



The Reorganized U.S. Intelligence System after One Year

By Richard A. Posner

The end of the first year since the appointment of the first director of national intelligence is an appropriate juncture at which to pause and ask what has been, is being, and is likely to be accomplished by implementation of the ambitious reorganization of the national intelligence system that Congress decreed in the Intelligence Reform and Terrorism Prevention Act of 2004. Experience to date supports the conclusion that stubborn organizational cultures, design flaws in the act itself, and design choices made by the new Directorate of National Intelligence are thwarting the achievement of real improvements. We would probably be better off with a different reorganization with the following characteristics: overall coordination of the intelligence system separated from the direction of the CIA without giving the coordinator an analytic capability, the national intelligence agencies spun off from the Department of Defense, and finally a domestic intelligence agency separate from the FBI.

Congress decreed reorganization of the U.S. intelligence system in the Intelligence Reform and Terrorism Prevention Act of 2004, which the president signed into law in December of that year. The intelligence community has been engaged in implementing the law for a year, since the president appointed Ambassador John Negroponte to be the first director of national intelligence (DNI). A recent article by Scott Shane in the *New York Times* states that “a year after the sweeping government reorganization [of intelligence] began, the [intelligence] agencies . . . remain troubled by high-level turnover, overlapping responsibilities and bureaucratic rivalry,” and that the reorganization has “bloated the bureaucracy, adding boxes to the government organization chart without producing clearly defined roles.”¹ The question on which I focus in this article is whether these are merely teething troubles—the inevitable transition costs involved in an ambitious government reorganization—or

whether they point to fundamental design flaws in the intelligence reorganization.

It is tempting to suppose that all must be well because the DNI has hired able people. Indeed he has. But it is possible that these people could be working equally or even more productively for the individual agencies from which they (largely) came. The reorganization reshuffled rather than augmented the nation’s federal intelligence personnel. In evaluating a reorganization, one must always consider the incremental benefits created by it, and compare them with the incremental costs.

The fundamental cause of the ambitious reorganization of the intelligence community that we are living through is not, I believe, some deep flaws in the system as it existed on the eve of the 9/11 attacks. Rather, it is a deep misunderstanding of the limitations of national-security intelligence. It is the kind of misunderstanding that the commissioner of baseball might harbor if he thought it a scandal that 70 percent of the time even the best hitters fail to get a hit, and if he proposed to boost batting averages to 1.000 by reorganizing the leagues. His thinking would be deeply flawed, and

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his reorganization would fail to raise batting averages, though it might lower them.

Ephraim Kahana, in a recent article, lists Israeli intelligence failures since the founding of the State of Israel in 1948.² It is a remarkably long list. Many of the failures, it is true, occurred before Israel's warning-intelligence system was reorganized after the nation's biggest intelligence failure—the Egyptian-Syrian surprise attack of October 1973. But as many occurred afterwards. Israel is reputed to have an excellent intelligence system and one that is on high alert because of the acute threat to its existence posed by the Arab states. Nevertheless, it is fooled repeatedly. And its rate of being fooled seems insensitive to organizational structure.

U.S. intelligence has been fooled repeatedly too. Think only of Pearl Harbor (after which we reorganized our intelligence system); the Tet Offensive of 1968, which put us on the road to eventual defeat in Vietnam; and, of course, the 9/11 attacks. We are fooled not because our intelligence system is poor, but because surprise attacks are extremely difficult to predict. And there are no organizational panaceas. Intelligence misses are a constant; they are not a function of the details of the table of organization. Improvement is possible,³ but improvement and reorganization are not synonyms.

But failure in a democratic society demands a scapegoat. And because the CIA is a much less popular agency than the military services or the FBI, it is the designated scapegoat for the failure to prevent 9/11 and for the subsequent failure to detect Saddam Hussein's abandonment of his program of weapons of mass destruction (though we may not have heard the last of that). And failure in a democratic society also demands a response that promises, however improbably, to prevent future failures. The preferred response is a reorganization because it is at once dramatic and relatively cheap. And so the 2004 legislation and its subsequent implementation.

Three Organizational Problems

There were flaws in the organization of our intelligence system on the eve of 9/11, and this gave some plausibility to the idea that we needed to reorganize the system. There were in fact three organizational problems in need of solution. The first was the stacking of too many responsibilities on the director of central intelligence (DCI), with insufficient statutory powers. The second was the Defense Department's ownership of the national intelligence agencies (the National Security Agency

[NSA], the National Reconnaissance Office [NRO], and the National Geospatial-Intelligence Agency [NGA]). And the third was the FBI's control of domestic intelligence, or in other words, the absence of a U.S. counterpart to Britain's MI5 or Canada's Security Intelligence Service.

The DCI was the head of the CIA, a full-time job because of the size of the agency and because of the sensitivity of many of the missions of the Directorate of Operations. He was also the president's senior intelligence advisor—itself a full-time job, at least for presidents such as George W. Bush who want to meet frequently with their senior intelligence advisor. And he was the coordinator of the fifteen (actually more) U.S. intelligence agencies, which should also be a full-time job, especially since the DCI had limited statutory powers—particularly over the Defense Department's intelligence agencies—and thus had to operate by cajoling and politicking rather than by command. All this was too much for one person, given the enormous challenge—greater than the challenges that the Cold War had posed for the intelligence community—presented by Islamist terrorism in the era of proliferation of weapons of mass destruction. The DCI and director of the Central Intelligence Agency (DCIA) jobs should have been split and the DCI's powers strengthened, but not to the point of making him the actual administrator, or “czar,” of the intelligence community. The DCI's job should have been reconceptualized as that of the coordinator or board chairman of the intelligence community, much as in the British intelligence system. The DCIA would have remained the president's chief intelligence advisor and thus responsible for preparing the President's Daily Brief; those two jobs would be plenty for one person.

The Intelligence Reform Act separated the DCI and DCIA jobs, renaming the DCI the DNI—a cosmetic change, but perhaps justified by a sensible desire to give him domestic intelligence authority without suggesting continuity with the CIA—but went much further, as I am about to explain (and complain about). At the same time, Congress did nothing about the Defense Department's control of the national intelligence agencies and nothing about the FBI's domination of domestic intelligence either. I will return to these omissions, which seem to me unfortunate.

The “much further” was to make the DCI—now DNI—not merely a coordinator or board chairman of the intelligence community, but the president's chief intelligence advisor and the presiding deity of a new

bureaucracy, the Directorate of National Intelligence, which may, though I hope will not, engulf many of the responsibilities of the CIA and demote the agency to little more than a spy service, like MI6. The military is making inroads into the CIA as well, and the FBI is trying to. The CIA is embattled—and decentered.

The names of government agencies often don't mean a lot. But there is special significance to the word "central" in the CIA's name. The agency was meant to be the center of the U.S. intelligence system. It was to have most of the spies and most of the analysts, along with significant technical capabilities (NRO and NGA began life as components of the CIA, not of the Defense Department); it would integrate intelligence data obtained by other agencies and present its assessments to the president and other high officials. This still seems to me the right system. It implies, for example, that the National Counterterrorism Center (NCTC) should be inside the CIA (where it began, as the Terrorist Threat Integration Center [TTIC]) rather than inside the Directorate of National Intelligence, both to minimize friction with the CIA's Counterterrorist Center and to keep the analysts close to the operations officers. Returning NCTC to the CIA would give the CIA a significant domestic role, but one of analysis, not operations; and I do not recall that people were much disturbed that the formation of the TTIC put the CIA in the domestic intelligence business. And likewise the new National Counter Proliferation Center seems to me to belong in the CIA, if it belongs anywhere—if it should exist at all—for the proliferation of centers may be another example of the bureaucratic hypertrophy that may eventually strangle the intelligence community. There is also a danger that intelligence tasks that do not fall within the scope of some center will be slighted, and the further danger that centers will survive after the need that gave rise to them has waned.

My analysis further suggests that the head of the CIA should be the president's senior intelligence adviser, not the DNI, and therefore that the Directorate of National Intelligence does not require an analytical capability.

The DNI's staff is climbing toward 1,000; it may have reached or exceeded that number, for all I know, and be en route to 2,000. It has become a new bureaucracy layered on top of the intelligence community, a new agency on top of the fifteen or more previously existing agencies. The DNI finds himself tasked with coordinating the intelligence system, serving as the president's senior intelligence advisor, and managing his own intelligence service. The reorganization may have replicated the main

organizational flaw (an overburdened DCI) that it sought to rectify, while doing nothing to rectify the other two organizational flaws that existed before the reorganization (the Defense Department's ownership of the national intelligence agencies and the FBI's domination of domestic intelligence). Ambassador Negroponete appears to have ceded the main coordination role to General Michael Hayden, his principal deputy, producing (to exaggerate slightly) a strange inversion: the number 2 man is the CEO; the number 1 is the presidential advisor.

I am not clear what successes the reorganization has had in its first year. The intelligence community has been poor at getting out its message, an example being Ambassador Negroponete's virtual silence during the debate over the NSA's non-FISA surveillance program, which has stirred up such a storm. But that is a story for another day. (Note the failure of the intelligence community to obtain any credit from either the general public or influential opinion makers for its considerable contribution to our victory in the Cold War—an extraordinary failure of public relations.) I am sure that there have been successes because of the high quality of the persons hired by and detailed to the Directorate of National Intelligence. But I remind the reader of my earlier point that the critical question is not what successes have been achieved, but what successes would not have been achieved without the reorganization.

Clearly there have been setbacks. The departure of Captain John Russack from his post as Program Manager for the Information Sharing Environment, after several months of not being able to assemble a staff, suggests that little progress has been made in solving the stubborn problem of the reluctance, at once technical and cultural, of intelligence agencies to share information with each other. Maybe there has been progress on other fronts, though this is unclear to an outsider such as myself; and it is, to repeat a point that cannot be repeated too often, particularly unclear what, if anything, such improvements as have been made in the intelligence system owe to the reorganization. I have the sense (no stronger assertion is possible) that little progress has been made in exerting control over the intelligence activities of either the military or the FBI and the Department of Homeland Security (DHS).

Before Captain Russack left, he testified before the Senate Judiciary Committee that he intended his staff to be composed mainly of detailees from other agencies rather than permanent employees of the DNI. I was surprised, thinking that detailees were a temporary

expedient. I suspect that it would be a mistake for the DNI to make detailees a major component of its staff after it reaches its equilibrium size. This is an area (there are others) in which the seductive analogy of the Goldwater-Nichols reorganization of the armed forces should be resisted. When officers are detailed to the staff of the Joint Chiefs of Staff or otherwise assigned temporarily to joint positions, they are moving within the Defense Department, and if they do not do their joint work well it will reflect adversely on their career prospects. But when the CIA details an officer to the Directorate of National Intelligence, his performance there will not directly affect his career prospects at the CIA, because the DNI is not the ultimate employer of CIA officers; the CIA is. So the DNI may find it difficult to obtain the complete loyalty of its detailees. That will undermine the DNI's effectiveness.

A sure sign of the continuing though perhaps inevitable weakness of our counterterrorist intelligence is that we really have no good idea of the capabilities or plans of our terrorist enemies.

It is tempting to think that, despite all the criticisms that I and others have made of the reorganization of the intelligence system, the government must be doing something right because we haven't been attacked since 9/11. But haven't we? What exactly is going on in Iraq and Afghanistan? And the main thing we did right was to invade Afghanistan and scatter the leadership of al Qaeda, not to reorganize the intelligence community. Moreover, the 9/11 attacks made us hypervigilant about Islamic terrorism; that is a "benefit" that owes nothing to reorganization. A sure sign of the continuing though perhaps inevitable weakness of our counterterrorist intelligence is that we really have no good idea of the capabilities or plans of our terrorist enemies. And a steady drain of experienced intelligence officers to the private sector, whose demand for security personnel soared in the wake of the 9/11 attacks, has weakened the intelligence community, at least temporarily.

My guess, and it is only that, is that in the end the reorganization of the intelligence community will amount to rather little. The continuing debacle that is the

Department of Homeland Security, still floundering desperately despite the efforts of its able secretary and his corps of excellent deputies, should make us all suspicious of ambitious reorganizations. That Congress has yet not tried to consolidate the intelligence agencies into a single department, on the model of the Department of Homeland Security, is only a small comfort. The main result of the creation of DHS has been to layer a new bureaucracy over twenty-two separate agencies with a total of 184,000 employees, and the main result of the intelligence reorganization may turn out to be the layering of a new bureaucracy over fifteen or more separate agencies with a total of some 100,000 employees—though this is to exaggerate, since the DNI has no real control over the Defense Department, whose agencies comprise in the aggregate the largest segment of the intelligence community.

When a bureaucratic layer is added on top of a group of agencies, the result is delay, loss or distortion of information from the bottom up, delay and misunderstanding of commands from the top down, turf fights for the attention of the top layer (rival agencies now have a single boss for whose favor they can fight), demoralization of agencies that have been demoted by the insertion of a new layer of command between them and the president, and underspecialization, since the new top echelon can't be expected to be an expert in all the diverse missions of the agencies below. That is one of the lessons of the Hurricane Katrina fiasco. Placing the Federal Emergency Management Agency in DHS inserted between the head of FEMA and the White House an official (the secretary of DHS) who, naturally, because of the breadth of his responsibilities, was not an expert in emergency management. The result was and continues to be needless delay and confusion.

Incompatible Cultures

There is an additional factor, which has been neglected because the people who design government reorganizations are not mindful of the lessons of organization theory. Business mergers often founder on incompatible firm cultures possessed by the merged and merging firms. Mergers of government agencies can founder for the same reason. DHS is the prime current example, but DNI may go the same way. Coordinating, let alone directing, the intelligence system is greatly complicated by the existence of three distinct, stubborn, and largely incompatible organizational cultures that are poorly balanced: military intelligence, civilian national-security intelligence (mainly

CIA), and criminal-investigation intelligence (mainly FBI). I discuss their distinctness first, their stubbornness second, and their imbalance third.

No one will deny that the military has a distinctive culture (due to many factors, prominently including its up-and-out promotion system, its discipline, and its strong mission orientation) and views a competing civilian agency such as the CIA with a degree of hostility and disdain, which the agency reciprocates. An aggravating factor is that the military and the CIA are competitors in strategic intelligence and that the military, being at once the customer and the owner of the national intelligence agencies, has no wish to share their spy satellites and other facilities with the agency.

To speak a bit fancifully, the FBI agents are like dogs, and the CIA officers like cats. The pointer, the retriever, the hound has a definite target, and goes for it. The cat is furtive, slinks about in the dark, pounces unexpectedly at the time and place of its choosing.

No one will deny that the FBI has a distinctive culture too—and it happens to be one inimical to intelligence gathering. The bureau's conception of intelligence is of information that can be used to obtain a criminal conviction. A crime is committed, having a definite time and place and usually witnesses, and these circumstances enable the investigation to be tightly focused and create a high probability that the information gathered in the investigation will enable a successful prosecution. National security intelligence, especially counterterrorist intelligence, works differently. The aim is to prevent the crime, not punish the criminals. The key to prevention is detection in advance, which requires casting a very wide net, following up on clues, assembling bits of information, and often failing because there is as yet no crime, no definite time and place from which to begin, no witnesses. To speak a bit fancifully, the FBI agents are like dogs, and the CIA officers like cats. The pointer, the retriever, the hound has a definite target, and goes for it. The cat is furtive, slinks about in

the dark, pounces unexpectedly at the time and place of its choosing.

There was a noteworthy incident, shortly after the NSA's non-FISA surveillance program came to light last December, that received less attention than it should have. I am referring to leaks by FBI officials, reported in the media, expressing skepticism about the value of the program. These officials complained that the NSA had given the FBI clues to follow up, most of which led nowhere. The bureau's dissatisfaction with this assignment reflected the dominance of the criminal-investigation culture in the bureau, despite Robert Mueller's and Philip Mudd's efforts to change that culture. When a crime has been committed, as I have said, a focused investigation with a high probability of success is possible. That focus and that expectation of success are impossible in national security intelligence concerned with preventing a new round of surprise attacks on the nation. Intelligence is a search for the needle in a haystack. FBI agents don't like being asked to chase down clues gleaned from the NSA's interceptions because 99 out of 100 (probably even a higher percentage) turn out to lead nowhere. That is not what they are accustomed to when they conduct criminal investigations. The agents think that they have better things to do with their time. Maybe they do—maybe the root problem is that we simply don't have enough intelligence officers working on domestic threats.

Organizational cultures are difficult to change, even in business (as I noted), in which competitive pressures are acute, and more so in nonbusiness sectors, such as government. No one wants to be jarred out of his accustomed groove. Changing the FBI's culture from one of criminal investigation to one of criminal investigation plus national security intelligence is particularly unlikely to succeed, for a reason illuminated by the government's inability to alter the organizational culture of our armed forces during the Vietnam War, even though it was plain to many people in government that the culture was poorly suited to the conditions of that war.⁴ A particular obstacle was that the culture was optimized for a continuing threat, namely that of a conventional war in Europe. The FBI faces the same problem. Its primary focus is and will remain on criminal investigation, a vital national need. It resists blurring that focus by transforming itself even part way into a national security intelligence agency.

If like the United Kingdom we had a domestic intelligence agency, like MI5, no one would seriously suggest merging it with the FBI, just as no one suggests merging MI5 into Scotland Yard.

What makes coordination of the three competing cultures in the intelligence community—the military, civilian intelligence, and the FBI—so difficult, and maybe impossible, is a profound political imbalance. The military is immensely popular, immensely powerful politically (in part because of its popularity, in part because of the support it receives from defense contractors), accounts for the lion's share of the intelligence budget, is ambitious to expand its intelligence activities under the forceful leadership of Secretary Donald Rumsfeld and Under Secretary Stephen Cambone, and for all these reasons is out of the practical control of the DNI. The FBI is also immensely popular (despite its very poor performance as a domestic intelligence agency—the worst-performing in the run-up to the 9/11 attacks) and politically powerful, and especially resistant to change for the reason mentioned earlier. That leaves the CIA in a situation of considerable vulnerability, as an unpopular agency and therefore a natural scapegoat; and it limits the power of the DNI, who finds cabinet officers (the secretary of defense and the attorney general) between him and the military and bureau intelligence services.

A notable example of the limitations of the DNI's powers, and a dramatic example of the FBI's political strength, is that the improper, as well as obtuse, leaks of which I have just been speaking received no public rebuke from the DNI. Or for that matter from Director Mueller or Attorney General Alberto Gonzales, even though the FBI is part of the Department of Justice and at the very moment that the bureau leakers were deriding the NSA program, the Attorney General was defending it before Congress as essential to the national security (which I believe it is).

My book *Uncertain Shield*⁵ documents the FBI's future as an intelligence agency, and the evidence continues to mount up. Recently the *New York Times* published an article on the continuing saga of the FBI's computer struggles.⁶ One already knew that the bureau had blown more than \$100 million on Virtual Case File, a computer system designed to enable the bureau's agents to share information across field offices and with headquarters. Virtual Case File was abandoned last year in favor of Sentinel, which, we learn from the article, "is still not fully staffed," and "it is not clear that the bureau has a management system in place to prevent the huge cost overruns that plagued previous incarnations of the project"—that is, Virtual Case File. Although it is estimated that Sentinel will cost \$500 million or more (surely more), the article reports that the Justice Department's "inspector general's

office said it was not yet satisfied that the overhaul [i.e., Sentinel], even if successful, would allow the bureau to share information adequately with other intelligence and law enforcement agencies." So four and a half years after 9/11, the FBI is years away from having computer capabilities adequate to its national security intelligence mission. That is a result not primarily of technical incompetence, but rather of cultural resistance rooted in the autonomy of the bureau's field offices and the reluctance of criminal investigators to leave a documentary trail that might be discoverable in a criminal proceeding.

The nation needs a true domestic intelligence agency, outside the bureau, modeled on MI5 or on the Canadian Security Intelligence Service (CSIS). (I emphasize CSIS because MI5 has a rather scary reputation, having until recently operated with far less sensitivity to civil liberties than would be tolerated in this country.) Here is one organizational change that makes compelling sense, yet was not recommended by the 9/11 Commission or the WMD Commission and was omitted from the Intelligence Reform and Terrorism Prevention Act of 2004. The FBI would retain an intelligence capability, but it would be a capability for intelligence as an adjunct to criminal investigation, which is anyway the bureau's concept of national security intelligence. The National Security Branch would remain in the bureau, corresponding to Scotland Yard's Special Branch. The new agency, corresponding to MI5, would be free from the police culture that dominates the FBI.

The other overdue organizational recommendation, made by a commission headed by Brent Scowcroft and rejected by the Bush administration, is to spin off the national intelligence agencies from the Defense Department, make them their own agency or agencies and by doing so place them under more effective control by the DNI. That would improve the balance among the intelligence cultures by reducing the "twin stars" problem (the secretary of defense and the director of national intelligence circling warily around each other) that is created by the Defense Department's disproportionate weight in the overall intelligence budget. In the case of the NRO and NGA, divesting them from the Defense Department would restore them to approximately their original status, except that they would not be part of the CIA, as they once were.

The culture clash is a factor, though not the only one, in the government's failure to get a good handle on domestic intelligence, a failure reflected in the eruption of a series of unnecessary controversies in recent months.

Think of the recent controversies concerning intelligence: the NSA's surveillance program outside of FISA; Dubai Ports World; and the increasing involvement of the Defense Department in domestic intelligence, an involvement not limited to the NSA's program of electronic surveillance of U.S. citizens within the United States. Other Pentagon agencies, notably the Counterintelligence Field Activity (CIFA) have, as described in articles by Walter Pincus in the *Washington Post*, been conducting domestic intelligence on a large scale. Although CIFA's formal mission is to prevent attacks on military installations in the United States, the scale of its activities suggests a broader involvement in domestic security.

Another Pentagon agency that has gotten into the domestic intelligence act is the Information Dominance Center (IDC), which developed the Able Danger data-mining program, a very promising program derailed by the involvement of Admiral John Poindexter and the failure of the administration to explain and defend the program. Another recent article in the *Times* reported

that the military's counterterrorism effort is hampered by bureaucratic duplication, officials said, citing in particular an overlap between new government centers, including the National Counterterrorism Center . . . The review found that the government-wide national security bureaucracy still does not respond rapidly and effectively to the new requirements of the counterterrorism campaign. The report said more streamlining was necessary across a broad swath of the civilian bureaucracy and military.⁷

All these controversies, even the one over Dubai's now-thwarted acquisition of U.S. port operations, are about protecting the United States from attacks from within—the domain of domestic intelligence. The controversies demonstrate the extraordinary importance and sensitivity of domestic security, which stirs acute fears both of attacks (hence the Dubai controversy) and of civil-liberties abuses (hence the NSA, CIFA, Terrorism Information Awareness, and Able Danger controversies). These fears that, however groundless, require focused attention by the leadership of the intelligence community on domestic intelligence and for the further reason that domestic intelligence is a cockpit of conflict among the three separate intelligence cultures that I have described.

I do not sense such focus, or that the DNI is taking a leadership role, though of course he may be operating

effectively behind the scenes, concealed from an outsider like myself. (The DNI is invisible to the world outside the national security community, and this I take to be another failure of the community's public relations.) I sense that the cultural imbalance—the Pentagon's huge budget, its control of the national intelligence agencies, the able and aggressive secretary of defense and his able and aggressive under secretary for intelligence, and the FBI's apparent freedom from control by its nominal superiors—is stifling reform on the domestic intelligence front. We not only have no real domestic intelligence agency; we have no official with sole and comprehensive responsibility for domestic intelligence. It is no surprise that gaps in domestic intelligence are being filled by controversial ad hoc initiatives.

The best way to end one of these controversies—the debate over the propriety of the National Security Agency's conducting electronic surveillance outside the framework of the Foreign Intelligence Surveillance Act—is for Congress to enact a new statute along different lines from those currently under consideration.

The Bush administration is right to point out that FISA, enacted in 1978—long before the danger of global terrorism was recognized and electronic surveillance was transformed by the digital revolution—is dangerously obsolete. It retains value as a framework for monitoring the communications of known terrorists, but it is hopeless as a framework for detecting terrorists. It requires that surveillance be conducted pursuant to warrants based on probable cause to believe that the target of surveillance is a terrorist, when the desperate need is to find out who is a terrorist.

Critics point out that surveillance not cabined by a probable-cause requirement produces many false positives (intercepts that prove upon investigation to have no intelligence value). That is not a sound criticism. National security intelligence is a search for the needle in a haystack. The intelligence services must cast a wide net with a fine mesh to catch the clues that may enable the next attack to be prevented. The NSA's initial trolling for clues is done by computer search programs, which do not invade privacy because search programs are not sentient beings. The programs pick out a tiny percentage of communications to be read by (human) intelligence officers, and a small subset of these will turn out to have intelligence value and spur an investigation. Some of them may be communications to which a U.S. citizen is a party.

The civil liberties concerns that revelation of the NSA's program has aroused can be allayed without gutting

the program. Not, however, by relaxing while retaining the standard for obtaining a warrant. Instead of requiring probable cause to believe the target a terrorist, FISA could be amended to require merely reasonable suspicion. But even that would be too restrictive. And the lower the standard for getting a warrant, the less of a filter a warrant requirement creates. If all that the government is required to state in its application is that it thinks an interception might yield intelligence information, judges will have no basis for refusing to grant the application.

It is a mistake to think that the only way to prevent abuses of the NSA's surveillance program is by requiring warrants. Congress could enact a statute that would subject warrantless electronic surveillance to effective oversight and specific legal controls. The statute might, for example, create a steering committee for national security electronic surveillance composed of the attorney general, the director of national intelligence, the secretary of homeland security (chairman), and a senior or retired federal judge or justice appointed by the chief justice of the United States. The committee would monitor all such surveillance to assure compliance with the Constitution and laws.

The NSA could be required to submit to the FISA court, every six months, a list of the names and other identifying information of all persons whose communications had been intercepted without a warrant in the previous six months, with a brief statement of why these individuals had been targeted. If the court concluded that an interception had been inappropriate, it would so report to the steering committee and the Congressional intelligence committees.

The statute would authorize "national security electronic surveillance" outside FISA's existing framework, provided that Congress declared a national emergency and the president certified that such surveillance was necessary in the national interest. Warrants would continue to be required for all physical searches and for all electronic surveillance for which FISA's existing probable-cause requirement could be satisfied. "National security" would be defined narrowly, excluding "ecoterrorism," animal-rights terrorism, and other forms of political violence that, though criminal and deplorable, do not endanger the nation. The statute would sunset after five years, or sooner if the declaration of national emergency was rescinded.

Most important, any use of intercepted information for any purpose other than "national security" as narrowly defined in the statute would be forbidden. Information

could not be used as evidence or leads in a prosecution for ordinary crime, to alleviate concern that "wild talk" picked up by electronic surveillance would lead to criminal investigations unrelated to national security. The responsible officials would be required to certify to the FISA court annually that there had been no violations of the statute during the preceding year. False certification would be punishable as perjury. But lawsuits challenging the legality of the NSA's current warrantless surveillance program would be forbidden. Such lawsuits would distract officials from their important duties, to no purpose given the new statute.

To return to my major theme, that of organization, I am well aware of the political obstacles to taking what I believe to be the sound path to organizational reform. But there is value in speculation. American politics are in continuous flux; what is politically unthinkable one year can in a few years become a political imperative. I hope it will not take another terrorist attack to put us back on the right path: the path that leads to an independent DCI (or DNI), independent national intelligence agencies, a domestic intelligence agency separate from the FBI, and, once more at the center of the spider's web that is national security intelligence, the Central Intelligence Agency.

Notes

1. Scott Shane, "Year into Revamped Spying, Troubles and Some Progress," *New York Times*, February 28, 2006.
2. Ephraim Kahana, "Analyzing Israel's Intelligence Failures," *International Journal of Intelligence and Counterintelligence* 18 (2005): 262.
3. See, for example, John A. Kringen, "How We've Improved Intelligence: Minimizing the Risk of 'Groupthink,'" *Washington Post*, April 3, 2006.
4. R. W. Komer, *Bureaucracy Does Its Thing: Institutional Constraints on U.S.-GVN Performance in Vietnam* (Arlington, VA: RAND, 1972); and John A. Nagl, *Learning to Eat Soup with a Knife: Counterinsurgency Lessons from Malaya and Vietnam* (Chicago: University of Chicago Press, 2005).
5. Richard A. Posner, *Uncertain Shield: The U.S. Intelligence System in the Throes of Reform* (Lanham, MD: Rowman & Littlefield Publishers Inc., 2006).
6. Eric Lichtblau, "Cost Concerns for F.B.I. Overhaul," *New York Times*, March 14, 2006.
7. Thom Hanker, "Study Is Said to Find Overlap in U.S. Counterterror Effort," *New York Times*, March 18, 2006.