prior to September 11, according to the congressional joint inquiry.⁷⁴ GAO and the Department of Justice Office of Inspector General reports conclude that the FBI still lacks an enterprise architecture, a critical and necessary component, they argue, to successful IT modernization.⁷⁵ In addition to lacking an enterprise architecture plan, according to the GAO, the FBI has also not had sustained information technology leadership and management. To demonstrate this point, a recent GAO report found the FBI has had five Chief Information Officers in the last 2003-2004, and the current CIO is temporarily detailed to the FBI from the Department of Justice.⁷⁶

One important manifestation of the FBI's historical problems with information management is the deleterious effects it has had on analysis. For numerous information technology reasons, it has historically been difficult for FBI analysts at Headquarters, whose primary responsibility is to integrate intelligence from open sources, FBI field offices and legal attaches, and other entities of the U.S. Intelligence Community, to retrieve in a timely manner intelligence which should be readily available to them. Among other factors, this is the result of lack of appropriate

⁷⁴ See the *JIC Inquiry*, p. 245.

⁷⁵ Statement by David M. Walker, Comptroller General of the United States, General Accounting Office, in U.S. Congress, House Committee on Appropriations, Subcommittee on Commerce, Justice, State, and the Judiciary, June 18, 2003, p. 19. See also *The Federal Bureau of Investigation's Implementation of Information Technology Recommendations*, U.S. Department of Justice, Office of Inspector General, Audit Division (Audit report 03-36, Sept. 2003), p. v.

⁷⁶ See "FBI Transformation: FBI Continues to Make Progress in Its Efforts to Transform and Address Priorities," statement by Laurie E. Ekstrand, Director Homeland Security and Justice Issues; and Randolph C. Hite, Director Information Technology Architecture and Systems Issues, GAO-04-578T, Mar. 23, 2004, p. 13.

information management and technology tools and, to a lesser extent, the lack of uniform implementation of policies relating to information technology usage.

Technology alone is not, however, a panacea. Existing information technology tools must be uniformly used to be effective. One FBI official responsible for intelligence analysis stated before the Joint Inquiry that "... Information was sometimes not made available (to FBI Headquarters) because field offices, concerned about security or media leaks, did not upload their investigative results or restricted access to specific cases. This, of course, risks leaving the analysts not knowing what they did not know."⁷⁷

As mentioned above, supporters say that Director Mueller recognizes the important role technology must play in his reforms, and that despite setbacks to the Trilogy technology upgrade, the Director is making important progress.⁷⁸ However, the third and arguably most important stage of the Trilogy technology update, the deployment of the aforementioned Virtual Case File system, did not meet its December 2003 deadline. Moreover, according to the Department of Justice Office of Inspector General, as of January 2003, the FBI confirmed the Inspector General's assessment that an additional \$138 million (over the then estimated requirement of \$458 million) would be necessary to complete the Trilogy project.⁷⁹ This would bring the total cost of the Trilogy update to \$596 million.

FBI Field Leadership. An important issue is whether the FBI's field leadership is able and willing to support Director Mueller's reforms. Critics argue that the lack of national security experience among the existing cadre of Special Agents-in-Charge (SACs) of the FBI's field offices represents a significant impediment to change. According to one former senior FBI official, "... over 90 percent of the SACs have very little national security experience"⁸⁰ He suggested that lack of understanding and experience would result in continued field emphasis on law enforcement rather than an intelligence approach to terrorism cases.

Supporters counter that Director Mueller has made it inalterably clear that his priorities are intelligence and terrorism prevention. Some SACs who have been uncomfortable with the new priorities have chosen to retire. But critics also contend that it will require a number of years of voluntary attrition before field leadership more attuned to the importance of intelligence is in place.

⁷⁷ See the *JIC Inquiry*, p. 358.

⁷⁸ Statement of Richard Thornburgh, Chairman, Academy Panel on FBI Reorganization, National Academy of Public Administration, in U.S. Congress, House Committee on Appropriations, Subcommittee on Commerce, State, Justice, the Judiciary, and Related Agencies, June 18, 2003.

⁷⁹ *The Federal Bureau of Investigation's Implementation of Information Technology Recommendations*, U.S. Department of Justice, Office of Inspector General, Audit Division (Audit report 03-36, Sept. 2003), p. xiv.

⁸⁰ Interview with a former senior FBI official, Oct. 2, 2003.

Lack of Specific Implementation Plans and Performance Metrics.

Another issue is whether the FBI is effectively implementing its reforms and has established appropriate benchmarks to measure progress. Critics assert that although the FBI developed various concepts of operations to improve its intelligence program, in many cases it lacks specific implementation plans and benchmarks. The Department of Justice Inspector General has recommended that “an implementation plan that includes a budget, along with a time schedule detailing each step and identifying the responsible FBI official”⁸¹ be drafted for each concept of operations.

Supporters say that the FBI recognizes the need for specific implementation plans and is developing them. They cite as an example the implementation plan for intelligence collection management, almost half of which they estimate is in place.⁸²

Funding and Personnel Resources to Support Intelligence Reform.

Prior to September 11, FBI analytic resources — particularly in strategic analysis — were severely limited. The FBI had assigned only one strategic analyst exclusively to Al-Qaeda prior to September 11.⁸³ Of its approximately 1,200 intelligence analysts, 66% were unqualified, according to the FBI’s own assessment.⁸⁴ The FBI also lacked linguists competent in the languages and dialects spoken by radicals linked to Al-Qaeda.⁸⁵

Some supporters argue that appropriate resources now are being allocated to reflect the FBI’s new intelligence priorities. “Dollars and people are now flowing to the FBI’s most critical needs ... This trend is clearly reflected in the FBI’s requested resources for FY2004,”⁸⁶ according to former Attorney General Richard Thornburgh, who said intelligence analytic support, particularly for counterterrorism, has improved substantially.⁸⁷ As mentioned above, the Department of Justice is requesting at least \$76 million in support of intelligence and intelligence-related programs for FY2005.

Supporters of the ongoing FBI intelligence reform describe a “dramatic increase” in intelligence analysts, both at headquarters and in the field — from 159 in 2001, to 347 planned in 2003, and that an initial cadre of about a dozen analysts

⁸¹ See *The Federal Bureau of Investigation’s Efforts to Improve the Sharing of Intelligence and Other Information*, U.S. Department of Justice, Office of Inspector General, Audit Division, Audit Report 04-10, Dec. 2003, p.x.

⁸² Interview with an FBI official, Jan. 6, 2004.

⁸³ See the *JIC Inquiry*, p. 337.

⁸⁴ *Ibid.*, p. 340. The vast majority of FBI analysts are located in the FBI’s 56 regional field offices.

⁸⁵ *Ibid.*, p. 245.

⁸⁶ See statement of Richard Thornburgh, Chairman, Academy Panel on FBI Reorganization, National Academy of Public Administration, in U.S. Congress, House Committee on Appropriations, Subcommittee on Commerce, State, Justice, the Judiciary and Related Agencies, June 18, 2003, p. 3.

⁸⁷ *Ibid.*, p. 5.

is supporting TTIC.⁸⁸ Moreover, as mentioned above, the FBI intends to hire 900 intelligence analysts in 2004. Supporters also point to the Daily Presidential Threat Briefings the FBI drafts, and 30 longer-term analyses and a comprehensive national terrorist threat assessment that have been completed.⁸⁹ But even supporters caution that institutional change now underway at the FBI “does not occur overnight and involves major cultural change.”⁹⁰ They estimate that with careful planning, the commitment of adequate resources and personnel, and hard work, the FBI’s “transformation” will be well along in three to five years, though it will take longer to fully accomplish its goals.⁹¹

GAO presents a more mixed assessment. According to GAO: “The FBI has made substantial progress, as evidenced by the development of both a new strategic plan and a strategic human capital plan, as well as its realignment of staff to better address the new priorities.” Notwithstanding this progress, however, the GAO concluded “...an overall transformation plan is more valuable...” than “cross walks” between various strategic plans.⁹² GAO also reports that 70% of the FBI agents and 29 of the 34 FBI analysts who completed its questionnaire said the number of intelligence analysts was insufficient given the current workload and priorities.⁹³ As a result, many field agents said they have no choice but to conduct their own intelligence analysis. Despite a lack of analysts apparent before September 11, if not after, the FBI did not establish priority hiring goals for intelligence analysts until 2003.⁹⁴ According to GAO, the FBI was well on its way to meeting its target of 126 new analytic hires in 2003 — having hired 115 or 91%.⁹⁵

The mix of analytic hires also is critical. But, according to GAO, the FBI lacks a strategic human capital plan, making it difficult to determine whether the FBI is striking an effective balance in its analytic core.⁹⁶ It also is difficult to assess whether

⁸⁸ Ibid., p. 4.

⁸⁹ Ibid., p. 5.

⁹⁰ Ibid., p. 3.

⁹¹ Ibid.

⁹² See “FBI Transformation: FBI Continues to Make Progress in Its Efforts to Transform and Address Priorities,” statement by Laurie E. Ekstrand, Director Homeland Security and Justice Issues; and Randolph C. Hite, Director Information Technology Architecture and Systems Issues, GAO-04-578T, Mar. 23, 2004, p. 33. A congressional requirement concerning resource management was levied on the FBI by P.L. 108-199. By Mar. 15, 2004, the FBI is to provide a report to the Committees on Appropriations a report which “...details the FBI’s plan to succeed at its terrorist prevention and law enforcement responsibilities, including proposed agent and support personnel levels for each division.”

⁹³ Ibid., p. 14.

⁹⁴ Ibid., p. 23.

⁹⁵ Ibid., p. 22.

⁹⁶ See “FBI Reorganization: Progress Made in Efforts to Transform, But Major Challenges Continue,” statement by David M. Walker, Comptroller of the United States, General Accounting Office, in U.S. Congress, House Committee on Appropriations, Subcommittee (continued...)

the FBI is providing sufficient institutional support, the appropriate tools, and incentive system for these resources to be harnessed effectively in pursuit of its priority national security missions-counterterrorism and counterintelligence.

Skeptics of the ongoing FBI intelligence reform argue — and supporters concede — that this is not the first time the FBI has singled out intelligence for additional resources. The FBI did so in the wake of the 1993 World Trade Center bombing and the 1995 Oklahoma City bombing, only to allow those resources to revert to the FBI's traditional priorities — violent and organized crime, drug trafficking, and infrastructure protection. Additional intelligence analysts also were hired, but they were viewed as poorly trained, limited in experience, and lacking in needed information technology tools. They also were easily diverted to support the FBI's traditional anti-crime operations,⁹⁷ even though efforts were made during the intervening years to protect resources intended to support the agency's national security efforts, including intelligence.⁹⁸

Changes in The Intelligence Cycle. As the FBI attempts to formalize its intelligence cycle, it will likely face challenges in each element of the intelligence cycle. Incomplete or ineffective implementation in any one element of the cycle detracts from the overall system's effectiveness.

Will the Changes in the Collection Requirements Produce Desired Results? The FBI's new Office of Intelligence is establishing an internal intelligence requirements mechanism that will be part of an integrated IC national requirements system. Supporters of establishing this mechanism maintain that the FBI has outlined a rational process for managing collection requirements. According to FBI officials, the FBI is developing for each of its investigative/operational programs a detailed set of priority intelligence collection requirements. These requirements will be disseminated to FBI field offices through a classified FBI Intranet.

Skeptics question whether the FBI can overcome its historic lack of experience with a disciplined foreign intelligence requirements process. The FBI, they argue, traditionally has viewed domestic collection of foreign intelligence as a low priority "collateral" function, unless it helped solve a criminal case. And dissemination of any domestically collected foreign intelligence tended to be ad hoc.

Skeptics point to four hurdles that the FBI may have trouble surmounting. First, given that traditional intelligence tasking from the Intelligence Community to the FBI has generally been vague and voluminous; the FBI, they say, must be able to strike a balance between directing its collectors to answer questions that are either too

⁹⁶ (...continued)

on Commerce, Justice, State and the Judiciary, June 18, 2003, p. 8.

⁹⁷ See statement of Richard Thornburgh, Chairman, Academy Panel on FBI Reorganization, National Academy of Public Administration, in U.S. Congress, House Committee on Appropriations, Subcommittee on Commerce, State, Justice, the Judiciary and Related Agencies, June 18, 2003, p. 4.

⁹⁸ Interview with a former senior FBI official, Oct. 2, 2003.

nebulous or too specific. Questions that are overly vague can go unanswered for lack of direction. On the other hand, collection requirements that are too specific risk reducing intelligence to a formulaic science, when most analysts would agree the intelligence discipline is more art than science. In the final analysis, while appropriately drafted intelligence collection requirements are an essential element in the intelligence cycle, there is no substitute for experienced intelligence professionals who are capable of successfully collecting intelligence in response to the requirements. Second, they say, the FBI will need to dedicate appropriate resources to managing a requirements process that could easily overwhelm Headquarters and field intelligence staff with overlapping and imprecise requests for intelligence collection. Third, they say, the FBI will have to significantly upgrade its cadre of strategic analysts, who will play a critical role in identifying intelligence gaps. Fourth, they say, the FBI will have to support its requirements process with incentives and disincentives for agent intelligence collectors so that requirements are fulfilled. Enhanced performance of the intelligence requirements process depends largely on the accumulated successes the FBI has in each of these areas. Incomplete or ineffective implementation in any one element of the cycle detracts from the overall system's effectiveness.

Are Changes in Collection Techniques Adequate? Both supporters and skeptics of the adequacy of FBI's reforms agree that collecting intelligence by penetrating terrorist cells is critical to disrupting and preventing terrorist acts. Supporters argue that the FBI has a long and successful history of such penetrations when it comes to organized crime groups, and suggest that it is capable of replicating its success against terrorist cells. They assert that the FBI has had almost a century of experience recruiting and managing undercover agents and informers, and that it long ago mastered collection techniques such as electronic surveillance and witness interviews. They also argue that the FBI can uniquely use both money and the threat of prosecution to induce cooperation in recruiting human source assets.⁹⁹ They also cite as evidence of the FBI's commitment to improving its human intelligence collection the organization's recent deployment of six teams to "...examine ways to expand the FBI's human intelligence base and to provide additional oversight."¹⁰⁰

Skeptics are not so certain. They say recruiting organized crime penetrations differs dramatically from terrorist recruiting. As one former senior level intelligence official put it, "It's one thing to recruit Tony Soprano, yet quite another to recruit an al Qaeda operative."¹⁰¹ This official was alluding to the fact that terrorist groups may have different motivations and support networks than organized crime groups.¹⁰² Moreover, terrorist groups may be less willing than organized crime enterprises to

⁹⁹ See statement of William P. Barr, former Attorney General of the United States, before the House Permanent Select Committee on Intelligence, Oct. 30, 2003, p.18.

¹⁰⁰ See "FBI Creates Structure to Support Intelligence Mission," U.S. Department of Justice, Federal Bureau of Investigation, press release, Apr. 3, 2003. The results of these examinations remain classified.

¹⁰¹ Interview with a former senior intelligence official, Oct. 15, 2003.

¹⁰² See William E. Odom, *Fixing Intelligence for a More Secure America*, 2003, (Yale University Press) p. 177.

accept as members or agents individuals who they have not known for years and are not members of the same ethnocentric groups, or whose bona fides are not directly supported by existing members of the group.

As alluded to above, skeptics also argue that while the FBI is good at gathering information, it has little experience collecting intelligence based on a policy driven, strategically determined set of collection requirements.¹⁰³ As one observer commented:

While the FBI correctly highlights its unmatched ability to gather evidence and with it information, there is nonetheless a National Security imperative which distinguishes intelligence collection from a similar, but different, function found in law enforcement. “Gathering” which is not driven [and] informed by specific, focused, National Security needs is not the same as “intelligence collection”... which means intelligence activities which are dictated by, and coupled to, a policy driven, strategically determined set of collection requirements.¹⁰⁴

Critics assert that the FBI’s criminal case approach to terrorism produces a vacuum cleaner approach to intelligence collection. The FBI, they say, continues to collect and disseminate interesting items from a river of intelligence when, instead, it should focus collection on those areas where intelligence indicates the greatest potential threat.¹⁰⁵ But critics contend that there are few evident signs that the FBI has adopted such an approach. “They are jumping higher, faster,” but not collecting the intelligence they need, according to one critic.¹⁰⁶ As a result, critics maintain, the process turns on serendipity rather than on a focused, directed, analytically driven requirements process. Another observer put it this way:

Using the metaphor “finding the needle in the haystack,” since September 11 government agencies have been basically adding more hay to the pile, not finding needles. Finding the needles requires that we undertake more focused, rigorous and thoughtful domestic intelligence collection and analysis not collect mountains of information on innocent civilians.¹⁰⁷

Skeptics also question whether the FBI is prepared to recruit the type of individual needed to effectively collect and analyze intelligence. The FBI’s historic emphasis on law enforcement has encouraged and rewarded agents who gather as many facts as legally possible in their attempt make a criminal case. Because a successful case rests on rules of criminal procedure, the FBI draws largely from the top talent in state and local law enforcement agencies, and the military; in short,

¹⁰³ Interview with a former senior FBI official, Aug. 21, 2003.

¹⁰⁴ See statement of John MacGaffin, III, before the National Commission on Terrorist Attacks upon the United States, Dec. 8, 2003.

¹⁰⁵ Interview with a former senior FBI official, Aug. 21, 2003.

¹⁰⁶ Ibid.

¹⁰⁷ See statement of John J. Hamre before the National Commission on Terrorist Attacks upon the United States, Dec. 8, 2003. Hamre is a former deputy secretary of defense.

some say, those individuals who focus on discrete facts rather than on the connections between them.¹⁰⁸

Perhaps as fundamental to the collection of more targeted human intelligence is the implementation of a formal asset vetting program to assess the validity and credibility of human sources, according to informed observers, who note that only three to four percent of the FBI's human assets are vetted.¹⁰⁹ They point out the failure to effectively vet its human assets has contributed to serious problems in the FBI's criminal and national foreign intelligence programs.¹¹⁰

Supporters contend that the FBI is currently implementing its national intelligence collections requirements concept of operations, and so it may be premature to assess effectiveness. Critics contend, however, that it remains unclear what specific performance metrics the FBI is employing to measure the effectiveness of its collection. They say that when asked to assess its performance in the war on terrorism, the FBI continues to cite arrests and convictions of suspected terrorists.¹¹¹ They further contend that the FBI rarely cites the number of human sources recruited who have provided information essential to counterterrorism or counterintelligence as a performance metric.¹¹²

¹⁰⁸ See Siobhan Gorman, Government Executive Magazine, *FBI, CIA Remain Worlds Apart*, Aug. 1, 2003. See also Frederick P. Hitz and Brian J. Weiss, "Helping the FBI and the CIA Connect the Dots in the War on Terror," *International Journal of Intelligence and Counterintelligence*; volume 17, no. 1, Jan. 2004.

¹⁰⁹ Interview with a former senior FBI official, Oct. 2, 2003.

¹¹⁰ Former FBI Special Agent John J. Connally, Jr., was recently convicted of racketeering and obstruction of justice for secretly aiding organized crime leaders in the Boston, Massachusetts area. See Fox Butterfield, "FBI Agent Linked to Mob is Guilty of Corruption," *New York Times*, May 29, 2002, p.14. Special Agent James J. Smith recently was indicted on one count of gross negligence in handling national defense information [Title 18, U.S. Code, Section 793(f)] and with four counts of filing false reports on an asset's reliability to FBI Headquarters [18 U.S. Code §§1343, 1346]. See [<http://news.findlaw.com/hdocs/docs/fbi/ussmith50703ind.pdf>] It is alleged that Smith and former Special Agent William Cleveland had sexual relationships with Katrina Leung, an FBI operational asset informing the FBI on the intelligence activities of the People's Republic of China (PRC). It is further alleged that Ms. Leung may have been a double agent for the PRC. Leung has been charged with unauthorized access and willful retention of documents relating to national defense [Title 18 U.S. Code, §793(b)]. See [<http://news.findlaw.com/cnn/docs/fbi/usleung403cmp.pdf>] James Smith has pleaded guilty and his trial has been set for February 2005. Katrina Leung's trial is scheduled for September. In addition to appointing an Inspector-in-Charge to investigate the integrity of the Chinese counterintelligence program in the FBI's Los Angeles Field Office (the last FBI Office of employment for Mr. Smith), the FBI has launched organizational and administrative reviews to determine why its established accountability system for the handling of intelligence assets apparently failed in this case. See FBI press release dated Apr. 9, 2003.

¹¹¹ See Statement of Robert S. Mueller, III, Director, Federal Bureau of Investigation, in U.S. Congress, Senate Select Committee on Intelligence, Feb. 11, 2003.

¹¹² For further information on how to assess performance of the FBI, and the U.S. (continued...)

Are Analytical Capabilities Sufficient? Some observers contend that the FBI has made notable progress in professionalizing its analytical program since September 11, and, indeed, over the past two decades. During this period, they assert that the FBI's analytic cadre, particularly at Headquarters, has evolved from a disjointed group of less than qualified individuals into a group of professionals which understands the role analysis plays in advancing national security investigations and operations. The majority of intelligence analysts at Headquarters possesses advanced degrees and has expert knowledge in various functional and geographic areas. Over the last two decades, they also cite the FBI's progress in internally promoting analysts to analytic management positions.

Supporters of Director Mueller's reforms also point to the new Office of Intelligence, and maintain that it is implementing a number of initiatives focused on improving the quality of analysis. They include a new promotion plan that will provide analysts GS-15 promotion opportunities (they now are capped at GS-14); new career development plans; an increased flexibility to continue working in their areas of expertise or to rotate to other functional, geographic or management positions; improved mid-career training; and improved and more standardized recruitment practices. They assert that these efforts will improve retention rates, a chronic problem.¹¹³

Critics, however, remain largely unpersuaded and argue that analysis remains a serious FBI vulnerability in the war on terrorism. The Congressional Joint Inquiry on September 11 urged the FBI, among other steps, to

... significantly improve strategic analytical capabilities by assuring qualification, training, and independence of analysts coupled with sufficient access to necessary information and resources.¹¹⁴

Although they applaud the FBI's new focus on analysis, critics question its effectiveness and point to a number of trends. For example, they cite the continuing paucity of analysts in the FBI's senior national security ranks, even more than two years after the September 11 attacks. This, they say, reflects the FBI's continuing failure to treat analysis as a priority and more fundamentally to understand how to leverage analysis in the war on terror.¹¹⁵ They also point to the FBI's own internal study that found 66 percent of its analytic corps unqualified and question whether the FBI's changes are sufficiently broad to address this legacy problem.¹¹⁶

¹¹² (...continued)

Government in the war on terrorism, see Daniel Byman, "Measuring the War on Terrorism: A First Appraisal," in *Current History*, Dec. 2003.

¹¹³ The FBI has never experienced problems in recruiting educated analysts, at least at FBI Headquarters. The FBI, however, has from suffered a retention problem.

¹¹⁴ See the *JIC Inquiry*, Recommendations Section Errata, p. 7.

¹¹⁵ See Daniel Benjamin and Steven Simon, *The Age of Sacred Terror*, p. 298. (Random House).

¹¹⁶ See the *JIC Inquiry*, p. 340.

Critics support the new GS-15 promotion plan, but contend that implementation is lacking and that it falls short of senior executive service promotion which they advocate.¹¹⁷ According to an FBI official, there are currently no FBI intelligence analysts at the non-managerial GS-15 grade level. They also are concerned that the FBI has eliminated the requirement that all new intelligence analysts possess a minimum of a bachelor's degree, and substituted instead a less rigorous requirement, in their view, of one year of analytic experience, or military or law enforcement employment. They insist that a bachelor's degree provides more formal and necessary academic training in research methodologies, written and oral communication and critical thinking. Moreover, according to some critics, the collapsing of all functional and cross-disciplinary analysts into one intelligence analyst position encourages a "one size fits all" approach to analysis that may undermine a need for functional, geographic and target-specific expertise.¹¹⁸

Finally, critics are concerned that although the FBI says it is trying to strengthen strategic analysis, it is failing to commit adequate resources. The new Office of Intelligence has a Strategic Intelligence Unit, but more in name only, according to some observers. Few analysts have been assigned to the unit, and those who have are being forced to balance management and executive briefing responsibilities with actually conducting strategic analysis. Further complicating the situation is the fact that tactical and strategic analysts still physically located in each of the FBI's operational divisions are now "matrixed" to the Office of Intelligence. That is, they report both to their own divisions and to the Office of Intelligence. Therefore, they potentially confront competing priorities — analysis largely composed of briefing materials to support FBI executives, and tactical analyses to support ongoing cases.¹¹⁹

Are Efforts to Improve Intelligence Sharing Adequate? The FBI continues to be criticized for not sharing information — a failure that variously has been blamed on a variety of shortcomings, including culture, an absence of information sharing strategy, technological problems, and legal and policy constraints. Some of the legal and policy constraints were eliminated by the USA

¹¹⁷ Other IC agencies permit analysts to rise to the analytical equivalent of Senior Executive Service, or Senior Intelligence Service. One such program, the Senior Analytic Service (SAS), was established at the CIA in the late 1990s by CIA Deputy Director John McLaughlin. The SAS track allows analysts to rise to the senior-most analytic level, without assuming managerial responsibilities.

¹¹⁸ This approach is manifested in a recent intelligence analyst job announcement (04-FO-0515). While the FBI used to recruit intelligence analysts according to the functional or geographic area of need, it now asks potential candidates to identify one of four areas of interest, choosing from: counterintelligence, counterterrorism, criminal or cyber. According to the announcement, "... Applicants must identify the program area or interest, however, this does not guarantee placement in the particular program..." See [\[https://www.fbijobs.com/JobDesc.asp?src=001&requisitionid=1614&r=021811042620\]](https://www.fbijobs.com/JobDesc.asp?src=001&requisitionid=1614&r=021811042620).

¹¹⁹ Although these types of analyses are not mutually exclusive, they serve two different sets of consumers — the executive who is supporting policymakers, and the special agent who is running an investigation or operation.

PATRIOT Act.¹²⁰ And more recently, by a decision to allow criminal and intelligence investigators to work side by side.¹²¹

FBI supporters give the FBI high marks since the September 11th attacks for sharing threat information, building information bridges to the intelligence agencies and state and local law enforcement, collaborating with foreign law enforcement components, and opening itself up to external reviewers.¹²² But even supporters believe that maintaining this commendable record will be a continuing management challenge, one which will require constant reinforcement.¹²³ They emphasize that the traditional values of FBI agents as independent and determined must give way to include values of information sharing and cooperation.¹²⁴

Sharing within FBI: Some Improvements. Supporters argue that perhaps the most significant change — a sea change, according to some — is a recent decision to tear down the organizational wall that has separated criminal and intelligence investigations since the spying scandals of the 1960s.¹²⁵ As a result, criminal and intelligence investigators will now physically work as part of the same squads on terrorism investigations. All counterterrorism cases will be handled from the outset like intelligence or espionage investigations, allowing investigators to more easily use secret warrants and other methods that are overseen by the surveillance court and are unavailable in traditional criminal probes. The FBI was able to do so as a result of the USA PATRIOT Act, which allows counterterrorism intelligence and criminal information to be more easily shared within the FBI.¹²⁶

Supporters blame Congress for creating the wall in the first place. They assert that in the wake of the 1960s spy scandals, Congress weakened the FBI's domestic intelligence capabilities by imposing stricter standards. The result, they argue, was a dangerous lack of intelligence sharing.¹²⁷ According to the FBI, the recent change has resulted in the disruption of at least four terrorist attacks overseas and the uncovering of a terrorist sleeper cell in the United States.¹²⁸

¹²⁰ For a policy-oriented discussion of relevant legal and regulatory changes, see **Appendix 7**.

¹²¹ Dan Egan, *The Washington Post*, "FBI Applies New Rules to Surveillance," Dec. 12, 2003, p. A-1. (Hereafter cited as Egan, FBI Applies New Rules.)

¹²² See statement of Richard Thornburgh, Chairman, Chairman, and Academy Panel on FBI Reorganization, National Academy of Public Administration, in U.S. Congress, House Committee on Appropriations, Subcommittee on Commerce, State, Justice, the Judiciary, and Related Agencies, June 18, 2003, pp. 21-22.

¹²³ *Ibid.*, p. 22.

¹²⁴ *Ibid.*

¹²⁵ See Dan Egan, "FBI Applies New Rules."

¹²⁶ *Ibid.*

¹²⁷ See statement of William P. Barr, former United States Attorney General, in U.S. Congress, House Select Committee on Intelligence, Oct. 30, 2003, p. 14.

¹²⁸ *Ibid.*

Although these changes undoubtedly will improve intelligence sharing between FBI's criminal and intelligence components, the question remains whether the information will be shared with other agencies and state and local law officials. Some critics do not dispute that Director Mueller's decision will enhance intelligence sharing within the FBI. They agree it will. Rather, they are concerned that more innocent people will become the targets of clandestine surveillance.¹²⁹

Supporters Say Sharing, Internally and With Other Agencies, Is Improving For Additional Reasons. Advocates assert intelligence sharing, both internally and with other agencies is improving for other reasons — the FBI is better training its personnel and providing them with improved sharing processes. In addition, they point to the FBI's new concept of operations for intelligence dissemination that collapses a number of current and different production processes into a single one that will be imbedded throughout the FBI.¹³⁰ Supporters also point favorably to Director Mueller's decision to establish the position of "Reports Officers," whose responsibility will be to extract pertinent intelligence from FBI collection and analysis and disseminate it to the widest extent possible. Supporters who believe that sharing with state and local authorities has improved point out that since September 11, the number of Joint Terrorism Task Forces, which are the principal link between the Intelligence Community and state and local law enforcement officials, has increased from 66 in 2001 to 84 in 2003. The number of state and local participants has more than quadrupled from 534 to over 2,300, according to the FBI.

Supporters also finally embrace Director Mueller for correctly emphasizing technology that emphasizes horizontal, rather than vertical, flow of information to produce better results. Director Mueller asserts that, "Our move to change the technology in the next two or three years will have a dramatic impact on the way we do business — eliminating a lot of the bureaucratic hang-ups, giving the agents the tools they need to be interactive, pass among themselves the best ways of doing things and we will free up the FBI in a substantial number of ways."¹³¹

Critics Still Point to Number of Troubling Signs on Sharing. The FBI concedes that although it "... has always been a great collector of information," its "sharing of information was primarily case oriented rather than part of an enterprise wide activity."¹³² Critics point to a number of troubling signs that they claim indicate continuing problems. According to the Gilmore Commission, the Federal government is far from perfecting a system of sharing national security intelligence

¹²⁹ See Dan Egan, "FBI Applies New Rules."

¹³⁰ See statement of Steven C. McCraw, Assistant Director, Federal Bureau of Investigation, in U.S. Congress, House Select Committee on Homeland Security, July 24, 2003.

¹³¹ See statement of Robert S. Mueller, III, Director, Federal Bureau of Investigation, in U.S. Congress, House Committee on Appropriations, Subcommittee on Commerce, Justice, State and Judiciary June 21, 2002, transcript, p. 30.

¹³² See Statement of Assistant Director Steven C. McCraw, Federal Bureau of Investigation, in U.S. Congress, House Select Committee on Homeland Security, Subcommittee on Intelligence and Counterterrorism, July 24, 2003.

and other information. Moreover, the flow of information remains largely one way — from the local and state levels to the FBI. The prevailing view, according to the Commission, continues to be that the Federal Government likes to receive information but is reluctant to share it completely. One local law enforcement official said the FBI's intelligence sharing practices remain essentially unchanged since September 11. This official suggested that the FBI shares a great volume of threat information, but little of real value that would help state and local officials prevent terrorist attacks.¹³³ Another state office said, "We don't get anything (of value) from the FBI."¹³⁴

Some skeptics argue that technology problems notwithstanding, willingness to share intelligence, both within the FBI and with other Intelligence Community agencies, remains a continuing problem. According to a recent report issued by the Markle Foundation, there has been only marginal improvement in the past year in the sharing of terrorist-related information between relevant agencies, including the FBI. The report states that sharing remains haphazard and still overly dependent on the ad hoc network of personal relations among known colleagues. It is not the result of a carefully considered network architecture that optimizes the abilities of all of the players, according to the report.¹³⁵

The Markle report argues that the existing system of counterterrorism information sharing remains too centralized, federal government-centric, and bound by increasingly tenuous distinctions in U.S. regulations and law regarding domestic and foreign intelligence.¹³⁶ In order to combat a decentralized terrorist threat more effectively, Markle recommends a model of information sharing which runs counter to the existing "hub and spoke" information sharing model the FBI is building. Advocates envision a decentralized "peer-to-peer" network in which the various federal, state, local and private sector entities systematically collecting information relevant to counterterrorism, and according to established guidelines protecting civil liberties and privacy, share that information directly with one another.¹³⁷

The Department of Justice's Office of Inspector General, recently reported that despite progress in terrorism information sharing, the FBI faces considerable impediments in establishing an effective information and intelligence sharing

¹³³ Interview with a local law enforcement official, Nov. 18, 2003.

¹³⁴ Interview with a former senior FBI official, Nov. 13, 2003.

¹³⁵ See "Creating a Trusted Network for Homeland Security," The Markle Foundation, Dec. 2, 2003, p. 2.

¹³⁶ See *Creating a Trusted Network for Homeland Security*, Second Report of the Markle Foundation Task Force, Dec. 2, 2003.

¹³⁷ The Markle Foundation has recommended the creation of a System-wide Homeland Analysis and Resources Exchange (SHARE) Network, in which the Department of Homeland Security would assume a central role in working with federal, state, local and private sector organizations to establish a strategy and implementing mechanisms and policies to share and analyze information in a decentralized manner. See *Creating a Trusted Network for Homeland Security*, Exhibit A: "Action Plan for Federal Government Development of the SHARE Network," Dec. 2, 2003, p. 10.

program, including changes to information technology constraints, ongoing analytical weaknesses, agency origination control procedures,¹³⁸ and lack of "... established policies and procedures that delineate the appropriate processes to be used to share information and intelligence, either internally or externally."¹³⁹

Some State and Local Officials Also Remain Dissatisfied With Level of Sharing. Some state and local law enforcement officials continue to criticize what they characterize as FBI's continuing unwillingness to share intelligence, while expecting state and local law officials to share their information with them. Nevertheless, some state and local law enforcement officials concede that there has been some improvement in the sharing relationship since September 11. And there also is a growing recognition among some state and local law enforcement officials that "... there may be a mis-perception that the FBI has more detailed accurate or confirmed information than it actually has."¹⁴⁰

While acknowledging some improvement, these officials insist the exchange of information remains largely one-way.¹⁴¹ And although that hasn't prevented them from participating in their local JTTFs, one official said he believed that the FBI did not consider him an intelligence consumer.¹⁴² According to another, the FBI has shared information through the JTTF but made clear it was doing so because "...he has a right to know, but not a need to know," and that the FBI told him not to share the information with anyone else in law enforcement or state government, including the governor, who, he said, possesses a Top Secret clearance.¹⁴³

Some state and local law enforcement officials complain that although JTTFs are intended to be joint enterprises, combining federal, state and local law

¹³⁸ Originator control, or ORCON, is a process designed to protect categories of (generally) classified information from being sharing with unauthorized third parties. If an agency wishes to share ORCON information it received from another agency, it must first request ORCON release from the originating agency to share the information with a specific third party consumer. In terms of providing security clearances to state and local law enforcement officials with a "need to know," the FBI has established a streamlined security process that allows law enforcement officials to receive expedited "secret" clearances in about nine weeks. See Dan Eggen, "Bridging the Divide Between FBI and Police," *The Washington Post*, Feb. 16, 2004, p. A25.

¹³⁹ See *The Federal Bureau of Investigation's Efforts to Improve the Sharing of Intelligence and Other Information*, U.S. Department of Justice, Office of Inspector General, Audit Division, Audit Report 04-10, Dec. 2003, p.iv.

¹⁴⁰ See Gerard R. Murphy and Martha R. Plotkin, *Protecting Your Community from Terrorism: Strategies for Local Law Enforcement (Volume 1 — Local-Federal Partnerships)*, Police Executive Research Forum, as supported by the U.S. Department of Justice, Office of Community Oriented Policing, Mar. 2003.

¹⁴¹ Many of the state and local law enforcement officials interviewed for this report also had substantial experience at the federal level, both in the IC and in law enforcement. They said they therefore well understand the inherent capabilities and limitations of intelligence and the roles foreign intelligence and criminal intelligence play in preventing terrorism.

¹⁴² Interview with a local law enforcement official, Nov. 18, 2003.

¹⁴³ Interview with a state law enforcement official, Nov. 13, 2003.

enforcement resources, they characterize the relationship as more of one of “co-habitation” where the FBI clearly is in charge and non-federal representatives are viewed as second tier participants, despite often having greater knowledge of a particular case.¹⁴⁴

With respect to the case-orientation and law enforcement bias so often mentioned as challenges for the FBI as it shifts to having a more preventative bias, state and local law enforcement officials stated that notwithstanding recognition by FBI leadership that the “intelligence is in the case,” the FBI agent on the street still starts with a case and has a bias in the direction of law enforcement. Moreover, one senior state law enforcement official stated that FBI leadership is “... still being led by individuals who have a criminal law mindset.”¹⁴⁵

Some States Have Suggested Alternate Sharing Procedures. Some state and local law enforcement officials are sufficiently displeased with the current sharing relationship that they have proposed that the Department of Homeland Security establish regional intelligence centers through which classified raw and finished foreign intelligence on terrorism could be disseminated.¹⁴⁶ The centers would be staffed by a cadre of Top Secret-cleared personnel drawn principally from State Police and State DHS Offices and would serve as “... regional repository and clearinghouse for terrorist related information gathered at the federal level, consisting

¹⁴⁴ One local law enforcement official suggested that the JTTFs are where the investigative expertise lies, and should be retained. However, he suggested that in order to be more valuable in preventing terrorist acts domestically, the JTTFs should be reorganized around the concept of “joint ness,” and cited the “Goldwater Nichols” Department of Defense Reorganization Act as a model. The “joint ness” envisioned by this official would have state and local law enforcement, federal law enforcement, and IC entities responsible for counterterrorism, operate in an integrated and seamless environment. As envisioned by this local law enforcement official, consistent with joint officers in the military, promotion to senior level positions at the parent agency would be contingent upon a successful rotation to the “Joint” Terrorism Task Forces. The Goldwater-Nichols Department of Defense Reorganization Act of 1986 (P.L. 99-433) integrated the operational capabilities of the military services. For further information on Goldwater-Nichols, see [<http://www.ndu.edu/library/goldnich/goldnich.html>]. H.R. 3439, the “JTTF Enhancement Act of 2003” proposes that 1) there be a greater degree of participation in the JTTFs from DHS Bureau of Immigration and Customs Enforcement officials; and 2) a program be established to detail state and local law enforcement officers to the CIA, or CIA personnel to state and local law enforcement organizations.

¹⁴⁵ Interview with a state law enforcement official, Nov. 13, 2003.

¹⁴⁶ See “Blue Spies for City,” *New York Post*, June 29, 2003. The New York Police Department (NYPD), in what it describes as a substantial resource investment, has dedicated more than 100 officers to the New York JTTF. According to NYPD officials, there has been a steady improvement in the flow of information between the NY JTTF and the NYPD. But there also have been occasions when police officials have requested information from the FBI and the IC, but failed to receive a timely response. As result, the NYPD has stationed several of its officers overseas to better protect the city’s security needs by collecting information regarding terrorist activities. As one New York City official commented, “We’re not looking to supplant anything that is being done by the Federal government. We’re looking to supplement. We’re looking to get the New York question asked.”

of trends, indicators, and warnings.”¹⁴⁷ Through a pending arrangement with the DHS, Directorate of Information Analysis and Infrastructure Protection (IAIP), the goal would be to “... create a national pipeline for pattern and trend analysis of terrorism intelligence,”¹⁴⁸ at the state level. DHS has not acted on the proposal.¹⁴⁹

Congressional Oversight Issues

The U.S. Senate and House of Representatives each established intelligence oversight committees in the 1970s. The catalyst for the creation of these committees was public revelations resulting from press coverage and congressional investigations that the Intelligence Community had conducted covert assassination attempts against foreign leaders, and collected information concerning the political activities of some U.S. citizens during the late 1960s and early 1970s.¹⁵⁰ Intelligence Committee Members are selected by the majority and minority leadership of each chamber of Congress, and serve terms of eight years on the Senate Select Committee on Intelligence and six years on the House Permanent Select Committee on Intelligence. Terms limited were established so that a greater number of Members could become knowledgeable on intelligence matters over time. Membership rotation was also viewed as the best way to maintain a flow of new ideas. Committee membership was also structured so that Members serving on other committees with interests in intelligence issues — the Appropriations, Armed Services, Judiciary, and Committee on Foreign Relations (Senate) and Committee on International Relations (House) — would be represented. Finally, in the Senate, the majority was given a one-vote, rather than a proportional margin, to ensure bipartisanship. The House apportions its membership using the traditional proportional method.

One oversight issue is whether the current congressional structure is sufficiently focused to monitor effectively the FBI’s intelligence reforms. In the wake of the

¹⁴⁷ See Northeast Regional Agreement Information Sharing Proposal, Sept. 22, 2003. The states engaged in this effort include Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont. These proposed “centers” are distinct from the existing Homeland Security Information Network (HSIN). The HSIN uses the Joint Regional Information Exchange System (JRIES) to foster communication among federal, state and local officials involved in counterterrorism information. Currently, the system contains only information categorized as “sensitive but unclassified.” See “Homeland Security Information Network to Expand Collaboration, Connectivity for States and Major Cities,” Department of Homeland Security, Press Release, Feb. 24, 2004.

¹⁴⁸ Ibid.

¹⁴⁹ Proponents contend that state and localities should have access to raw foreign intelligence, because the analysts they have been able to recruit are often superior to those the FBI employs in its field offices. Moreover, they argue that FBI analysts, unlike their local counterparts, are unfamiliar with local infrastructure needing protection, and provide inferior analysis. In asking for more intelligence sharing, state and local officials say they recognize and respect the FBI’s authority to conduct terrorism investigations, but insist they need access to unfiltered foreign intelligence in order to protect state and local security needs.

¹⁵⁰ See Appendix 3 (page 48) for additional information.

September 11 terrorist attacks, the FBI has been criticized for failing to more effectively collect, analyze and disseminate intelligence. The congressional committees principally responsible for conducting FBI oversight — the Intelligence, Judiciary and Appropriations Committees — on the other hand, have been subject to little or no criticism.¹⁵¹ Some critics argue that those responsible for conducting oversight should be held accountable as well. They have questioned the diligence of the committees and, in the case of the Intelligence Committees, the committees' structure.¹⁵²

Ellen Laipson, former director of the National Intelligence Council (1997-2002) suggests while the balance between intelligence collection and analysis is unlikely to be corrected soon:

What are needed are more radical steps to dismantle the bloated bureaucratic behavior of the large agencies and retool most employees to contribute more directly to the intelligence mission. The fault lies both with Congress and with the intelligence community's bureaucrats. This is not an argument for less collection, but perhaps less collection management, less complicated requirements process, and more priority given to a workforce whose productivity is measured in terms of output, of more useful processing of data, and creation of more analytic product. It seems that even the best intentioned intelligence community leaders cannot effect this change alone; a serious push by the oversight process and the senior customers must take place.¹⁵³

At the same time, GAO recommends that continuous internal and independent external, monitoring and oversight are essential to help ensure that the implementation of FBI reforms stays on track and achieves its purpose. "It is important for Congress to actively oversee the proposed transformation."¹⁵⁴

Oversight Effectiveness. According to Representative David Obey, congressional oversight, at times, has been "miserable."

I've been here 33 years and I have seen times when Congress exercised adequate oversight, with respect to [the FBI], and I've seen times when I thought Congress' actions in that regard were miserable ... I can recall times when members of the committee seemed to be more interested in getting the

¹⁵¹ At the beginning of the 108th Congress, the House Select Committee on Homeland Security was established. Along with the Senate Governmental Affairs Committee, this new committee now shares FBI oversight responsibilities.

¹⁵² See Cory Reiss, "Graham's security complaints might bite back," *The Gainesville Sun*, May 27, 2003.

¹⁵³ See Ellen Laipson, President and Chief Executive Officer, the Henry L. Stimson Center, "Foreign Intelligence Challenges post September-11," a paper delivered at the Lexington Institute's conference titled "Progress Towards Homeland Security: An Interim Report Card," Feb. 27, 2003. [<http://www.lexingtoninstitute.org/homeland/Laipson.pdf>].

¹⁵⁴ See statement by David M. Walker, Comptroller General of the United States, Government Accounting Office, before the Subcommittee on Commerce, Justice, State and the Judiciary, Committee on Appropriations, United States House of Representatives, June 21, 2002, p. 18.

autographs of the FBI director than they were in doing their job asking tough questions. And I don't think the agency was served by that any more than the country was. And I hope that over the next 20 years we'll see a much more consistent and aggressive oversight of the agency, because your agency does have immense power.¹⁵⁵

Some observers agree, and have singled out the oversight exercised by the two congressional intelligence committees for particular criticism. According to Loch Johnson, a former congressional staff member and intelligence specialist at the University of Georgia, "They [the intelligence committees] didn't press hard enough [with regard to 9/11]. There's all the authority they need. They didn't press hard enough [for change]." Another observer commented, "They should be held as accountable as the intelligence agencies."¹⁵⁶

Some Members of Congress, however, contend that the congressional committees have their limits. "Our job is to see that the agencies are focused on the right problems as we think them to be and they have the capabilities to meet those mission requirements," former Senate Intelligence Committee Chairman Bob Graham is reported to have said.¹⁵⁷ One of Graham's predecessors seems to agree. "We can legislate, but there is little we can do to compel compliance," according to a press account of former Chairman Senator Richard Shelby, who said the committees face an unacceptable choice from a security standpoint when it comes to fencing spending in an effort to force change.¹⁵⁸

"As you examine the record, you will discover numerous examples of complete disregard for congressional direction, not to mention the law." Shelby is reported to have said. But as one Senate aide pointed out, "When you're in the middle of a war on terror, holding money back from the Intelligence Community — that's the problem."¹⁵⁹

Eliminating Committee Term Limits. Some have suggested that the current eight-year cap on intelligence committee service be eliminated. Critics of the term limits argue that members often are just beginning to grasp the complexities of the Intelligence Community by the time their term ends. "I was at a peak of my knowledge and ability to carry out effective oversight," Graham, who already had received a two-year extension of his eight-year term when he had to leave the committee at the end of the 107th Congress in 2002 is quoted as saying.¹⁶⁰

¹⁵⁵ See remarks of Congressman David Obey during a hearing in U.S. Congress, House Committee on Appropriations, Subcommittee on Justice, State and Judiciary, June 21, 2002.

¹⁵⁶ See Cory Reiss, "Graham's Security Complaints Might Bite Back," *The Gainesville Sun*, May 27, 2003.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

Critics also argue that term limits, although seen as a well-intentioned effort to prevent members from becoming co-opted by the Intelligence Community, have outlived whatever usefulness they may have had. The community, they assert, has become technically so complex that effective oversight requires members who are knowledgeable and well-versed in its intricacies. Term limits work against that goal by robbing the committee of institutional memory, knowledge and expertise. That outcome can only be avoided if members are permitted to serve on an open-ended basis; of all congressional committees, only the intelligence committees are term-limited.

Supporters of term limits argue that the eight-year cap still effectively prevents Members of Congress from becoming too close to the Intelligence Community — including the FBI; and this remains an important objective given the sensitive role the Intelligence Community plays in a democracy. Term limits, supporters argue, also provide exposure to the arcane world of intelligence to a greater number of members. Finally, they argue, by ensuring a stream of new members with relatively little experience in intelligence, term limits bring more new ideas to the table.

Consolidating Oversight Under the Intelligence Committees. Some observers argue that Congress could more effectively oversee the FBI’s intelligence operation if the joint jurisdiction now exercised by the intelligence and judiciary committees was eliminated, and the sole responsibility given to the intelligence committees. They concede, however, that such an outcome could result only if a stand-alone collection and analysis entity, was separate and became independent from the FBI, effectively removing the rationale for judiciary committee oversight. In recommending such an outcome, they at least imply that the intelligence committees would bring a more focused oversight expertise to judging the effectiveness of domestic intelligence analysis, collection and dissemination. They further suggest that putting the intelligence committees in charge would provide an even better mechanism for protecting civil liberties than do “current structure and processes.”¹⁶¹

However, opponents of consolidation argue that the intelligence committees are ill-quipped to focus on questions of civil liberties in connection with a domestic intelligence agency. They also could argue that the sensitivity of such issues requires the transparency that comes with regular public hearings. The intelligence committees, by contrast, conduct the majority of their work behind closed doors.

Options

The debate over Congressional options on FBI reform centers on two fundamentally opposing views on how best to prevent terrorist acts and other clandestine foreign intelligence activities directed against the United State before they occur. Adherents to one school of thought believe there are important synergies to be gained from keeping intelligence and law enforcement functions combined as they are currently under the FBI. They argue that the two disciplines share the goal

¹⁶¹ See the Gilmore Commission, *Fourth Annual Report to the President and Congress*. pp. 44-45.

of terrorism prevention; that prevention within the U.S. will invariably require law enforcement to arrest and prosecute alleged terrorists; and, that the decentralized nature of terrorist cells is analogous to that of organized crime.¹⁶²

A second school of thought counters that the chasm between the exigencies of the two disciplines, both cultural and practical, is simply too broad to effectively bridge, and, therefore, that the two should be bureaucratically separated.

These two opposing views raise several options for Congress, including the following:

- Option 1: Support Director Mueller's reform package.
- Option 2: Create a semi-autonomous National Security Intelligence Service within the FBI.
- Option 3: Establish a separate domestic intelligence agency within the Department of Homeland Security.
- Option 4: Establish a separate domestic intelligence agency under the authority of the DCI, but subject to oversight of the Attorney General.
- Option 5: Create an entirely new stand-alone domestic intelligence service.

Option 1: Status Quo

Under this option Congress would continue to support Director Mueller's reforms with necessary funding. Proponents of this could argue that Director Mueller's reforms constitute the most effective way to address weaknesses and improve the FBI's intelligence program, and ultimately, to prevent terrorism in the U.S. They could also argue that the reforms accomplish three important and inter-related goals. First, the FBI would continue to benefit from the synergies that integrated intelligence-law enforcement provides in the war on terror. Second, by keeping the intelligence program within the FBI and under the watchful eye of the Department of Justice, the Attorney General would be better able to reassure the American people that the FBI's use of intelligence will not be allowed to infringe on their civil liberties. Third, the reforms would improve the FBI's intelligence capabilities, while minimizing the bureaucratic disruption, confusion and resource constraints that would result if the FBI's intelligence program were re-established in a new stand-alone entity separate from the FBI. More specifically, they could maintain that Director Mueller's changes are improving day-to-day collection, analysis and dissemination of intelligence.

¹⁶² For a treatment of the evolution of the relationship between law enforcement and intelligence, see CRS Report RL30252, *Intelligence and Law Enforcement: Countering Transnational Threats to the U.S.*, by Richard A. Best Jr.

Opponents to this option could counter that the reforms are necessary but insufficient. While applauding Director Mueller's new focus on the intelligence, some could contend that his reforms are too limited and that intelligence still and always will be, undermined by its arguably second-class status in an FBI that has long been proud of its law enforcement culture. They could cite past instances when additional resources were provided to the FBI's intelligence program, only later to be siphoned off to support criminal priorities. Or, they could also go further, arguing that the disciplines of intelligence and law enforcement are so different that they must be separated, and the FBI's intelligence program housed in and directed by a new agency.

Option 2: Creation of a National Security Intelligence Service within the FBI

Under this option, Congress could establish a semi-autonomous national security intelligence service (NSIS) within the FBI, and provide it with sufficient staff and protected resources. The service would have its own budget to ensure sustainable resources. The service's principal responsibility would be to develop and nurture an integrated intelligence program, and to establish well-defined career paths for special agents and analysts that would hold out realistic promise of advancement to the highest levels of the FBI and the Intelligence Community.¹⁶³ Current FBI employees who decide to join the service could be protected from mandatory transfers to the FBI's criminal programs. The service director, experienced in all-source domestic and foreign intelligence, would be presidentially appointed and Senate-confirmed. Regional service squads could be established to focus intelligence resources in the field.

There are multiple ways such an organization could be structured. One such construct, however, would pull all (investigative, operational and analytical — headquarters and field) of the FBI's international terrorism, foreign counterintelligence, JTTF, and security countermeasures resources into the NSIS. While the NSIS Director would report to the FBI Director and the Attorney General, and operate under the Attorney General Guidelines, the NSIS Director would also be tasked to ensure seamless coordination with the Director of Central Intelligence on issues for which the distinction between foreign and domestic intelligence are increasingly blurred, such as terrorism. Analysts within the NSIS would have access to all the FBI's intelligence relevant to national security, including criminal intelligence. Moreover, formal analytical working groups could be established to ensure analytical integration across counterterrorism, counterintelligence, and criminal programs. Finally, field intelligence groups could be fewer in number to ensure focus and deployment of experienced human resources, and could report to both the NSIS Deputy Director, and local Special Agent in Charge.

Proponents could argue this option would enhance the FBI's focus on intelligence without building any "walls" between the various types of intelligence

¹⁶³ The Central Intelligence Agency's Senior Analytic Service might serve as a possible model for elevating senior analysts to the non-managerial analytical equivalent of Senior Executive Service special agents.

the FBI collects, analyzes, and exploits. They could contend that the FBI could build a more effectively leveraged intelligence program on the foundation that the Director is currently putting in place. And that it could do so without severing the connection with law enforcement and the FBI's 56 field offices and 46 legal attaches¹⁶⁴ serving in U.S. embassies. Such an approach would also ease efforts to establish intelligence career paths and strengthen the role of intelligence. Some proponents of a "service within a service" also argue that it may serve as an interim or bridge solution to the eventual creation of an autonomous domestic intelligence agency (see option 5 below).¹⁶⁵

Opponents could argue that this option is still too limited, and that intelligence and law enforcement should be separated. They could also contend such an effort could be bureaucratically confusing as the new service seeks to build its independence while the FBI continues to exert control. Opponents could also argue that this option would disrupt Director Mueller's current reforms at the very time they are taking hold.

Option 3: Transfer of Existing FBI National Foreign Intelligence Program Resources to Department of Homeland Security

A third option could be to establish a separate domestic intelligence service and house it in the Department of Homeland Security.¹⁶⁶ The service would be a member of the Intelligence Community and its authorities would be limited to collecting and analyzing foreign intelligence inside the United States, including the plans, intentions and capabilities of international terrorist groups operating in the U.S. As envisioned, the agency, like Great Britain's MI5,¹⁶⁷ would not have arrest authority.

Proponents of this option could argue that folding the new entity into DHS, as opposed to creating a new stand-alone agency, would avoid creating more bureaucracy while also establishing an organization unencumbered by the FBI's law enforcement culture. They could argue that such an entity would be able to more sharply focus on intelligence while also better safeguarding the rights of citizens, provided new checks on its ability to collect intelligence against innocent people were put in place.

¹⁶⁴ FBI legal attaches serve in overseas posts, and are declared to the host country. Legal attaches serve as the FBI's link to foreign law enforcement and security services. While legal attaches conduct overt liaison with foreign services, they do not engage in clandestine intelligence collection overseas.

¹⁶⁵ See Richard A. Clarke, *Against All Enemies: Inside America's War on Terror*, (Free Press, 2004), pp. 254-256.

¹⁶⁶ U.S. Senator John Edwards introduced S. 410, The Foreign Intelligence Collection Improvement Act of 2003, which would establish a Homeland Intelligence Agency within DHS.

¹⁶⁷ See CRS Report RL31920, *Domestic Intelligence in the United Kingdom: Applicability of the MI-5 Model to the United States*, by Todd Masse.

Opponents could counter that placing the new organization in DHS would undermine its ability to play the role of an honest broker that could produce intelligence products not only for DHS but for other federal agencies, as well as for state and local authorities. They could also argue that placing the new entity within DHS would force it to compete with other DHS offices for scarce resources.¹⁶⁸ They also could oppose the idea for the same reason they might oppose a new entity separate from the FBI — that the essential synergistic relationship between intelligence and law enforcement would be severed. Finally, opponents could argue that establishing a separate agency is tantamount to creating an MI5-like agency, which may be unworkable in the U.S. context for political, cultural and legal reasons despite any efforts to mold it to conform to American experience.¹⁶⁹

Option 4: Transfer of Existing FBI National Foreign Intelligence Program Resources to the DCI

A fourth option could be to establish a domestic intelligence service under the direction of the Director Central Intelligence, either as a separate entity reporting directly to the DCI in that capacity,¹⁷⁰ or incorporated into the CIA. The Attorney General would retain the authority to establish and enforce rules to assure that the rights of Americans would be preserved.

Supporters of this option could contend that providing the DCI additional operational capability would improve the integration of analysis and collection and would ensure that security rather than criminal concerns would be emphasized.¹⁷¹ Opponents could argue that legal, policy perception, and cultural concerns militate against expanding DCI control over domestic intelligence collection and analysis. They could assert that there is a risk that the IC could misuse information it collected on American citizens.¹⁷² They could also argue that as a practical matter if a decision was made to incorporate this entity into the CIA, it, like the FBI, simply may not up

¹⁶⁸ See Gilmore Commission, *Fourth Annual Report to the President and Congress*. p. 42.

¹⁶⁹ See CRS Report RL31920, *Domestic Intelligence in the United Kingdom: Applicability of the MI-5 Model to the United States*, by Todd Masse.

¹⁷⁰ The Director of Central Intelligence serves as both the leader of the Central Intelligence Agency, and as Director of the broader U.S. Intelligence Community. The proposed 9/11 Intelligence Memorial Reform Act (S. 1520) would create a Director of National Intelligence. That individual would be precluded from simultaneous service as the Director of the CIA and Director of National Intelligence. Some have argued this proposal would undermine the DCI's power base. See Robert M. Gates, "How Not to Reform Intelligence," *Wall Street Journal*, Sept. 3, 2003. Finally, while the TTIC reports to the Director of Central Intelligence as leader of the Intelligence Community, the organization has been categorized as a "joint venture" of Intelligence Community participants.

¹⁷¹ See statement by John Deutch, former Director of Central Intelligence, before the National Commission on Terrorist Attacks upon the United States, Oct. 15, 2003, p. 5.

¹⁷² *Ibid.*, p. 5.

to the task of reorienting its efforts quickly enough to take on this added responsibility.¹⁷³

Option 5: Creation of a New Domestic Security Intelligence Service

A fifth option could be to create an entirely new agency within the IC — but, one which is independent of the FBI, CIA and DHS. The new agency would fuse all intelligence — from all sources, domestic and foreign — on potential terrorist attacks within the United States and disseminate it to appropriately cleared federal, state, local and private sector customers.¹⁷⁴ This stand-alone entity also would include a separate but collocated collection units, which would be authorized to collect domestic intelligence on international terrorism threats within the United States. The new organization would be prohibited from collecting intelligence un-related to international terrorism. Counterterrorism intelligence collection outside the United States would continue to fall under the purview of the CIA, NSA, and other foreign IC components.¹⁷⁵ It also would lack arrest authorities, but would provide “actionable” intelligence to those entities, such as the FBI, with authority to take action. The new entity would have authority to task the IC for collection. It would be overseen by a policy and steering committee comprised of the new agency’s director, the DCI, the Attorney General and the DHS Secretary. The steering committee would ensure that the new entity adheres to all relevant constitutional, statutory, regulatory, and policy requirements.

Proponents of this option could argue that because of its law enforcement culture, the FBI is incapable of transforming itself into an agency capable of preventing terrorist attacks.¹⁷⁶ And even if it could, proponents could argue that failing to separate intelligence collection from law enforcement could give rise to the fear that the U.S. was establishing a secret police.¹⁷⁷ Proponents also could assert that the federal government artificially distinguishes between foreign and domestic terrorist threats, when those distinctions increasingly are blurred. And they could contend, given the historical record, that the FBI and CIA are incapable of changing direction quickly enough to work together effectively to bridge that divide.¹⁷⁸

Opponents could counter that establishing another agency will simply create more bureaucracy. They could argue that it would take years for a new organization to be fully staffed, and become effective in the fight against terrorism, and that

¹⁷³ See Gilmore Commission, *Fourth Annual Report to the President and Congress*, p. 41.

¹⁷⁴ *Ibid.*, pp. 41-47.

¹⁷⁵ *Ibid.*, p. 44.

¹⁷⁶ *Ibid.*, pp. 43-44.

¹⁷⁷ *Ibid.*, p. 44.

¹⁷⁸ *Ibid.*, p. 41.

pushing for better CIA-FBI cooperation is a more practical approach.¹⁷⁹ They also could argue that establishing a separate domestic intelligence service (like MI-5) is impractical in the U.S. context¹⁸⁰ and would move the country in the wrong direction by creating a more stove-piped bureaucracy that would undermine the country's ability to wage an integrated war on terrorism.¹⁸¹ And they could argue that the FBI has never been solely a law enforcement agency but rather an investigative and domestic security agency that is well prepared to collect and analyze intelligence, and they could cite the FBI's successes against organized crime as proof.¹⁸²

Opponents could also counter that the FBI in the past has effectively collected intelligence, but, that its ability to do so over time has been eroded. Former U.S. Attorney General Barr and others argue that historically the FBI has been effective in the collection of domestic intelligence, but that it was undermined by policymakers, such as Congress and the courts, through the placement of legal constraints on the FBI over the past 30 years.¹⁸³ Finally, opponents could argue that Britain's MI-5 has a mixed record of effectiveness.¹⁸⁴

¹⁷⁹ According to former House Intelligence Committee Chairman Lee Hamilton, "if the shortcomings leading up to Sept. 11 were systemic in nature, the solution lies in better system management, the handling and analysis of vast amounts of information, and the distribution in a timely manner of the key conclusions to the right people." See the *JIC Inquiry*, p. 350.

¹⁸⁰ *Ibid.*, p. 351. According to former FBI Director William Webster, the MI-5 concept is inapplicable in the U.S. context. "We're not England," Webster said. "We're not 500 miles across our territory. We have thousands of miles to cover. Would you propose to create an organization that had people all over the United States, as the FBI does?" He instead supports training FBI personnel to be more responsive to terrorist threats. He further argues that, "More than any other kind of threat, there is an interrelationship between law enforcement and intelligence in dealing with the problem of terrorism...We need investigative capability and intelligence collection capability, as well as those who go through the bits and pieces and fill in the dots."

¹⁸¹ See statement of William P. Barr, former United States Attorney General, in U.S. Congress, House Select Committee on Intelligence, Oct. 30, 2003, p. 13.

¹⁸² *Ibid.*, p. 18. Former Attorney General Barr testified, "An idea making the rounds these days is the notion of severing "domestic intelligence" from the FBI and creating a new domestic spy agency akin to Britain's MI-5. I think this is preposterous and goes in exactly the wrong direction. Artificial stove-piping hurts our counterterrorism efforts. What we need to do now is meld intelligence and law enforcement more closely together, not tear them apart. We already have too many agencies and creating still another simply adds more bureaucracy, spawns intractable and debilitating turf wars, and creates further barriers to the kind of seamless integration that is needed in this area."

¹⁸³ *Ibid.*, p. 14.

¹⁸⁴ See Center for Democracy, "Domestic Intelligence Agencies: The Mixed Record of the UK's MI5," Jan. 27, 2003.

Conclusion

Congressional policymakers face FBI intelligence reform options in a dynamic context. The FBI has made or is in the process of making substantial organizational, business process, and resource allocation changes to enhance its ability to deter, detect, neutralize and prevent acts of terrorism or espionage directed against the United States. Some experts believe that the remedial measures currently being taken by the FBI, to include a centralization of national security-related cases, enhanced intelligence training for agents and analysts, increased recruitment of intelligence analysts, and the development of a formal and integrated intelligence cycle are all appropriate and achievable. Other experts are more critical of the current intelligence reforms believing that the culture of the FBI, including its law enforcement-oriented approach to intelligence, may prove to be an insurmountable obstacle to necessary intelligence reforms. Some argue that the pace and scope of reform may be too slow and not radical enough.

One of the central points of distinction between supporters and critics of the current FBI intelligence reforms is the extent to which they believe that the two disciplines of law enforcement and intelligence are synergistic, that is that the commonalities among them would benefit from continued integration. In general, those believing that law enforcement and intelligence should be integrated argue for the status quo. However, other experts believe that given the conceptual and operational differences between law enforcement and intelligence, the national interest would be best served by having them located in separate organizations with systematic and formal mechanisms in place to share information and protect civil liberties. Should the Congress choose to influence the direction and/or outcome of the FBI's intelligence reform, numerous options, from support of the status quo to the establishment of an autonomous domestic security intelligence service, are available for consideration.

Appendix 1: Definitions of Intelligence

Three formal categories of intelligence are defined under statute or regulation:

- Foreign Intelligence. Information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons.¹⁸⁵
- Counterintelligence. Information gathered, and activities conducted, to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities.¹⁸⁶
- Criminal Intelligence. Data which has been evaluated to determine that it is relevant to the identification of and the criminal activity engaged in by an individual who or organization which is reasonably suspected of involvement in criminal activity. [Certain criminal activities including but not limited to loan sharking, drug trafficking, trafficking in stolen property, gambling, extortion, smuggling, bribery, and corruption of public officials often involve some degree of regular coordination and permanent organization involving a large number of participants over a broad geographical area].¹⁸⁷

¹⁸⁵ See National Security Act of 1947, as amended (50 U.S. Code, Chapter 15, 401(a) and Executive Order 12333, 3.4.

¹⁸⁶ Ibid.

¹⁸⁷ See *Code of Federal Regulations*, Part 23.

Appendix 2: The FBI's Traditional Role in Intelligence

According to Executive Order 12333, United States Intelligence Activities, signed December 4, 1981, and the National Security Act of 1947 (50 U.S. Code §401), the FBI is a statutory member of the United States Intelligence Community. Specifically, and in accordance with section 1.14 of Executive Order 12333, United States Intelligence Activities, the intelligence roles of the FBI are outlined as follows:

Under the supervision of the Attorney General and pursuant to such regulations as the Attorney General may establish, the Director of the FBI shall:

- (a) Within the United States conduct counterintelligence and coordinate counterintelligence activities of other agencies within the Intelligence Community. When a counterintelligence activity of the military involves military or civilian personnel of the Department of Defense, the FBI shall coordinate with the Department of Defense;
- (b) Conduct counterintelligence activities outside the United States in coordination with the Central Intelligence Agency as required by procedures agreed upon by the Director of Central Intelligence and the Attorney General;
- (c) Conduct 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 the communications security activities of the United States Government;
- (d) Produce and disseminate foreign intelligence and counterintelligence; and
- (e) Carry out or contract for research, development, and procurement of technical systems and devices relating to the functions authorized above.

Appendix 3: The FBI's Intelligence Programs — A Brief History

The FBI's is responsible for deterring, detecting and preventing domestic activities that may threaten the national security, and, at the same time, respecting constitutional safeguards.¹⁸⁸ The FBI, a statutory member of the IC, is able to collect foreign intelligence within the U.S. when authorized by IC officials.

The FBI and its predecessor, the Bureau of Intelligence, have collected intelligence — foreign intelligence, counterintelligence and criminal intelligence — in the U.S. since 1908,¹⁸⁹ and, at times, effectively.¹⁹⁰ During the Cold War, the FBI successfully penetrated the Soviet leadership through a recruited U.S. Communist Party asset. The FBI also battled the Kremlin on the counterintelligence front.¹⁹¹ In 1985 — dubbed the Year of the Spy, the FBI arrested 11 U.S. citizens for espionage, — including former U.S. warrant officer John Walker, who provided the Soviets highly classified cryptography codes during a spying career that began in the 1960s. The FBI also arrested Larry Wu-Tai Chin, a CIA employee, a spy for the People's Republic of China; Jonathan Pollard, a Naval Investigative Service intelligence analyst who stole secrets for Israel; and Ronald Pelton, a former National Security Agency communications specialist who provided the Soviet Union classified material.¹⁹² More recently convicted spies include FBI Special Agent Robert P. Hanssen, who spied on behalf of Soviet Union and, subsequently, Russia, and pleaded guilty to 15 espionage-related charges in 2001; and former Defense Intelligence Agency analyst Ana Belen Montes, arrested in 2001 and subsequently convicted for spying for Cuba.

FBI Excesses

The FBI has been applauded for its historical successes, but also criticized for overstepping constitutional bounds by targeting U.S. citizens who were found to be exercising their constitutional rights.¹⁹³ For example, during the 1919-1920 "Palmer

¹⁸⁸ For a more detailed description of the FBI's traditional intelligence role, see **Appendix 2**.

¹⁸⁹ For an official history of the FBI, see [<http://www.fbi.gov/fbihistory.htm>]. See also CRS Report RL32095, *The FBI: Past, Present and Future*, by William Krouse and Todd Masse.

¹⁹⁰ Interview with a former senior FBI official, Oct. 3, 2003.

¹⁹¹ The successful prosecution of an espionage case can be viewed as both a counterintelligence success, and failure. It is a success insofar as the activity is stopped, but is a failure insofar as the activity escaped the attention of appropriate authorities for any period of time.

¹⁹² See CRS Report 93-531, *Individuals Arrested on Charges of Espionage Against the United States Government: 1966-1993*, by Suzanne Cavanagh (available from the authors of this report). For a compilation of espionage cases through 1999, see [<http://www.dss.mil/training/espionage>].

¹⁹³ See Tony Poveda, *Lawlessness and Reform: The FBI in Transition*, Brooks/Cole (continued...)

Raids,” the FBI’s so-called Radical Division (later renamed the General Intelligence Division) arrested individuals allegedly working to overthrow the U.S. government, but who were later judged to be innocent.¹⁹⁴

Between 1956 and 1970, the FBI investigated individuals it believed were engaging in “subversive” activities as part of the FBI’s so-called COINTELPRO Program.¹⁹⁵ In the mid-1960s, the FBI surveilled such prominent Americans as Martin Luther King, Jr., collecting “racial intelligence.”¹⁹⁶ And in the 1980s, the FBI was found to have violated the constitutional rights of members of the Committee in Solidarity with the People of El Salvador (CISPES) who the FBI believed violated the Foreign Agent Registration Act.¹⁹⁷ Although congressional investigators concluded that the FBI’s investigation did not reflect “significant FBI political or ideological bias ...,” its activities “resulted in the investigation of domestic political activities protected by the First Amendment that should not have come under governmental scrutiny.”¹⁹⁸

Oversight and Regulation: The Pendulum Swings

In response to these FBI abuses, the Department of Justice imposed domestic intelligence collection standards on the IC, including the FBI. For example, in 1976, Attorney General Edward H. Levi issued specific guidelines governing FBI domestic security investigations. Congress also established House and Senate intelligence oversight committees to monitor the IC. And President Carter signed into law the Foreign Intelligence Surveillance Act of 1978, which established legal procedures and standards governing the use of electronic surveillance within the U.S.

Critics argue that until Congress approved the U.S.A. PATRIOT Act granting the FBI additional authority to investigate suspected terrorists, increased oversight and over-regulation had seriously weakened the FBI’s intelligence capabilities. Some thought that not only had regulations curtailed the FBI’s surveillance authorities, but that they had undermined the risk-taking culture thought to be essential to successful

¹⁹³ (...continued)
Publishing, 1990.

¹⁹⁴ See Edwin Hoyt Palmer, *The Palmer Raids, 1919-1921: An Attempt to Suppress Dissent*, Seabury Press, 1969.

¹⁹⁵ For further information on the history of COINTELPRO, see S.Rept. 94-755, *Supplementary Detailed Staff Reports of Intelligence Activities and the Rights of Americans, Book III*, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, U.S. Senate, (Washington, Apr. 23, 1976); (Hereafter cited as the Church Committee Report).

¹⁹⁶ See Church Committee Report, *Intelligence Activities and the Rights of Americans*, Book II, p.71.

¹⁹⁷ The Foreign Agent Registration Act requires that persons acting as foreign agents (as defined by the act) register with the U.S. Department of Justice for, among other reasons, transparency. (see 22 U.S.C. Chap. 611)

¹⁹⁸ See “The FBI and CISPES,” a report of the Select Committee on Intelligence, U.S. (S.Rept. 101-46, July 1989).

intelligence work.¹⁹⁹ The Levi Guidelines²⁰⁰ were singled out as being particularly onerous.²⁰¹

Some observers blamed the restrictions for discouraging domestic intelligence collection unless the FBI could clearly show that its collection was tied to a specific alleged crime. They also said the restrictions led the FBI to transfer responsibility for parts of its counterterrorism program from the FBI's former Intelligence Division to its Criminal Division. The result, they contend, was an anemic intelligence program that contributed to the failure to prevent the September 11, 2001 terrorist attacks.²⁰²

¹⁹⁹ See Bill Gertz, *Breakdown: How America's Intelligence Failures Led to September 11*, 2002, pp. 83-125. (Regnery Publishing).

²⁰⁰ According to the Levi guidelines, domestic security investigations were to be limited to gathering information on group or individual activities "... which involve or will involve the use of force or violence and which involve or will involve a violation of federal law...."

²⁰¹ See Testimony of Francis J. McNamara, former Subversive Activities Control Board Director, before the National Committee to Restore Internal Security, May 20, 1986. Quoted in W. Raymond Wannall, "Undermining Counterintelligence Capability," *International Journal of Intelligence and Counterintelligence*, vol. 15, winter 2002, pp. 321-329.

²⁰² Interviews with former senior FBI officials.

Appendix 4: The Case File as an Organizing Concept, and Implications for Prevention

The FBI uses a case approach to categorize each of its investigations. Each case receives an alphanumeric indicator signifying the target country, or issue, and the level of priority. Some observers have criticized this approach as reactive; a case is opened only after a crime has been committed. Traditionally, *ex post* investigation is the FBI's greatest investigative strength. It can deploy thousands of agents, as it did after the terrorist attacks of September 11, 2001, to track domestic and international leads, conduct witness interviews and develop a "story board" about how the act and the events surrounding it took place. Although well suited for assembling a criminal case, this operational approach is ill-suited for terrorism prevention.

While the FBI reacts to crimes after the fact, it adopts a proactive approach in some counterintelligence cases. For example, FBI counterintelligence agents, working with their IC counterparts, may open a "case" to recruit a human asset, usually a foreign national, who may have access to information which would fulfill an existing intelligence gap.

The FBI says it is attempting to adopt a proactive approach to counterterrorism. FBI Director Mueller says that the new USA PATRIOT Act has helped. According to FBI Director Mueller, the FBI can now, "... move from thinking about 'intelligence as a case' to finding 'intelligence in the case'..."²⁰³ While the reactive opening a criminal case, such as those against cigarette smugglers, may yield intelligence relevant to counterterrorism, it is generally a serendipitous occurrence. Extracting preventative and predictive intelligence from a case arguably presupposes first, that the case was opened pro-actively, and not necessarily in response to some adverse event. Second, in order to extract intelligence from any case, well-trained and experienced reports officers and intelligence analysts must be integrated into the flow of intelligence resulting from investigations, and be able to sift the "signal" from the "noise" in the sea of raw intelligence to which they have access. According to one local law enforcement official, the FBI is unable to strip the intelligence from their own cases, much less share that intelligence with state and local law enforcement officials.²⁰⁴ Finally, for the FBI to succeed in using this new approach, it will likely have to implement successfully all the complex and inter-related elements of the intelligence cycle.

²⁰³ See statement of Robert S. Mueller III, Director, Federal Bureau of Investigation, in U.S. Congress Senate Judiciary Committee, July 23, 2003.

²⁰⁴ Interview with local law enforcement official, Apr. 5, 2004.

Appendix 5: Past Efforts to Reform FBI Intelligence

The FBI's current intelligence reform is not its first. Twice before — in 1998, and then again in 1999 — the FBI embarked on almost identical efforts to establish intelligence as a priority, and to strengthen its intelligence program. Both attempts are considered by some to have been failures.²⁰⁵

Both previous attempts were driven by concerns that FBI's intelligence effectiveness was being undercut by the FBI's historically fragmented intelligence program. The FBI's three operational divisions, at the time — criminal, counterterrorism and counterintelligence — each controlled its own intelligence program.²⁰⁶ As a result, the FBI had trouble integrating its intelligence effort horizontally between its divisions. In intelligence world parlance, the programs were “stove-piped.”

In 1998, the FBI attempted to address the stove pipe problem by consolidating control over intelligence under the authority of a newly established Office of Intelligence. It also took steps to improve the quality of its intelligence analysis, particularly in the criminal area, which was viewed as particularly weak.

Dissatisfied with the results, the FBI launched a second round of reforms the following year aimed at more thoroughly integrating FBI intelligence analysis in support of investigations. A new Investigative Services Division (ISD) was established to replace the Office of Intelligence, and to house in one location all FBI analysts that until then had been “owned” by FBI's operational divisions. Although the ISD was intended to provide each of the divisions “one-stop shopping” for their intelligence needs, it was never accepted by the operational divisions, which wanted to control their own intelligence analysis programs. In the wake of September 11, the FBI concluded that analysts would be more effective if they were controlled by the operational divisions. ISD was abolished, and analysts were dispersed back to the divisions in which they originally served.

Although observers blame the failure of both prior reform efforts on several complex factors, they put the FBI's deeply-ingrained law enforcement mentality at the top of the list. As one observer described it, efforts to integrate intelligence at the FBI were substantially hampered because resources dedicated to intelligence were gradually siphoned back to the FBI's traditional counter crime programs. Moreover, there was also little sustained senior level support for an intelligence function that was integrated with the Intelligence Community.²⁰⁷

²⁰⁵ Interview with a former senior FBI official, Oct. 2, 2003.

²⁰⁶ A fourth division — cyber crime — was established in Apr. 2002. Until the appointment of the EAD-I, it, too, had its own intelligence component.

²⁰⁷ Interview with a former senior FBI official, Oct. 2, 2003.

Appendix 6: Counterterrorism and Counterintelligence²⁰⁸

The FBI's two principal national foreign intelligence program responsibilities are counterterrorism and counterintelligence. Some observers of FBI intelligence reform have suggested that these two disciplines be integrated, but not necessarily under the control of the FBI.²⁰⁹ Numerous interviewees indicated their belief that of the FBI's NFIP responsibilities, the counterintelligence program was most closely integrated into the Intelligence Community.

Historically, the FBI has shifted its organization to counter both terrorist and clandestine foreign intelligence activity directed against the United States. Although the FBI in the past has integrated both missions as part of the same division, currently the FBI has separate counterterrorism and counterintelligence divisions. The Assistant Directors for each division report to an Executive Assistant Director having responsibility for both functions. In a debate that mirrors the ongoing discussion about the appropriate relationship between law enforcement and intelligence, some observers believe counterterrorism and counterintelligence should be reintegrated.²¹⁰ They make the following arguments:

- *Commonality of Adversary Methods of Operation.* No matter whether the threat the United States is confronting is that of a loosely affiliated foreign terrorist group, or a centrally controlled foreign intelligence service, the method of operation is consistent — a covertly organized set of activities designed to undermine U.S. national security. As such, the countermeasures are similar — primarily the penetration and surveillance of the inimical activity, up to, and until, the point at which action may be taken against the United States.
- *Linkages between Foreign Intelligence Services and Terrorist Groups.* Some argue that there are linkages between foreign intelligence services and terrorist groups.²¹¹ Information documenting these links, should they exist, are likely to be classified.

Supporters of the status quo argue the following:

- *Similar Disciplines — Different Time Lines and Pressures.* While the damage that can result from a successful espionage operation directed against the United States by a foreign power can be just as

²⁰⁸ According to Executive Order 12333, counterintelligence includes international terrorist activities. See **Appendix 1**.

²⁰⁹ See “Spying,” *The Economist*, July 10, 2003.

²¹⁰ Ibid.

²¹¹ Ibid.

damaging to national security as the terrorist attacks of September 11, counterintelligence moves at a different pace than counterterrorism. Building counter-espionage cases can sometimes consume months, if not years, of monitoring actions of those suspected of passing national defense information to an unauthorized third party, or committing economic espionage. In the case of a potential terrorist act, there is pressure to collect actionable intelligence, and to act quickly to prevent terrorists from striking.

- *Diminution of Resources/Organizational Focus on Counterintelligence.* Of the FBI's two principal National Foreign Intelligence Program priorities, the counterintelligence program, arguably, has been accorded a lower priority in the wake of the Cold War. Counterterrorism has become the FBI's first priority. Reintegrating the two could lead to situations in which, particularly from an FBI human resources perspective, counterintelligence personnel serve as a reserve pool of educated labor for counterterrorism. Such an occurrence may result in a diminished strategic focus on counterintelligence, a function which requires a long-term outlook and commitment.
- *The Law Enforcement Nexus with Counterterrorism and Counterintelligence.* Given the decentralized nature of the terrorist threat, and criminal activities engaged in to provide financial support for such activities, there is a close relationship between the FBI's criminal programs and its counterterrorism program. While there is also a nexus between the FBI's counterintelligence activities and its criminal programs, arguably, given that very few counterintelligence cases ever go to trial for espionage or economic espionage prosecution, the nexus is weaker.

Appendix 7: Relevant Legal and Regulatory Changes

Intelligence Community operations, including domestic intelligence collection, and collection of intelligence on U.S. persons,²¹² are governed by a body of laws, regulations and guidelines.²¹³ With regard to the domestic intelligence collection, for example, the U.S. Department of Justice has promulgated seven successive sets of guidelines²¹⁴ governing these efforts since 1976.

Following September 11, Congress also approved the USA PATRIOT Act, which makes it easier for the FBI to share intelligence with IC agencies, and to conduct electronic surveillance.²¹⁵ For example, with respect to electronic

²¹² United States persons means a United States citizen, an alien known by the intelligence agency concerned to be a permanent resident alien, an unincorporated association substantially composed of United States citizens or permanent resident aliens or a corporation incorporated in the United States, except in the case of a corporation directed and controlled by a foreign government, or governments. *See United States Intelligence Activities*, Executive Order 12333, Dec. 4, 1981.

²¹³ Richard Betts, Member of the National Commission on Terrorism and Director of the Institute of War and Peace Studies at Columbia University, contends that the balance between civil liberties and security is one in which a differentiation between two types of constraints on civil liberties (political censorship and compromises of individual privacy via enhanced surveillance) should be made. According to Betts, although the former (largely manifested through the suppression of free speech) will not measurably advance the war against terrorism, and should not be tolerated, greater acceptance of the latter, with appropriate measures for keeping secret irrelevant byproduct intelligence, may yield “...the biggest payoff for counterterrorism intelligence.” *See “Fixing Intelligence,” Foreign Affairs*, Jan./Feb. 2002.

²¹⁴ These policy guidelines include *The Attorney General’s Guidelines on Domestic Security Investigations* (April 5, 1976 — Attorney General Edward H. Levi), *The Attorney General Guidelines on Criminal Investigations of Individuals and Organizations* Dec. 2, 1980 — Attorney General Benjamin R. Civiletti), *The Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations* (Mar. 7, 1983 — Attorney General William French Smith), *The Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations* (Mar. 21, 1989 — Attorney General Richard Thornburgh), *The Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations* (Memorandum from Acting Deputy Attorney General Jo Ann Harris to Attorney General Janet Reno recommending a change in the guidelines; approved by Attorney General Reno on April 19, 1994.), *The Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations* (May 30, 2002 - Attorney General John Ashcroft), and *The Attorney General’s Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (U)* (Oct. 31, 2003 - Attorney General John Ashcroft). Other guidelines — classified and unclassified - regulating the use of confidential informants, undercover operations, and procedures for lawful, warrant less monitoring of verbal conversations may also play a role in the gathering of domestic intelligence.

²¹⁵ *See* CRS Report RL30465, *The Foreign Intelligence Surveillance Act: An Overview of* (continued...)

surveillance, a substantially broader legal standard authorized in the USA PATRIOT Act allows for electronic surveillance under the Foreign Intelligence Surveillance Act, as long as, among other requirements, the application includes a certification by an appropriate national security official that “a significant purpose of the surveillance is to obtain foreign intelligence information.”²¹⁶ Among the other criteria which must be met for an application for electronic surveillance to be approved under FISA, a court must find that the surveillance “... is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.”²¹⁷ Moreover, the Intelligence Authorization Act of FY2004 authorized the enhanced use of administrative subpoenas, also known as national security letters, by the FBI in order to gather information from financial institutions.²¹⁸

The USA PATRIOT Act has had a substantial impact on FBI intelligence gathering and sharing. For example, Foreign Intelligence Surveillance Act authorizations for electronic surveillance increased 21.3% during the two-year period, 2000 to 2002.²¹⁹ According to FBI Director Mueller, the act has been

²¹⁵ (...continued)

the Statutory Framework and Recent Judicial Decisions, Mar. 31, 2003, by Elizabeth B. Bazan. See also CRS Report RL31377, *The USA PATRIOT Act: A Legal Analysis*, by Charles Doyle. See also CRS Report RL31200, *Terrorism: Section by Section Analysis of the USA PATRIOT Act*, by Charles Doyle. See Title II - Enhanced Surveillance Procedures (Section 203 “Authority to Share Criminal Investigative Information,” altered rule 6(e) of the *Federal Rules of Criminal Procedure*[2003 Edition] to permit the sharing of grand jury information with “federal law enforcement, intelligence, protective, immigration, national defense, or national security officials for official duties.”) Section 203 of the USA PATRIOT Act authorized sharing of information gathered through electronic surveillance as part of a criminal investigation under 18 U.S.C. §2517, as well as the sharing of foreign intelligence and counterintelligence gathered as part of a criminal investigation with any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist that official in performance of his official duties, 50 U.S.C. § 403-5d. See also P.L. 107-56, Title V — Removal of Obstacles to Investigating Terrorism, and Title IX — Improved Intelligence.

²¹⁶ The requirement and standard was changed from “the purpose” to “a significant purpose.” Section 218 of the USA PATRIOT Act of 2001, P.L. 107-56, codified at 50 U.S.C. § 1804(a)(7)(B).

²¹⁷ 50 U.S.C. §1805(a)(3)(A). See numerous references to this standard in USA PATRIOT Act of 2001, P.L. 107-56, Title II — Enhanced Surveillance Procedures. Prohibitions against electronic surveillance or physical searches under FISA based solely on First Amendment protected activities pre-date the USA PATRIOT Act. However, the USA PATRIOT Act added similar language to the pen register and trap and trace devices part of FISA. See FISA, 50 U.S.C. §§1842 and 1843.

²¹⁸ The definition of financial institution as set out in the Intelligence Authorization Act for FY2004 (P.L. 108-177), adopts the language of Title 31, U.S. Code, §§(a) (2) and (c) (1), which includes any credit union, thrift institution, broker or dealer in equities or commodities, currency exchange, insurance company, pawn broker, travel agency, and/or operator of a credit card system, among others.

²¹⁹ See annual reports of the U.S. Justice Department to the Speaker of the U.S. House of Representatives, as required by the Foreign Intelligence Surveillance Act of 1978, as (continued...)

“extraordinarily beneficial in the war on terrorism ... Our success in preventing another catastrophic attack on the U.S. homeland would have been much more difficult, if not impossible, without the Act.”²²⁰

The USA PATRIOT Act also has provided a legal framework that makes it easier for the FBI’s four investigative/operational divisions — criminal, counterterrorism, counterintelligence, and cyber — to integrate their intelligence efforts. As a result, the FBI has adopted a new strategy, known as the Model Counterterrorism Investigations Strategy, which permits the FBI to treat counterterrorism cases as intelligence cases from the outset, making it easier to initiate electronic surveillance. Special Agent John Pistole, FBI Executive Assistant Director for Counterterrorism and Counterintelligence, stated, “We’re still interested in the criminal violations that many people may be involved in. But, in many cases we are going to put that in the back seat and go down the road until we have all that we need.”²²¹ If implemented and institutionalized, the new policy may significantly enhance the effectiveness of the FBI’s intelligence program. The question becomes whether the FBI can implement the policy and stay within constitutional limits. Some civil libertarian advocates say they are concerned that by making it easier for the FBI to employ surveillance under FISA, the USA PATRIOT Act might lead the FBI to use such FISA surveillance to investigate criminal cases in a manner that may be inconsistent with the requirements of the Fourth Amendment.²²²

²¹⁹ (...continued)

amended (Title 50 U.S. Code, §1807). Statistics and annual reports compiled by the Federation of American Scientists (see [<http://www.fas.org/irp/agency/doj/fisa/>]). This increase is attributable, at least in part, to Section 218 of the USA PATRIOT Act (P.L. 107-56) which changed the legal standard concerning the purpose of the surveillance and its relationship to foreign intelligence information. According to the original language, “the purpose” of the surveillance had to be to obtain foreign intelligence information. The new language demands certification that foreign intelligence gathering is a “significant purpose” of the requested surveillance.

²²⁰ See Statement of Robert S. Mueller, III, Director, Federal Bureau of Investigation, before the Judiciary Committee, United States Senate, July 23, 2003.

²²¹ See Dan Eggen, “FBI Applies New Rules to Surveillance,” *Washington Post*, Dec. 13, 2003, p. A1.

²²² *Ibid.*