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Intelligence and Law Enforcement: Countering Transnational Threats to the U.S.

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Summary

In the post-Cold War world, terrorism, narcotics trafficking, and related money laundering are perceived both as criminal matters and as threats to the nation's security. Often collectively termed transnational threats, these issues have become the concerns of law enforcement agencies as well as the U.S. Intelligence Community. Two foreign banking scandals in the late 1980s led to efforts to ensure that information in the possession of intelligence agencies would, in the future, be made available to law enforcement officials. In the mid-1990s, the Federal Bureau of Investigation began assigning additional agents to newly created offices worldwide. The tragic events of September 11, 2001 provide a clear demonstration of how large a threat international terrorism can become to national security. The Bush Administration and Congress have moved rapidly to promote intelligence/enforcement cooperation among U.S. agencies in the campaign against Al Qaeda.

This report looks at the separate roles and missions and distinct identities of intelligence and law enforcement agencies. Coordinating their efforts has raised significant legal and administrative difficulties that have been only partially overcome despite the creation of elaborate coordinative mechanisms under the oversight of the National Security Council. Some observers also have expressed concerns about the greater use of information derived from intelligence sources in judicial proceedings, fearing that it may lead to over-reliance on surreptitious means of information collection and, thus, undermine civil liberties. Other observers have cautioned that redirecting intelligence assets to collect information for legal cases may reduce support available to military commanders and policymakers. Some others believe that there may also be an overemphasis on law enforcement in dealing with problems arising abroad. The report notes the employment of covert actions by intelligence agencies in certain law enforcement efforts.

This report also addresses congressional oversight of the law enforcement-intelligence relationship that is spread among a number of House and Senate committees, each of which has only partial jurisdiction. Some observers believe that there should be further efforts to base the evolving relationship in statutory law. They have argued that closer attention should be given to coordinating the emerging relationship between intelligence and law enforcement efforts while practices are malleable rather than to wait until bureaucratic rigidities set in or unfortunate precedents are established during crises.

Even with conscientious efforts at coordination, others have noted that fundamental differences remain between matters of law and of national interest in a world of sovereign nation states. Enforcement of international law and the extraterritorial application of U.S. law can be vigorously and, at times, effectively resisted by other countries. The necessity to adapt U.S. responses to transnational threats to specific situations can also undermine respect for law by making enforcement appear inequitable.

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Introduction

The collapse of the Soviet Union and the Warsaw Pact by 1991 significantly altered the international environment. Transnational issues,[1] such as narcotics, terrorism, money laundering, economic espionage, and shipments of materials for weapons of mass destruction (WMD) have risen in importance, in some cases becoming more urgent than traditional geopolitical concerns. The Director of Central Intelligence (DCI), George Tenet, in his annual assessment of national security challenges in February 2001, renewed the heavy emphasis on transnational issues that had characterized his testimony in previous years:

> The threat from terrorism is real, it is immediate, and it is evolving. State sponsored terrorism appears to have declined over the past five years, but transnational groups–with decentralized leadership that makes them harder to identify and disrupt–are emerging. We are seeing few centrally controlled operations, and more acts initiated and executed at lower levels.[2]

Long before attacks on the Pentagon and World Trade Center in September 2001 galvanized American public opinion, observers noted that, among the American public, there was greater concern about international crime, especially to the extent

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[1] "Transnational threats are defined in statute as: "(A) Any transnational activity (including international terrorism, narcotics trafficking, the proliferation of weapons of mass destruction and the delivery systems for such weapons, and organized crime) that threatens the national security of the United States. (B) Any individual or group that engages in an activity referred to in paragraph (A)." 50 USC 402(i)(5). This Report will primarily focus on narcotics trafficking and terrorism—which may include proliferation issues—that have required the most extensive collaboration between law enforcement and intelligence agencies.

[2] Testimony of Director of Central Intelligence George J. Tenet before the Senate Select Committee on Intelligence, U.S. Congress, Senate, 107th Congress, 1st session, Select Committee on Intelligence, *Current and Projected National Security Threats to the United* States, Hearing, S. Hrg. 107-2, February 7, 2001, p. 4. Similar concerns have influenced the British Government to direct the Secret Intelligence Service (also known as MI6) to become involved in the counternarcotics efforts; see Rachel Sylvester and Michael Smith, "Cook Redirects MI6 to Forefront of the War on Drugs," *Electronic Telegraph*, August 29, 1997.

that it can reach into the country, than about many other aspects of the current international environment.[3]

Although the responsibilities of U.S. courts and law enforcement agencies have always included activities that occur outside U.S. territorial borders, *e.g.*, smuggling, piracy, *etc.*, such activities have not usually been considered in the same category as military threats posed by foreign countries that are the responsibilities of the State and Defense Departments and the Intelligence Community. Changed international realities have, however, led to a more expansive international role for law enforcement agencies, combined with the employment of intelligence agencies—and the operational arms of the State and Defense Departments—in efforts to counter them. Thus, there has arisen, on one hand, the phenomenon of agencies charged with domestic law enforcement acquiring extensive overseas missions and, on the other, intelligence agencies focusing on illegal activities in foreign countries.

The evolution and intermingling of law enforcement and intelligence efforts have served to blur distinctions between law and security policy that, in statutory principle and in administrative practice, have been kept separate and distinct. The Federal Bureau of Investigation (FBI), the nation's principal law enforcement agency, has attained a much more prominent international role in recent years, assigning increased numbers of agents overseas to expand contacts with foreign governments and to acquire information about potential transnational threats. The Central Intelligence Agency (CIA) and other intelligence agencies are devoting greatly increased resources to counterterrorism and counternarcotics activities. As a CIA official has noted:

> Today, there is no clear primacy for either the law enforcement or intelligence communities in the realms of international terrorism, narcotics, proliferation (as well as, in some cases, counterintelligence). Still, the law enforcement and intelligence communities remain designed and operated in fundamentally dissimilar manners, retaining different legal authorities, internal modes of organization, and governing paradigms.[4]

There appear, in addition, to be few well-understood criteria for choosing the most appropriate approach in a given situation, and also a sense among some policy analysts that ambitious law enforcement agency heads have not fully appreciated the complexities of these threats in an international environment within which the United States must protect its national security interests.

Beyond addressing the need for closer cooperation among law enforcement and intelligence agencies, however, lay larger and more complicated issues that some

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[3] Zoë Baird, a member of the President's Foreign Intelligence Advisory Board in the Clinton Administration, noted in 1995 that,"Polls show that only about 3% of Americans feel foreign policy is important, but 95% or more consider crime a critical national issue." "When Crime and Foreign Policy Meet," *Wall Street Journal*, October 24, 1995, p. A22.

[4] Jonathan M. Fredman, "Intelligence Agencies, Law Enforcement, and the Prosecution Team," *Yale Law and Policy Review*, 1998, Vol. 16, No. 2, pp. 336-337.

believe have not yet been fully considered.[5] Many observers continue to express concerns about the employment of intelligence agencies, using any number of surreptitious collection techniques, in laying the groundwork for criminal proceedings. Such concerns are deeper and more serious than the diversion of finite assets from more traditional responsibilities.

On the other hand, the decision to consider certain significant threats from outside U.S. borders as law enforcement matters presumes that adequate legal channels, either in international law or in U.S. law, exist within which such concerns can be resolved. This presumption is, however, seriously questioned by those who believe that international law remains in large measure ill-developed, and that the extraterritorial reach of domestic statutes is likely to remain distinctly limited. The use of law enforcement mechanisms against international threats may also imply that non-legal instruments, such as military force or a covert action by an intelligence agency, are less important and can be deemphasized. Questioning this assumption, observers argue that some important international outcomes are utterly unobtainable through judicial processes.

In 1999, military force was deployed in support of international law enforcement. U.S. armed forces undertook air strikes as part of the North Atlantic Treaty Organization on Serbian forces and other targets not only to halt the destabilization of other Balkan countries by Serbian attacks on Kosovar Albanians, but also to stop violations of international law, crimes against humanity occurring as part of a policy of "ethnic cleansing." According to President Clinton, the United States was involved in Operation Allied Force because we have "a moral responsibility to oppose crimes against humanity and mass ethnic and religious killing and cleansing where we can."[6]

There is little question that the lines currently dividing law enforcement and security issues are blurred. In several instances, different approaches to transnational issues appear to some observers to have been confused and counterproductive. Especially worrisome in this regard was the FBI's withholding information regarding illegal Chinese political contributions from the Secretary of State prior to an official visit to Beijing in 1997, and sharp divisions over U.S. support for certain dissident Iraqi groups in the mid-1990s among law enforcement and intelligence agencies that may have contributed to their violent suppression by forces loyal to Saddam Hussein.

The attacks on the World Trade Center and Pentagon on September 11, 2001 caused considerable discussion of the relationship between law enforcement and national security agencies, including the Intelligence Community. Some observers argued that inadequate exchanges of information among agencies may have contributed to a failure to gain advance warning of the attack.[7] A variety of views

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[5]The need to consider "rules of the road" to guide the choice of approaches is urged by Bruce Berkowitz, "Should We Send in the Marines–or the Cops?," *Hoover Digest*, Fall 2001.

[6]Commencement Address at the United States Air Force Academy in Colorado Springs, June 2, 1999, *Weekly Compilation of Presidential Documents*, June 7, 1999, p. 1018.

[7]See James Risen, "In Hindsight, C.I.A. Sees Flaws That Hindered Efforts on Terror," *New*

(continued...)

was expressed on the best way to deal with those who planned and supported the attacks, but it was rapidly decided by the Bush Administration that a military attack (supported by covert intelligence forces) on the Al Qaeda infrastructure in Afghanistan was the best response, an approach that gained wide support among the American public. Anti-terrorism legislation enacted in October 2001 included provisions facilitating information sharing between law enforcement and intelligence agencies.

Potential Congressional Concerns

Given the clear possibility that the international role of law enforcement agencies will continue to grow, observers believe that greater consideration should be given to making less ambiguous distinctions between law enforcement and security policy and to the relationships between law enforcement and intelligence agencies. As one journalistic account of the evolving relationship between the two communities concluded:

> [Coordination] sounds simple in concept. In reality, it is likely to prove very difficult, challenging constitutional limits on domestic law-enforcement activity while drawing intelligence officers ever closer to proceedings that could compromise sources and methods of intelligence collection. The momentum is clearly headed toward something like a merger between the two worlds.
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> It is dismaying that this move to reinvent the relationship between spies and federal agents took place with virtually no meaningful public debate and little journalistic scrutiny.[8]

Congress may choose to concern itself with the broad contours of intelligence cooperation with law enforcement. Congress authorizes the various instrumentalities of U.S. policy, appropriates funds, and conducts oversight. The ways that Congress funds and oversees law enforcement and intelligence agencies may not, however, be optimized to support their evolving and overlapping missions in the post-Cold War world. Congress has reviewed the coordinative mechanisms that have been established, but has not provided them with statutory charters.

Oversight of law enforcement, foreign policy, and intelligence is largely undertaken by different sets of committees with disparate agendas. Oversight of the State Department is conducted by the Senate Foreign Relations Committee and the House International Relations Committee. Intelligence activities (including those of the FBI) are overseen by the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence. Since the preponderance of intelligence

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York Times, October 7, 2001, p. 1A; Joe Klein, "Closework: Why We Couldn't See What Was Right in Front of Us," *New Yorker*, October 10, 2001.

[8] Jim McGee and Brian Duffy, *Main Justice: The Men and Women Who Enforce the Nation's Criminal Laws and Guard Its Liberties* (New York: Simon & Schuster, 1996), pp. 373, 374.

activities are undertaken by Defense Department agencies, there is also a certain amount of concurrent jurisdiction shared with the House and Senate Armed Services Committees. Law enforcement efforts are overseen primarily by the two Judiciary Committees. Appropriations Committees also have jurisdiction, but diplomatic, law enforcement, defense, and intelligence efforts are handled by different sub-committees in both the Senate and the House of Representatives.

Given the different oversight responsibilities, it is difficult, at best, to provide seamless oversight of intelligence and law enforcement activities abroad. The jurisdiction of the Judiciary Committees is very wide, encompassing many domestic issues, including abortion and immigration and, in the Senate, confirmation of Federal judges; for a variety of reasons, there have been no regular reauthorizations of Justice Department programs since FY1980.[9] On the other hand, the Intelligence and Armed Services Committees often focus on procurement of advanced technologies and the links between intelligence and the military services rather than on operational practices. In addition, neither the Intelligence nor the Judiciary Committees usually deal directly with questions of foreign policy that are the province of the Senate Foreign Relations Committee and the House International Relations Committee.

In situations in which law enforcement, military, diplomatic, and intelligence efforts are closely related, significant challenges to effective congressional oversight may arise given the disparate concerns of several committees and the executive branch's understandable tendency to maximize flexibility in employing different instruments under different circumstances. Possible new approaches to oversight could include joint hearings or even the eventual establishment of select or joint committees.

More difficult would be further changes in statutes that affect cooperation between law enforcement and intelligence agencies. Few observers would seek to alter proscriptions in the National Security Act on the CIA having law enforcement powers, and wholesale revision of the *Posse Comitatus* statutes that regulate any involvement of the military forces in law enforcement would undoubtedly be resisted. The Office of Homeland Security (OHS), established by Executive Order 13228 on October 8, 2001, involves intelligence and law enforcement agencies in developing a national strategy to secure the United States from terrorist threat or attacks. With its focus on preventing or responding to attacks within the United States, most observers believe that the role of intelligence in OHS will be generally limited to sharing information.[10] The enactment of the USA-Patriot Act (P.L. 107-56) on October 26, 2001, expanded authorities of both intelligence and law enforcement agencies to undertake surveillance of persons suspected of involvement in terrorist activities and provided for closer information sharing. These changes have raised concerns among some that intelligence methods might become routinely used for criminal investigations or that information gathered in criminal investigations might be widely spread throughout the Intelligence Community.

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[9] See CRS Report 98-559, *Department of Justice Reauthorization,*, by (name redacted), June 24, 1998.

[10]See CRS Report RL31148, *Homeland Security: the Presidential Coordination Office*, by (name redacted), November 9, 2001.

Some observers note the importance of statutory authorities and regular congressional oversight of the law enforcement-intelligence relationship. Such oversight could mitigate any potential abuses, as previously occurred in the 1960s when intelligence agencies collected information on domestic antiwar groups that some believed might have connections with foreign governments. Many observers believe that the resulting public distrust seriously undermined the effectiveness of the Nation's intelligence effort and jeopardized the careers of officials who believed that they were following legitimate directions.

Further, some observers believe that the continuing lack of clarity about relationships among U.S. law enforcement and intelligence agencies and their roles and missions may reduce the effectiveness of their individual and collective efforts and lead to waste and duplication of effort. The obvious limits to the success of counternarcotics efforts have suggested to such observers that neither law enforcement nor intelligence assets have been optimally deployed and organized. The events of September 11, 2001, and subsequent legislation have led intelligence and law enforcement agencies to remove barriers to the flow of information, although most observers believe that the flow is not yet completely seamless. Congress may choose to investigate whether different agency relationships might have led to advance warning of the Pentagon and World Trade Center attacks. In any event, it is widely believed that working out relationships among the many agencies involved will require time and that careful congressional oversight will be needed.

Illegal Activities and Transnational Threats

Some illegal activities occurring abroad affect U.S. security interests; these are, chiefly, transnational threats from terrorism, narcotics smuggling, and proliferation of WMD. Such activities have been held to justify the attention of law enforcement and intelligence agencies. Other illegal activities such as smuggling, copyright and trademark violations, monopolistic competition, *etc*. may not rise to a level that would constitute a genuine transnational threat. In recent years, especially since the enactment of the Comprehensive Crime Control Act of 1984 (P.L. 98-473) and the Omnibus Diplomatic Security and Antiterrorism Act of 1986 (P.L. 99-399), there has also been an increasing tendency for United States statutes to contain extraterritorial provisions. Extraterritorial jurisdiction has been claimed for:

> ... crimes committed aboard American ships or planes; offenses which imperil or misuse our foreign commerce with other nations; misconduct, like genocide, terrorism or air piracy, condemned in multilateral agreements to which the United States is a party; the overseas theft or destruction of the property of the United States government, the use of violence against its officers or employees, or the obstruction or corruption of the functioning of its agencies overseas; and misconduct outside of the United States which results in or is intended to result in harm within the United States, such as drug trafficking.[11]

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[11] CRS Report 94-166S, *Extraterritorial Application of American Criminal Law*, by (name redacted), February 25, 1994, p. 1. The United States is not alone in this regard; the United (continued...)

Activities abroad threatening U.S. security interests may also be violations of international law. International law is, in general, either based on treaty obligations that have been accepted by signatories, or found within the somewhat amorphous contours of customary international law, *i.e.*, the rules and practices characterizing relations between states and between private entities and foreign states. Innovations in (or even departures from) customary international law can be initiated by individual states, but patterns of conduct long established are recognized to have considerable benefit to the global community and are prescriptive. The complicated origins of international law, however, mean that, "National courts required to determine questions of international law must do so by imprecise methods out of uncertain materials, and they must look at a process that is worldwide and includes the actions and determinations of foreign actors (including foreign courts)."[12]

In recent years, international law has itself come to address a wider range of criminal activities for which individuals can be held accountable by foreign countries. Piracy, of course, has long been considered a crime that all states must act to suppress. Since the end of World War II, other types of terrorist activities and human rights violations, including genocide, torture, hostage taking, attacks on diplomatic personnel, and airplane hijacking have also been proscribed by international agreement. For such crimes of universal concern, any state, including, of course, the United States, may prescribe punishments.[13] Materials that can be used in weapons of mass destruction have been the subject of several international conventions to which the United States is a party.[14] (A very significant problem is, of course, the fact that many benign and commercially available chemicals can be combined with lethal effect. In addition, the spread of knowledge regarding weapons-making techniques has been greatly facilitated by the Internet.)

It has proven difficult, however, to reach an international agreement on a tight definition of terrorism given a determination of some in the international community

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Kingdom's Criminal Justice Act of 1988, for instance, brings certain crimes, whether or not committed in the U.K., under the purview of U.K. law. U.S. laws tend to encompass more sweeping prohibitions on various controlled substances and on conduct related to money-laundering than do other countries. There is an inevitable possibility of opposition from other countries in attempts to prosecute activities prohibited by U.S. laws, but not by those of the foreign country.

[12] American Law Institute, *Restatement of the Law (Third): the Foreign Relations of the United States*, (St. Paul, MN: American Law Institute Publishers, 1987), I, p. 19.

[13] *Ibid*., p. 254. On page 255, the *Restatement* adds: "Universal jurisdiction is increasingly accepted for certain acts of terrorism, such as assaults on the life or physical integrity of diplomatic personnel, kidnaping, and indiscriminate violent assaults on people at large." This passage leaves open the possibility that there are certain other acts of terrorism for which universal jurisdiction is not accepted; nevertheless, even this list probably comprehends most forms of terrorism that would represent a threat to the national security. See also Kenneth C. Randall, "Universal Jurisdiction Under International Law, *Texas Law Review*, March 1988.

[14] See CRS Report 97-343F, *Proliferation Control Regimes: Background and Status*, by (name redacted), Steven R. Bowman, and (name redacted), March 10, 1997.

to legitimize various activities involved in "wars of national liberation."[15] The Antiterrorism and Effective Death Penalty Act of 1996 (P.L. 104-132) authorized the Secretary of State to designate terrorist organizations, subject to congressional review.[16] The State Department subsequently designated some 30 organizations (mostly, but not exclusively, Middle Eastern) in October 1997, but many observers would challenge the fairness of the list.[17]

Foreign countries understand U.S. efforts to counter terrorist groups that target the United States; in the wake of the September 11, 2001 attacks, the international community has demonstrated widespread support for U.S. counter-terrorist efforts. There remains nevertheless widespread support in various parts of the world for some groups that the U.S. considers terrorist. As a result, there can be significant political costs involved in actions against some organizations that engage in terrorist activities. It is a fact of international life that persons and groups that have engaged in terrorist activities have been accepted as leaders of sovereign states that the United States may find it necessary to cooperate with to accomplish important national goals. Dealing with such leaders is distasteful, even abhorrent, but many observers will see it as necessary.

Narcotics trafficking has been declared illegal by several international treaties,[18] but the narcotics trade is not at present considered an international crime over which there is universal jurisdiction. Countries are expected to suppress the production and transit of illegal narcotics and to bring drug producers and traffickers to justice (and, when appropriate, respond to requests for extradition from other countries), but countries have no universal jurisdiction to enforce drug production or trafficking as they do under conventions against piracy, torture, and certain other crimes.[19] The United States must rely on diplomacy and various types of pressure and inducements to encourage other countries to cooperate in halting illegal drug production and shipments. As noted below, the military effort, ultimately successful in December

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[15] Louis René Beres, "On International Law and Nuclear Terrorism," *Georgia Journal of International and Comparative Law*, Spring 1994, pp. 3-8.

[16] The legislation specifically authorized the Secretary of State to consider "classified information," *i.e.* information obtained by the Intelligence Community, in making such a designation. Moreover, the legislation allows such a designation to be used to exclude representatives or members of such organizations from entering the United States.

[17] Department of State, Office of the Coordinator for Counterrorism, Designation of Foreign Terrorist Organizations, Public Notice 2612, published in *Federal Register*, October 8, 1997, pp. 52649-52651. Some observers have suggested that the United States, itself, applies different standards to some terrorist groups than to others inasmuch as some terrorist groups operating in Ireland and elsewhere are not similarly designated.

[18] *E.g.*, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances which entered into force in November 1990. See U.S. Congress, 105th Congress, 1st session, Senate Caucus on International Narcotics Control and the Committee on International Relations, House of Representatives, *International Narcotics Control and United States Foreign Policy: A Compilation of Laws, Treaties, Executive Documents, and Related Material*, Report, S. Prt. 105-32, September 1997.

[19] See Randall, p. 837.

1989, to oust the Panamanian dictator Manuel Noriega was, however, caused or at least greatly influenced by his involvement in illegal narcotics trafficking. Few observers, however, routinely advocate the use of military force or covert actions to interdict drug production and shipments within the territorial borders of other countries; even if authorized, such efforts would have significant drawbacks and could have damaging effects on other important interests.

Intelligence Agencies Support Law Enforcement

In seeking to take action against such criminal activities occurring in foreign countries, it has seemed logical to many to bring to bear the enormous information gathering capabilities of the Intelligence Community which has both collection systems and human agents available throughout the world. It would, some have argued, be relatively simple to make information obtained by intelligence agencies available to investigators and prosecutors in support of the latter' efforts to bring terrorists and narcotics traffickers to justice in U.S. courts. Some observers would, of course, go further, suggesting that, in especially threatening cases, covert actions by the CIA or military strikes might be necessary.

Closely coordinating the efforts of law enforcement agencies and the Intelligence Community (alongside the State and Defense Departments) presents, however, significant challenges. As three knowledgeable observers have written:

> The law enforcement/national security divide is especially significant, carved deeply into the topography of American government. The national security paradigm fosters aggressive, active intelligence gathering. It anticipates the threat before it arises and plans preventive action against suspected targets. In contrast, the law enforcement paradigm fosters reactions to information provided voluntarily, uses ex post facto arrests and trials governed by rules of evidence, and protects the rights of citizens.[20]

The division of responsibilities between intelligence and law enforcement agencies reflects this reality and is based in statutes and executive orders. Many observers—including intelligence agency officials—strongly believe in the fundamental importance of distinctions between law enforcement efforts, governed by laws and rules designed to protect the rights of the accused, and the far less restricted operations of intelligence agencies.[21] The National Security Act of 1947, that established the CIA, specifically precluded the Agency from having any

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[20] Ashton Carter, John Deutch, and Philip Zelikow, "Catastrophic Terrorism: Tackling the New Danger," *Foreign Affairs*, November-December 1998, p. 82.

[21] Intelligence professionals are keenly aware of the distinctions involved. For instance, Stansfield Turner, the Director of Central Intelligence during the Carter Administration, noted in 1996 that "The FBI agent's first reaction when given a job is, `How do I do this within the law?' The CIA agent's first reaction when given a job is, `How do I do this regardless of the law of the country in which I am operating?'" Quoted in Benjamin Wittes, "Blurring the Line Between Cops and Spies," *Legal Times*, September 9, 1996, p. 20.

responsibilities for law enforcement or internal security.[22] This provision derived from a determination shared by Congress and the Truman Administration not to create an American "Gestapo" or to encroach on the jurisdiction of the FBI. There was then, as there remains today, a concern that "[c]ombining domestic and foreign intelligence functions creates the possibility that domestic law enforcement will be infected by the secrecy, deception, and ruthlessness that international espionage requires."[23] The 1947 Act also reflected the division of labor during World War II between the Office of Strategic Services (OSS), the CIA's predecessor intelligence service, and the FBI (even though the latter undertook extensive intelligence gathering in Latin America).

Most of the other elements of the U.S. Intelligence Community are located in the Department of Defense (DOD), which also has been largely precluded from direct involvement in domestic law enforcement efforts since the post-Civil War enactment of the *Posse Comitatus* statutes. DOD has received legal authority to assist law enforcement agencies in counternarcotics efforts, although with restrictions precluding any involvement of military personnel in the arrest and detention of suspects.[24]

In some cases, efforts of intelligence agencies in support of law enforcement efforts proved to be ill-advised. In particular, instances of intelligence agencies acquiring information concerning U.S. citizens or persons has been widely condemned. In addition to various questionable Cold War activities, such as mail openings and involvement with the Mafia, the CIA and military intelligence units gathered intelligence on antiwar groups within the United States during the Vietnam War period.[25] Such activities served as a major impetus for wide-ranging congressional investigations of the U.S. Intelligence Community in the 94th Congress.

In the aftermath of sensational revelations about improper activities by intelligence agencies, both the Intelligence Community and its congressional overseers were determined to separate the work of intelligence and law enforcement agencies in order to prevent the use of intelligence techniques against citizens and legal residents of the United States unless court orders have been obtained. Proposals for enacting a charter for the Intelligence Community did not succeed, but the widespread criticisms of domestic spying by the CIA and other intelligence agencies served to build walls of separation between the two communities that were widely recognized in practice even if cooperation on narcotics and terrorism was officially allowed.[26] A

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[22] 50 USC 403-3(d)(1). On the establishment of the CIA and its early relationships with the military services and the FBI, see Thomas F. Troy, *Donovan and the CIA: A History of the Establishment of the Central Intelligence Agency* (Frederick, Md.: University Publications of America, 1981).

[23] Stewart A. Baker, "Should Spies Be Cops?," *Foreign Policy*, Winter 1994-1995, pp. 36-37.

[24] See CRS Report 95-964, *The Posse Comitatus Act & Related Matters: the Use of the Military to Execute Civilian Law*, by (name redacted), September 12, 1995.

[25] See Loch K. Johnson, *America's Secret Power: the CIA in a Democratic Society* (New York: Oxford University Press, 1989), pp. 133-203.

[26] The history of the much-criticized domestic intelligence gathering is described in U.S. (continued...)

study prepared by the House Intelligence Committee in 1996 concluded that, "One of the unwritten but significant side effects of these investigations was behavioral in nature. The years that followed the investigations were marked by some reluctance on the part of the two cultures to form interactive relationships. This over-caution was based more [on] a perception that closer association meant increased political risk than [upon] having any basis in prohibition of law."[27]

Even before the end of the Cold War, however, terrorism and narcotics smuggling were emerging as matters of national concern. Executive Order 12333, *United States Intelligence Activities*, signed by President Ronald Reagan on December 4, 1981, specifically assigned the CIA responsibilities for collecting and producing intelligence on foreign aspects of narcotics production. Intelligence agencies were authorized "to participate in law enforcement activities to investigate or prevent clandestine intelligence activities by foreign powers, or international terrorist or narcotics activities ...."[28]

With the end of the Cold War, intelligence agencies have had to adjust their efforts to meet changed national security requirements. By the mid-1990s they were downsized roughly by a third from 1980s levels and many Cold War missions disappeared. (Funding levels have risen somewhat more recently.) The Intelligence Community has faced major challenges in adjusting its expensive technical collection systems—satellites and signal intercept efforts—to the changed environment. It is now making much greater use of open sources, *i.e.* books, newspapers, radio and television programs, and pamphlets. Human collection has been a particular challenge inasmuch as the personnel and methodologies useful for collecting information about topics such as Soviet diplomatic or military policies are far different than those necessary to collect information about a terrorist or drug-smuggling groups.

The emergence of transnational threats in recent years and the availability of intelligence resources led many to urge greater use of Intelligence Community assets to obtain information that may, at some point, be used in criminal proceedings. The Intelligence Community collects a wealth of data about all regions of the world. Its data storage and retrieval capabilities, as well as thousands of trained analysts, could potentially be of enormous use in support of law enforcement efforts. In some parts of the world, intelligence contacts unique access can provide invaluable information concerning activities that may be related to violations of U.S. law. Although the vast bulk of intelligence collection is, and will likely remain, focused on topics far removed

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[26](...continued)
Congress, Senate, 94th Congress, 2nd session, Select Committee to Study Governmental Operations with respect to Intelligence Activities [usually known as the Church Committee], Final Report, Book III, *Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans*, S. Rept. 94-755, April 23, 1976. A comprehensive study of the legal aspects of information gathering on civilians by the military is found in Joan M. Jensen, *Army Surveillance in America, 1775-1980* (New Haven: Yale University Press, 1991).

[27] U.S. Congress, 104th Congress, House of Representatives, Permanent Select Committee on Intelligence, *IC21: Intelligence Community in the 21st Century*, Staff Study, 1996, p. 277.

[28] E.O. 12333, 2.6(b).

from the concerns of law enforcement agencies,[29] the use of intelligence information has been seen as having important potential advantages with the increasing global scope of much criminal activity.

Even as the Cold War was reaching its final stages, demands for closer intelligence and law enforcement cooperation intensified during the course of investigations of two international banking scandals during the late 1980s. There was considerable public consternation when it was learned that the CIA had acquired information about potential wrongdoing that had not been readily made available to the Justice Department; intelligence information about the activities of the Bank of Credit and Commerce International (BCCI) and Banca Nazionale del Lavoro (BNL) was apparently shared with prosecutors in haphazard and uncoordinated ways; some never emerged outside the Intelligence Community. Although most observers did not conclude that there was an effort by CIA to protect either of these two banks, congressional committees recommended that procedures be established to ensure that relevant information about international criminal activity collected by intelligence agencies would be made available to law enforcement officials even though, in some cases, the need to protect sources and methods would undoubtedly make it impossible to use the information directly as evidence in a trial.[30]

Law Enforcement Agencies Acquire International Missions

In responding to new expectations and a changed environment, the FBI has assigned increased numbers of agents abroad. In June 1996, the FBI launched a four-year plan to double the number of FBI officials serving in legal attaché offices of U.S. embassies; additional positions have subsequently been authorized. Offices opened

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[29] Stewart Baker, the former NSA general counsel, expressed strong skepticism: "When I was at the National Security Agency, we used to joke about the predictable stages traversed by prosecutors who sought intelligence reports in connection with big investigations. The first reaction was open-mouthed wonder at what the intelligence agencies were able to collect. That was followed by an enthusiastic assumption that vast quantities of useful data must lie in our files. Next came the grinding review of individual documents and the growing realization that the reports were prepared for other purposes and so were unlikely to contain much of relevance to the investigator's specific concerns. Last came ennui, and a gritted-teeth plod through the reports, mostly to avoid a later charge that the examination was incomplete." "Should Spies be Cops?," p. 51.

[30] See the conclusions and recommendations included in U.S. Congress, Senate, 103rd Congress, 1st session, Select Committee on Intelligence, *The Intelligence Community's Involvement in the Banca Nazionale del Lavoro (BNL) Affair*, Report, S. Prt. 103-12, February 1993, pp. 25-33; also, U.S. Congress, Senate, 102nd Congress, 2nd session, Committee on Foreign Relations, *The BCCI Affair*, Report by Senators John Kerry and Hank Brown, S. Prt. 102-140, December 1992, pp. 325-327. Congressional efforts to address statutory relationships of law enforcement and intelligence agencies in the wake of the BCCI and BNL affairs are discussed by L. Britt Snider with Elizabeth Rindskopf and John Coleman, *Relating Intelligence and Law Enforcement: Problems and Prospects* (Washington: Consortium for the Study of Intelligence, 1994).

in recent years include Cairo, Egypt; Islamabad, Pakistan; Tel Aviv, Israel; Moscow; Tallinn, Estonia; Kiev, Ukraine; Warsaw, Poland; Almaty, Kazakhstan; Prague, Czech Republic; Tashkent, Uzbekistan; Pretoria, South Africa; New Delhi, India; and Buenos Aires, Argentina. Additional office are planned. The plan was expected to entail the assignment of a total of some 130 special agents and a lesser number of support staff.[31]

These offices are expected to serve a number of purposes. They permit the establishment of close "cop-to-cop" relationships by which law enforcement information can be exchanged with host-country officials.[32] In addition, FBI officials are able to cultivate ties to other sources of information in the host countries. Then-FBI Director Louis Freeh has stated that the Legal Attaché program is "the single most significant factor in the Bureau's ability to detect, deter, and investigate international crimes in which the United States or our citizens are victims."[33] Some observers have expressed concern that they would overlap or duplicate the work of CIA or other intelligence officials already assigned to these countries. Then-DCI John Deutch was reported to have had some initial reservations, but efforts were undertaken to work out cooperation arrangements.[34]

In some countries, of course, rigid separation does not exist between intelligence and law enforcement agencies, and U.S. officials must carefully tailor their relationships with foreign counterparts. Inevitably, complications and overlap will arise, but they will, according to administration officials, be addressed on a case-by-case basis, with the ambassador or chief of station having a major role, consistent with that official's statutory responsibility for "the direction, coordination, and supervision of all Government executive branch employees in that country."[35] Observers note that not all ambassadors take an active interest in such concerns, that law enforcement and intelligence officials in embassies have not always been forthcoming with ambassadors, and that officials may be carrying out policies formulated by Washington agencies without the unqualified support of the State Department. Nonetheless, observers see disagreements, duplication of effort, or competition

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[31]In a new international law enforcement effort, the FBI sent some 59 agents and specialists in June 1999 to undertake crime scene investigations in Kosovo.

[32] U.S. officials are, however, prohibited from directly effecting an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts, although, with the approval of the U.S. chief of mission, they can be present when foreign officers are effecting an arrest and assist foreign officers effecting an arrest. 22 USC 2291(c).

[33] Statement of Louis J. Freeh, Director, Federal Bureau of Investigation, before the Senate Appropriations Committee, Subcommittee on Foreign Operations, March 20, 1997. Director Freeh also noted the involvement of several U.S. agencies in organizing and operating the International Law Enforcement Academy in Budapest, Hungary, which attempts to teach policy within the context of the rule of law.

[34] See R. Jeffrey Smith and Thomas W. Lippman, "FBI Plans to Expand Overseas," *Washington Post*, August 20, 1996, p. A1; earlier criticism of the FBI role is discussed in Daniel Klaidman, "Freeh Trip Sparks Debate About FBI's Role Overseas," *Legal Times*, July 18, 1994, p. 1.

[35] 22 USC 3927(a).

between FBI and intelligence officials in foreign countries as inevitable; potential problems which, while arguably outweighed by the benefits of "cop-to-cop" cooperation, will require careful monitoring.

Managing the Intelligence-Law Enforcement Relationship

In the aftermath of the wave of criticism and congressional direction that followed revelations of CIA's failure to provide information about the BCCI and BNL cases to Justice Department officials, a Joint Task Force on Intelligence and Law Enforcement was established in March 1993. The task force, chaired by Deputy Assistant Attorney General Mark Richard and CIA General Counsel Elizabeth Rindskopf, came up with a series of recommendations.[36] Many of these proposals involved relatively technical and administrative efforts to improve information flow and data retrieval:

- the creation of "focal points," *i.e.*, coordinating offices, in the Justice Department to interface with the CIA;
- new procedures to govern requests for intelligence-file searches that might result in the production of materials to be used in court cases;
- requirements for law enforcement agencies to provide notice to prosecutors when there is an intelligence interest;
- measures concerning the treatment of the identity of intelligence officers whose identities are classified;
- new procedures to protect classified information in situations not envisioned by earlier statutes, such as the Classified Information Procedures Act;
- a Memorandum of Understanding between the Attorney General and intelligence agencies that outlines the circumstances under which the agencies must report suspected criminal activity; and,
- an intercommunity training plan to facilitate coordination.[37]

Although Deputy Assistant Attorney General Mark Richard claimed that "the problems between the CIA and Justice Department no longer exist,"[38] there remained, nonetheless, a realization that difficult substantive issues would continue to be involved in facilitating information flow. Rindskopf subsequently noted:

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[36] Joint Task Force on Intelligence and Law Enforcement, *Report to the Attorney General and Director of Central Intelligence*, August 1994.

[37] Remarks of Michael Vatis, Associate Deputy Attorney General, quoted in *National Security Law Report*, November 1996, p. 19.

[38] Quoted in *National Security Law Report*, November 1996, p. 17.

> There were three possible solutions: (i) to blend the two services and place them under rules governing the law enforcement community; (ii) to blend the two services and place them under intelligence rules; and (iii) to coordinate the activities of the two services. Ultimately, the decision was made to go forward with great caution.[39]

A major challenge for promoting cooperation between intelligence and law enforcement agencies are their respective bureaucratic cultures, modes of operation, sources of information, and oversight structures.[40] The Justice Department, which includes both the FBI and the DEA, is responsible for conducting investigations of possible law breaking, and prosecuting alleged criminals in the judicial system. Although law enforcement agencies need background information or "strategic intelligence" regarding patterns of criminal activity (*e.g.*, analysis indicating that increasing quantities of cocaine are flowing through harbors in southern Florida), they tend to give higher priority to tactical information (*e.g.*, a tip that a specific cargo vessel is scheduled to off-load a shipment of cocaine at a specific dock in Miami on the night of August 4). Under applicable rules of legal procedure, this latter type of information may have to be used in a public trial and its origins revealed to a defendant's lawyer. Law enforcement agencies typically work on a case-by-case basis; when a trial is completed and all appeals exhausted, the information developed in the preliminary investigation has little use and can be consigned to the archives.[41]

However, national security policymakers require a continuous stream of information from the CIA and other intelligence agencies about world conditions, especially about countries, groups, and individuals working against U.S. interests. There is no end-point to these requirements; even a favorable evolution of events (such as the dissolution of the Soviet Union) does not mean the end of the need for up-to-date information. In many cases, the need for intelligence is more important than the need for dealing with a particular incident; thus, it may be advantageous to support a covert intelligence source for years (even if the source is publicly identified as anti-American or involved in illegal activities) and to keep the relationship with U.S. intelligence agencies secret. Public disclosure could not only destroy the source's usefulness, but also serve to undermine U.S. efforts to recruit and retain

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[39] Quoted in *National Security Law Report,* November 1996, p. 4.

[40] Section 9-90.210(A) of Volume 9A of the *Department of Justice Manual* states: "Although both are arms of the executive branch, the federal law enforcement and intelligence communities have very distinct identities, mandates, and methods. The mission of the former is to identify, target, investigate, arrest, prosecute, and convict those persons who commit crimes in violation of federal laws. The mission of the latter is to perform intelligence activities necessary for the conduct of foreign relations and the protection of the national security, including the collection of information and dissemination of intelligence; and the collection of information concerning espionage, international terrorist activities, and international narcotics activities."

[41] An inevitable factor that might hinder cooperation is the fact that the Justice Department has the authority to investigate intelligence agency personnel for potential illegal activity; see, for instance, Vernon Loeb and John Mintz, "CIA Faces Criminal Probe in China Case," *Washington Post*, December 5, 1998, p. A1. Although this authority is uncontested, its exercise may affect working relationships.

other sources. National security policymakers may, moreover, seek rumors and gossip that could never stand up in court. Such information may, nonetheless, provide the best indication of a fluid political situation in another country that could directly affect U.S. interests.

Coordinative and consultative mechanisms—an Intelligence-Law Enforcement Policy Board and a Joint Intelligence-Law Enforcement Working Group (JICLE)—have been established at several levels in response to the 1994 assessment of the Joint Task Force on Intelligence and Law Enforcement reached to ensure that exchanges of information are soundly established and preserve the integrity of the judicial process, as well as the legitimate functions of the Intelligence Community.[42] These entities have considered the nature and extent of appropriate law enforcement-intelligence coordination in pre-trial discovery and established administrative policies regarding such cooperation.[43] The Joint Task Force did not consider that a need existed for statutory changes.

Concerns about the future of interagency relationships in the post-Cold War era were also reflected in the Intelligence Authorization Act for FY 1995 (P.L. 103-359), signed on October 14, 1994. The Act established a commission to review the roles and capabilities of the Community. The resultant Commission on the Roles and Capabilities of the United States Intelligence Community[44] made an extensive review of the activities of intelligence agencies, and concluded that:

> Law enforcement can be an extremely powerful weapon against terrorism, drug trafficking, and other global criminal activity. But it may not be the most appropriate response in all circumstances. Often the perpetrators have sought sanctuary in other countries and cannot be brought to trial. Compiling proof beyond a reasonable doubt—the standard in criminal cases—may be even more difficult with respect to global crime. Diplomatic, military, or intelligence measures, in many cases, can offer advantages over a strict law enforcement response, or can be undertaken concurrently with law enforcement.[45]

The Aspin-Brown Commission recommended that direction of the effort be vested in a senior-level committee of the National Security Council (NSC), and that the committee include the Attorney General (who is not a member of the NSC). It urged the proposed committee to develop improved procedures to ensure increased sharing of information between the two communities, and to coordinate increasing law enforcement activities abroad with local U.S. ambassadors and with intelligence agencies. The Commission also noted the unwillingness of intelligence agencies to

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[42] See CRS Report 95-1204, *Intelligence Agencies' Information Support to Law Enforcement*, by Richard A. Best, Jr., December 12, 1995.

[43] A number of problems awaiting resolution was described in the "Intelligence and Law Enforcement" section of the IC21 Staff Study by the House Intelligence Committee..

[44] Known as the Aspin-Brown Commission after its two chairmen, former Secretaries of Defense Les Aspin and Harold Brown.

[45] Commission on the Roles and Capabilities of the United States Intelligence Community, *Preparing for the 21st Century: An Appraisal of U.S. Intelligence* (Washington: Government Printing Office, 1996), p. 38.

accept tasking from law enforcement agencies, based on their understanding that they were legally authorized to collect information for a valid foreign intelligence purpose. Based on the need to maximize the effort against terrorism and other transnational threats, the Commission argued that "the Intelligence Community should be permitted to collect information overseas at the request of a law enforcement agency so long as a U.S. person is not the target of the collection or the subject of the potential prosecution."[46]

Intelligence agencies had long argued that, even if information could be shared with law enforcement agencies, it could be collected only for foreign intelligence purposes, law enforcement use being essentially a by-product. Based on the needs that had been perceived by the Aspin-Brown Commission to facilitate the intelligence contribution to the struggle against transnational threats, the FY1997 Intelligence Authorization Act (P.L. 104-293) (Section 814) amended the National Security Act to authorize elements of the Intelligence Community to collect information outside the United States about individuals who are not U.S. persons. They would do so at the request of law enforcement agencies, "notwithstanding that the law enforcement agencies intend to use the information collected for purposes of a law enforcement investigation or counterintelligence investigation." For the Defense Department, this authorization extended only to NSA, the National Reconnaissance Office, and the National Imagery and Mapping Agency (and not to the intelligence offices of the military services). This seemingly minor shift was strongly criticized by some civil libertarians as a significant step towards a blurring of important distinctions between intelligence and law enforcement, and essentially giving NSA law enforcement responsibilities for the first time.

In addition, Congress has undertaken to remove some statutory prohibitions that were seen as inhibiting intelligence support to law enforcement efforts. The Antiterrorism and Effective Death Penalty Act of 1996 (P.L. 104-132) included provisions that allow the use of "classified information" indicating terrorist connections in deportation hearings of aliens seeking entrance into the U.S. Presumably, the "classified information" could derive from either law enforcement or intelligence sources. The information need not be disclosed to the alien or his or her attorney beyond a summary "adequate to prepare a defense." Such use of classified information has been harshly criticized. Some observers, including some Members of Congress, believe that these provisions violate constitutional requirements for due process. Others, however, consider that revealing such information in deportation or visa cases could provide terrorist organizations with highly valuable information.[47] In a widely reported case, former DCI James Woolsey, now an attorney in private practice, has challenged efforts of the Immigration and Naturalization Service to use classified materials to justify deportation of several Iraqis without sharing it with him as their counsel.[48]

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[46] *Ibid.*, p. 44.

[47] See CRS Report 96-499, *Antiterrorism and Effective Death Penalty Act of 1996: A Summary*, by (name redacted) , June 3, 1996, pp. 25-30.

[48] See Vernon Loeb, "Other Side of Secrecy Coin, Ex-CIA Chief Fights Confidentiality of (continued...)

Another instance of intelligence and law enforcement cooperation is the National Drug Intelligence Center (NDIC) in Johnstown, Pennsylvania, which also reflects an effort to encourage law enforcement-intelligence cooperation in the counternarcotics effort. Established pursuant to the Defense Appropriation Act for FY1992 (P.L. 102-172), NDIC includes personnel from both law enforcement and intelligence agencies. At its inception, it was expected that NDIC would make available information from both intelligence and law enforcement sources, enabling analysts to put together a comprehensive account of drug enterprises, identifying "the heart of a given organization, not just its extremities. Final success depends upon identifying and destroying those critical parts of the organization that are most vulnerable: key personnel, communications, transportation, finances, and essential supplies and equipment."[49] NDIC's current mission is to coordinate and consolidate strategic organizational drug intelligence, and produce assessments of the structure, membership, finances, communication, transportation, logistics, and other activities of drug trafficking organizations.[50]

Although the extent of NDIC's success in fulfilling its mission has not been publicly detailed, Congress continues to provide funding. In recent years some $27 million has been authorized annually for NDIC with the Attorney General retaining full authority over NDIC's operations. The Conference Committee on the FY1999 Intelligence Authorization Act, in reiterating a request for a comprehensive assessment of the national counter-narcotics architecture, noted that:

> NDIC should be the facility that brings together all law enforcement and intelligence information for integrated, all-source, cross-case analysis. The continued isolation of domestic and foreign aspects of the drug trafficking organizations for separate analysis by different intelligence centers ignores the transnational character of the drug trafficking threat to national security.[51]

Some observers continue to view NDIC is an organizational anomaly, managed by the Justice Department but with funding provided in intelligence authorization legislation. It represents a relatively small aspect of the much larger difficulty in addressing the law enforcement-intelligence relationship.

The FBI has been responsible for counterintelligence, protecting all U.S. government agencies from foreign penetration and for collecting information about threatening foreign activities in the United States. The CIA and FBI had longstanding arrangements for trading information on counterintelligence concerns, and CIA had established a Counterintelligence Center in 1986, but, according to many observers,

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[48](...continued)
Data on His Iraqi Clients," *Washington Post*, June 26, 1998, p. A3.

[49] Office of National Drug Control Policy, *National Drug Control Strategy*, February 1991, p. 116.

[50] NDIC Mission Statement, [http://www.usdoj.gov/ndic].

[51] U.S. Congress, House of Representatives, 105th Congress, 2nd session, Committee of Conference, *Intelligence Authorization Act for Fiscal Year 1999*, H.Rept. 105-780, October 5, 1998, p. 27.

there were limits to the extent of cooperation (as well as considerable ineptitude in both agencies) clearly reflected in the failure to identify and arrest Aldrich Ames in the nine years that he spied on behalf of the Soviet Union prior to his arrest in 1994.[52] The Ames debacle made closer cooperation imperative. In a 1994 Presidential Decision Directive, a National Counterintelligence Policy Board was established by President Clinton and a separate National Counterintelligence Center (NACIC), located at CIA Headquarters, but not part of the CIA, was created to coordinate counterintelligence activities of various agencies. The staff of the NACIC are counterintelligence and security professionals detailed from the FBI, CIA, DOD, State, and the National Security Agency (NSA) and serving two year terms; the initial director was from the FBI, and successors will rotate from the FBI, CIA, and DOD for two year terms.

Observers perceived, however, that the NACIC lacked sufficiently high visibility to deal effectively with counterintelligence challenges. In January 2001, President Clinton signed a Presidential Decision Directive, U.S. Counterintelligence Effectiveness–Counterintelligence for the 21st Century" (CI-21), creating a National Counterintelligence Executive, reporting to the FBI Director and other senior officials, to coordinate a counterintelligence program. CI-21 will include strategic planning, analysis, counterintelligence budgeting, and information collection operations, serving as the national coordination mechanism to issue warnings of counterintelligence threats to the national security. The Office of the National Counterintelligence Executive became operational in May 2001.

A Counterterrorist Center (CTC) was also established within CIA in 1986 to produce intelligence on terrorist threats. Although not a "national" center like the NACIC, the CTC now includes representatives from other intelligence agencies and from law enforcement and policy agencies as well. DCI Tenet has argued that the CTC:

> creates a whole that is greater than the sum of its parts. It harnesses all of the operational, analytical, and technical elements devoted to counterterrorism. The results through the years point to the soundness of this idea. The successes of this approach range from the uncovering of Libya's role in the bombing of Pan Am 103 to the thwarting of Ramzi Yousef's attempt to blow a dozen United States airliners out of the sky in the Far East during 1995. Moreover, CTC has worked with the State Department to provide extensive counterterrorist training to our allies. Over 18,000 individuals in 50 nations have been trained in counterterrorism over the past decade.[53]

The capability to exchange information between intelligence and law enforcement agencies is widely considered essential, even if some observers continue

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[52] See Department of Justice, Office of the Inspector General, *A Review of the FBI's Performance in Uncovering the Espionage Activities of Aldrich Hazen Ames*, Unclassified Executive Summary, April 1997.

[53] Statement of George J. Tenet, U.S. Congress, 105th Congress, 1st session, Senate, Committee on Appropriations, *Counterterrorism*, Hearing, S. Hrg. 105-383, 1998, p. 20. On the origins of the CTC, see Duane R. Clarridge with Digby Diehl, *A Spy for All Seasons: My Life in the CIA* (New York: Scribner, 1997), pp. 319-329.

to insist that "[i]ntelligence-gathering tolerates a degree of intrusiveness, harshness, and deceit that Americans do not want applied against themselves."[54] Thus far, there has been a recognition that information acquired by intelligence agencies can be useful to law enforcement agencies, and procedures have been established to allow it to be transferred and used in ways that are intended not to compromise intelligence sources and methods, on one hand, or violate the constitutional rights of American citizens and persons, on the other. As cases are tried in the courts, the limits of the procedures will undoubtedly be tested, and the courts may limit or extend the permissibility of using information from the Intelligence Community. The extent to which "a bright red line" can be drawn is as yet uncertain.

Important principles remain, however, that create limits to the extent of cooperation; the *Department of Justice Manual* (DOJM) states:

> Although coordination on matters of common concern is critical to the proper function of the two [*i.e.*, law enforcement and intelligence] communities, prosecutors must be aware of the concomitant need of both communities to maintain a well-delineated separation between criminal prosecutions and foreign intelligence activities, in which less-stringent restraints apply to the government. Not to do so may invite the perception of an attempt to avoid criminal law protections by disguising a criminal-investigation as an intelligence operation. The judicial response to that may be the suppression of evidence in the criminal case....[55]

Above and beyond the interagency bodies comprised of members of law enforcement and intelligence agencies, White House-level entities have been established to provide government-wide coordination. The efforts of the Intelligence Community, as well as the State and Defense Departments, are coordinated by the National Security Council (NSC) staff under the direction of the President. Law enforcement actions are coordinated by the Attorney General on behalf of the President. Concerns about executive branch oversight of the U.S. response to transnational threats led to the 1996 passage of amendments to the National Security Act of 1947. Section 804 of the FY1997 Intelligence Authorization Act (P.L. 104-293) established within the NSC a Committee on Transnational Threats to develop strategies to deal with such threats and to assist in the resolution of operational and policy differences among Federal departments and agencies in responding to the threats, to ensure the effective sharing of information about transnational threats among Federal departments and agencies, "including law enforcement agencies and the elements of the intelligence community," and "to develop guidelines to enhance and improve the coordination of activities of Federal law enforcement agencies and elements of the intelligence community outside the United States with respect to transnational threats."[56]

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[54] Baker, "Should Spies Be Cops?," p. 40.

[55] DOJM, section 9-90.210.

[56] 50 USC 402(i). President Clinton, objecting to establishing an NSC committee by statute, indicated that he had already asked the NSC to examine relevant issues. See Statement on Signing the Intelligence Authorization Act for Fiscal Year 1997, October 11, 1996, *Public*

(continued...)

The Attorney General has not been made a statutory member of the NSC, reflecting an intention to keep law enforcement separate from policymaking, defense, and intelligence agencies, although Justice Department representatives are routinely involved in NSC decisionmaking. In a memorandum of February 13, 2001 on the organization of the NSC system, President Bush directed that the Attorney General would be invited to participate in meetings pertaining to his responsibilities, but a formal inclusion of the Attorney General in the NSC was not proposed. The memorandum did indicate that the Justice Department would be represented in the NSC Deputies Committee and Policy Coordination Committees giving DOJ the functional equivalence of membership.

The only official with authority over both intelligence and law enforcement efforts is the President, even though in some administrations the National Security Adviser or the White House Chief of Staff may have significant, if nonstatutory, responsibilities. Presidents will have limited time to devote to sorting out jurisdictional responsibilities of various agencies in specific cases, and some observers question the effectiveness of existing mechanisms for balancing international legal and policy concerns. Philip Heymann, a former Deputy Attorney General, has argued that, "Uncertainty is upsetting to both sides. It would be wise for the federal government to propose a statute in an effort to use the weight of legislation to settle open questions .... [T]he Supreme Court is likely to give great deference to the views of the executive and legislative branches on an issue that has such significant national security dimensions."[57]

Distinctions between law enforcement and intelligence can lead to potentially important difficulties. For instance, in March 1997, according to media reports, the FBI, out of concern for an ongoing criminal investigation, was unwilling to share information with the NSC staff about alleged contacts between Chinese officials and U.S. political fundraisers. Reports further indicate that such information was not shared with the Secretary of State, who was then preparing for an official visit to China.[58] Samuel Berger, President Clinton's National Security Adviser was recalled as "sputtering in a profane rage," and his deputy, James Steingberg, subsequently recalled that the problem of insufficient information-sharing was "commonplace."[59]

Although the absence of this information may not have complicated U.S. diplomacy in this instance, some observers suggest that information regarding other countries' efforts to influence U.S. policies must be available to those responsible for

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[56](...continued)
Papers of the Presidents of the United States: William J. Clinton, 1996, Book II (Washington: Government Printing Office, 1998), pp. 1813-1814.

[57] Philip B. Heymann, "Law Enforcement and Intelligence in the Last Years of the Twentieth Century," *National Security Law Review*, Winter 1996, p. 12.

[58] See Doyle McManus, "FBI Director Objects to Briefing Request," *Los Angeles Times*, March 25, 1997, p. 11.

[59]John F. Harris and David A. Vise, "With Freeh, Mistrust Was Mutual," *Washington Post*, January 10, 2001, p. A1; see also James Steinberg, "Foreign Policy: Time to Regroup," *Washington Post*, January 2, 2001, p. A15.

the formulation and execution of U.S. national security policy. Given the stakes of U.S. relations with China, they suggest that keeping the Secretary of State and other officials responsible for foreign policy uninformed of important initiatives of the government in Beijing may jeopardize important U.S. interests in international negotiations. The FBI is not charged with responsibility for national security policy, and critics argue that a determination by the Justice Department to monopolize information legitimately needed by the NSC or the Secretary of State undermines the constitutional responsibilities of the entire executive branch.

In another case, both the Attorney General and the FBI Director were publicly critical of the cooperation received from the government of Saudi Arabia concerning the 1996 bombing of the Khobar Towers housing complex in which 19 U.S. military personnel were killed.[60] Former DCI John Deutch remarked on

> the faintly ridiculous spectacle of Freeh, an individual with impeccable law enforcement credentials, who has successfully battled crime in the United States, being stiffed repeatedly by the Saudis when he requested coequal status in their internal investigation, and expected treatment of suspects and evidence according to American standards. Fat chance—the Saudi royal family's conception of justice is quite different from our own. In any case, if the situation were reversed, it is highly unlikely that we would let foreign law enforcement officials play a significant role in a sensitive internal investigation of an incident that occurred on U.S. soil.[61]

An area of growing concern is the possibility of attacks on U.S. information systems. Although such attacks thus far have apparently been few in number and without permanent effects, many observers are greatly concerned that significant damage could be inflicted on the computer systems and databases that are depended upon not only by government agencies, but also by important sectors of the U.S. economy. It is difficult to determine the sources of such attacks, whether they originate inside or outside of U.S. territory, or whether they are isolated or part of a larger plan. Resolving such question may be significantly complicated by statutes that assign separate responsibilities to law enforcement and intelligence organizations. An attack launched by a teen-aged hacker from a computer in the United States is clearly a law enforcement matter. An attack by a foreign government on U.S. defense databases would undoubtedly be viewed as a concern for intelligence agencies. In actuality, however, determining the source and purpose of the attack within a reasonable time might be difficult without the involvement of both law enforcement and intelligence agencies. It is argued that current statutory restrictions can, however, preclude an investigatory role by intelligence agencies if U.S. persons or locales are involved in launching such attacks.

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[60]See David Johnston, "Reno Says Saudis Did Not Cooperate in Bombing Inquiry," *New York Times*, January 24, 1997, p. A1; a congressional hearing was also held on the issue: U.S. Congress, House of Representatives, 105th Congress, 1st session, Committee on the Judiciary, Subcommittee on Crime, *The FBI Investigation into the Saudi Arabia Bombing and Foreign FBI Investigations*, Hearing, February 12, 1997, Serial No. 44.

[61]John Deutch, "Terrorism," *Foreign Policy*, Fall 1997, pp. 16-18. For additional information on the FBI's concern with foreign cooperation in regard to the Khobar Towers attack, see Elsa Walsh, "Louis Freeh's Last Case," *New Yorker*, May 14, 2001.

The need for coordinating law enforcement and policy issues is reflected in Presidential Decision Directives (PDDs) 62 (Protection Against Unconventional Threats) and 63 (Critical Infrastructure Protection) of May 22, 1998. The Directives are classified, although summaries have been officially released.[62] They established within the NSC staff a National Coordinator for Security, Infrastructure Protection, and Counterterrorism, whose responsibilities include coordination among agencies for policies dealing with terrorism and other threats to U.S. infrastructure. A major focus of these directives is the need to develop plans in conjunction with the private sector that controls a major percentage of U.S. infrastructure, but which may, for a variety of reasons, be reluctant to share plans for infrastructure protection with government officials. The Bush Administration subsequently placed these responsibilities in the NSC Policy Coordination Committee on Counter-Terrorism and National Preparedness.

PDD-63 also established a National Infrastructure Protection Center (NIPC) within the FBI to serve as a national critical infrastructure threat assessment, warning, vulnerability, and law enforcement investigation and response entity. Staffed by law enforcement agency investigators, as well as representatives detailed from other agencies, including the Intelligence Community, the NIPC will be able to provide direct support to DOD or the Intelligence Community, depending upon the nature and level of a foreign threat/attack, protocols established between special function agencies (DOJ/DOD/CIA), and the ultimate decision of the President."[63] NIPC's former Director, Michael Vatis, described the role of this Center in 1999:

> Thus, the NIPC is housed in the FBI to enable it to utilize the appropriate authorities to gather and retain the necessary information and to act on it. Now, this does not mean that the ultimate response to a cyber attack is limited to criminal investigation and prosecution. The response will be determined by the facts that are uncovered. Thus, for instance, if it is determined that a cyber intrusion is part of a strategic military attack, the President may determine that a military response is called for. But no such determination can be made without adequate factual foundation, and the NIPC's role is to coordinate the process for gathering the facts, analyzing them and making determinations about what is going on, and determining what responses are appropriate.[64]

Sensitive to statutory complexities, the PDD stated that, "All executive departments and agencies shall cooperate with the NIPC and provide such assistance, information and advice that the NIPC may request, *to the extent permitted by law*." (Emphasis

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[62] In Fact Sheets issued by the White House, Office of the Press Secretary, on May 22, 1998.

[63]White Paper: The Clinton Administration's Policy on Critical Infrastructure Protection: Presidential Decision Directive 63, May 22, 1998. March 1998 press reports suggest that Justice Department officials cautioned against any provision that would put prosecutorial decisions in the hands of non-lawyers; see Robert Suro and Dana Priest, "Plan to Overhaul Anti-Terrorism Strategy Would Boost NSC's Role," *Washington Post*, March 24, 1998, p. A7.

[64] Statement for the Record of Michael A. Vatis, Director, National Infrastructure Protection Center, Federal Bureau of Investigation, before the Senate Armed Services Committee, Subcommittee on Emerging Threats and Capabilities, March 16, 1999.

added.) Although a related White Paper indicated that the Administration "shall consult with, and seek input from, the Congress on approaches and programs," there is no indication that the Clinton Administration believed that the existing statutory regime is inadequate for dealing with cyber threats or that a need exists for legislative initiatives. Subsequently, however, there were indications that Clinton Administration officials believed that the government needed greater authorities to trace persons who abuse the Internet.[65] These concerns were addressed in the USA-Patriot Act passed in October 2001 in the wake of terrorist attacks.

In these two directives (the complete texts of which have not been made public), the Clinton Administration established a policy and an administrative structure to deal with critical infrastructure protection and with terrorism. The structure has been maintained by the Bush Administration. It is well understood that ways must be found to encourage cooperation from the private sector, and that there are many difficulties to be overcome in this regard. Some observers argue, in addition, that, in crises involving computer-based attacks on U.S. infrastructure, the separate responsibilities and authorities of law enforcement and intelligence agencies might be impediments to immediate detection or to a rapid response.

Other observers suggest that organizational authorities established by classified executive branch directives fail to provide necessary public accountability, and may increase suspicion of government among parts of the electorate traditionally suspicious of government secrecy. Administration spokesmen argue, however, that, given the changing variety of potential threats now facing the country, a flexible structure centered on the NSC staff can enable the Federal Government to choose the best approach in specific circumstances and adapt organizational relationships to changing needs.

Beyond Information Exchanges: Using Intelligence Agencies in Enforcing Laws

The national goal is, of course, not merely to study transnational threats, but, also, to reduce or eliminate them. The role of intelligence agencies in the effort to counter transnational threats, such as narcotics smuggling and terrorism, are not limited to acquiring information and analyzing it. There are longstanding programs by which U.S. intelligence agencies provide training and technical support to foreign governments. Intelligence agencies have also been involved in efforts to bring alleged

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[65] "In this digital age of Internet-based communications, signals do not travel along straight lines . . . . Signals are often broken up and may pass through many providers, in several different jurisdictions, en route to their destination. . . . A possible amendment to existing statutes could allow federal judges to direct cooperation among successive communications providers that carry a particular communication in tracing a call to its ultimate source or destination." *Statement of Janet Reno, Attorney General of the United States, before the United States Senate Committee on Appropriations, Subcommittee on Commerce, Justice, and State, the Judiciary, and Related Agencies, February 4. 1999.* See also CRS Report RL30153, *Critical Infrastructures: Background and Early Implementation of PDD-63*, by (name redacted), April 22, 1999, p. 12.

international criminals to the United States in cooperation with diplomats and military and law enforcement officials. Observers believe that, on occasion, foreign countries prefer to have some criminals, even their own citizens, tried in U.S. courts rather than their own to avoid undesirable political repercussions.

Depending on the circumstances, the Department of State, Department of Justice, and the Department of Defense can have proactive roles in countering transnational threats. The State Department can attempt to persuade or pressure another state to crack down on lawbreaking occurring within the latter's borders. The United States, having developed evidence that a crime has occurred, or is likely to occur, can also request formal extradition (or, make a more informal request that the individual be transferred to U.S. custody which is known as rendition[66]) through diplomatic or law enforcement channels in cases where the alleged violation is of U.S. law.

In a handful of cases, suspects have been brought to the United States by force. In 1987, one alleged airline hijacker was lured onto a boat in the Mediterranean, captured by FBI agents, and flown in a U.S. Navy aircraft to stand trial in the United States. An alleged participant in the torture death of a DEA agent in Mexico was brought to the U.S. by a non-governmental group and turned over to Federal law enforcement personnel and subsequently stood trial. The involvement of Panamanian General Manuel Noriega in narcotics smuggling was so egregious that it led to indictments by U.S. grand juries in February 1988; in March 1988, the Senate (by a vote of 92-0) had resolved that the United States should obtain his extradition from Panama.[67] Subsequently, President Bush launched a full-scale invasion of Panama in December 1989 to restore the legitimate leadership of the country and turn Noriega "over to civil law enforcement officials of the United States as soon as practicable."[68] Noriega was captured, and subsequently put on trial in Florida; he was convicted of drug trafficking in April 1992 and sentenced to prison for 40 years (although the sentence was reduced in 30 years in March 1999). In its report to the United Nations, the United States did not base its intervention in Panama on Noriega's alleged narcotics trafficking, but rather upon the inherent right of self-defense under international law in response to armed attacks by forces under the direction of Manuel Noriega.[69] It has been argued that the first Bush Administration thus refrained from

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[66] In a recent case, the Pakistani government apparently turned a blind eye to the forceful return of Mir Aimal Kasi, who was subsequently convicted and sentenced to death for having shot occupants of cars near the entrance of the CIA in January 1993.

[67] S.Con.Res. 108 (100th Congress, 2nd session); approved by the Senate March 25, 1988.

[68] Memorandum on the Arrest of General Manuel Noriega in Panama, December 20, 1989, printed in *Public Papers of the Presidents, George Bush, 1989*, Book II (Washington: Government Printing Office, 1990), p. 1726.

[69] United Nations Document S/21035, Letter dated December 20, 1989, from the Permanent Representative of the United States of America to the United Nations [Pickering] addressed to the President of the Security Council.

arguing that drugtrafficking is a legal justification for military action.[70] It is clear, however, that Noriega's drugtrafficking lay behind the invasion.

There is no question that such forcible abductions against the desires of a foreign country can greatly complicate U.S. relations with that country. Such efforts, according to some observers, appear to many in other countries to reflect U.S. disdain for acceptable procedures of international law. They arguably contribute to the impression that the U.S. relies on brute force and undermine legal norms. It is easy to imagine the public consternation in the U.S. if another country "snatched" a U.S. official and put him on trial.[71]

On the other hand, supporters of such unilateral actions argue that, in extreme cases, a forcible abduction may be the best means to deal with flagrant criminals whose activities seriously jeopardize U.S. interests. Moreover, the process results in a public trial by a judicial system that is arguably among the fairest in the world. They further point out that the only remaining alternatives are diplomatic protests, various types of economic restrictions, or the employment of covert actions. These, they argue, also have significant drawbacks. A diplomatic protest can be ignored; recalling ambassadors or breaking relations may be an option in dealing with Libya, but relations with other countries, including Mexico, are so multi-faceted and important that maintaining diplomatic representation is essential. Economic retaliation may not affect a desired target in another country, but may harm broader American interests.

There have been more instances in which U.S. military force has been used to inhibit and punish terrorism. In April 1986, in retaliation for Libyan involvement in a bomb attack on a Berlin nightclub frequented by U.S. military personnel, President Reagan ordered air attacks on Libyan military targets. Although Libyan leader Muammar Qadhafi was not injured in the attacks, some 70 people were reportedly killed. Observers believe that the attacks may have served as a deterrent to further Libyan involvement in anti-American terrorist activities.

In June 1993, reports of plans by Iraqi-backed terrorists to assassinate former President Bush led President Clinton to order an attack by cruise missiles on Iraqi military headquarters. In response to August 1998 terrorist attacks on U.S. embassies in Kenya and Tanzania, President Clinton also ordered missile strikes on a terrorist training complex in Afghanistan and a chemical weapons/pharmaceutical factory in the Sudan.

The attacks of September 11, 2001 have been treated as military strikes against the United States rather than a felony. Congress quickly passed a joint resolution (P.L. 107-40) authorizing the President to use "all necessary and appropriate force" against the nations, organizations, and persons involved in the attacks. In the campaign that ensued, intelligence agencies provided extensive information support

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[70] See John F. Murphy, "Commentary on Intervention to Combat Terrorism and Drug Trafficking," in *Law and Force in the New International Order*, ed. By Lori Fisler Damrosch and David J. Scheffer (Boulder, CO: Westview Press, 1991), pp. 241-242.

[71] See, for instance, Abraham Abramovsky, "Extraterritorial Abductions: America's 'Catch and Snatch' Policy Run Amok," *Virginia Journal of International Law*, Winter 1991.

to U.S. military commanders and diplomats, and CIA clandestine units have had a significant role in combat operations in Afghanistan (and possibly elsewhere), but the response was fundamentally a military operation.

Capturing alleged criminals and returning them to the U.S. can, under some conditions, be accomplished without the involvement of large military forces. In such cases, small, elite military units or intelligence agents can capture an alleged criminal or bring a suspect into the United States. U.S. courts have long ruled that such abductions do not necessarily jeopardize a defendant's right to a fair trial.[72]

As noted herein, terrorists and narcotics smugglers abroad can be the targets of either military strikes or covert action. In doing so, military forces and intelligence agencies operate mostly (but, arguably, not invariably) within the indeterminate parameters of international law that permits states to act in self-defense, rather than the different and much tighter constraints of constitutional and domestic law.

Efforts such as these that are undertaken by U.S. officials, or at the behest of U.S. officials, undoubtedly fall within the category of covert actions as regulated by statute.[73] Supporters argue that covert actions have some advantages over certain efforts by law enforcement agencies. They are deniable; by definition, a covert action is designed in a way that the role of the U.S. is not perceived. In many cases, covert actions may be contrary to the laws of the country in which the action is to take place, but at the same time they can be consistent with international law.[74] This deniability allows the U.S. to avoid taking responsibility for actions that would be deeply offensive to a foreign country or a major interest group within a foreign country. Covert actions would not necessarily involve the affront to another country's prestige that would be involved in a forcible abduction. Covert actions do not involve the tacit assertion or assumption that U.S. law is superior to that of a foreign country or of customary international law. Covert actions do not even require a determination that given actions are contrary to specific provisions of U.S. law; they are built on the assumption that there are overriding national interests that have to be dealt with outside the framework of international law and normal state-to-state relations, but without resort to the use of military force. Given the existence of countries or other entities in the contemporary world that have no respect for U.S. interests or for any norm of international society—and the absence of world-wide institutions with

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[72]Under the *Ker-Frisbie* doctrine; see Andreas F. Lowenfeld, "U.S. Law Enforcement Abroad: the Constitution and International Law, Continued," *American Journal of International Law*, April 1990, pp. 460-467.

[73] See CRS Report 96-844F, *Covert Action: An Effective Instrument of U.S. Foreign Policy?*, by Richard A. Best, Jr. , October 21, 1996.

[74] W. Michael Reisman and James E. Baker, *Regulating Covert Action: Practices, Contexts, and Policies of Covert Coercion Abroad in International and American Law* (New Haven: Yale University Press, 1992). These authors write (p. 25): ". . . lawfulness is, and should continue to be, determined by contextual analysis: who is using a particular strategy, in what context, for what purpose, and in conformity with what international norm, with what authority, decided by what procedures, where and how, with what commensurance to the precipitating event, with what degree of discrimination in targeting, and with what effects as a sanction and what peripheral effects on general political, legal, and economic processes."

coercive force—the U.S. must be prepared, according to this view, to take direct action to protect its interests. While such covert initiatives will be endorsed by few countries, they will be understood and tolerated by most.

Such covert actions also have significant drawbacks. To bring someone from a foreign country to trial in the U.S. or to act directly to impede criminal activity in a foreign country, the U.S., or its agents, is breaking (or, at the very least, coming close to the edge of) the laws of another country (or even customary international law).[75] The immediate U.S. goal may be achieved, but the larger purposes of upholding a rule of law are not necessarily enhanced. According to some observers, international law is undermined more by one country unilaterally apprehending a suspected criminal and then trying him in its own courts than by the suspect's allegedly illegal activities. Furthermore, covert actions themselves reflect a decision not to accept the constraints of acting openly within legal norms.

Covert actions designed to punish illegal activities are especially hazardous. Some covert actions, of course, might only involve trying to disrupt a narcotics processing or transportation facility. The potential, however, for the loss of lives of U.S. officials or agents is probably higher. The country in which they operate, if it doesn't consent to the operation, may take grave offense (and even retaliate). Covert actions also deprive the U.S. of the premise that it is acting consistent with either national or international law. There are no trials, no court procedures, no cross-examinations of witnesses, *etc*. Resort to covert action clearly sends a message that the U.S. is prepared to operate on the basis of force and without taking formal responsibility for its actions. (Covert actions are designed to avoid revealing the role of the U.S. in their planning or execution.) They do little if anything to support adherence to norms of international society.

In choosing the appropriate option for dealing with threats arising abroad that can be characterized as criminal, decisionmakers will have to weigh a number of factors against the danger involved in letting alleged criminals continue unmolested. They include:

- Is the country where the activity took place (or is taking place) prepared to deal with the activity if the U.S. supplies relevant evidence?

- Is the country where the activity took place (or is taking place) politically able to turn the alleged offenders over to U.S. authorities) as a result of a request of through formal extradition procedures)?

- Is the country where the activity took place (or is taking place) prepared "to look the other way" were the alleged offender to be forcibly abducted by U.S. officials or agents and subsequently put on trial in the U.S.?

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[75] Or U.S. law; in one case CIA officials working with the Iraqi resistance were a subject of an FBI investigation as a result of concerns that they had planned an assassination plot. See James Risen, "FBI Probed Alleged CIA Plot to Kill Hussein," *Los Angeles Times*, February 15, 1998, p. 1.

- If not "prepared to look the other way," would the country be so offended by U.S. actions as to retaliate in some way?

- Are there practical ways that a covert action could be used to deal with the problem?

- What would the other country's reaction be to a U.S. covert action?

Virtually all such decisions will be case-dependent; different criteria would clearly hold for efforts by a terrorist group to smuggle weapons of mass destruction into the U.S., as compared with ongoing narcotics smuggling endeavors. The employment of a covert action, and, most especially, a covert action that involved a risk of lives, would probably have a far higher threshold than the delivery of a *démarche* by the State Department or a request for extradition.

Choosing the best response to transnational threats will inevitably be affected by important, and not always compatible, assumptions:

- Terrorism and narcotics smuggling have risen to the status of threats to U.S. national security.

- Concern for legal standards leads many to argue that, in most cases, alleged terrorists and narcotics smugglers should be tried in courts of law rather than dealt with as if they were military opponents.

- Some terrorists and international narcotics traffickers are sufficiently dangerous as to lead the United States to capture alleged perpetrators and bring them to justice even if other countries' laws must be evaded.

- Nevertheless, the U.S. must continue to deal with certain groups and governments even when they have relationships with terrorist groups and even narcotics smuggling.

- Some threats are sufficiently grave to require a military response or a covert action.[76]

- The most appropriate instrument will continue to depend heavily on the specifics of each situation.

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[76]This was, of course, the conclusion quickly reached after the September 11 attacks; see Charles Krauthammer, "To War, Not to Court," *Washington Post*, September 12, 2001, p. A29; a similar conclusion, reached before the September attacks, is made by Ruth Wedgwood "Cause for Alarm: Legal Action Can Bring Victories, but Preventing Terrorism Calls for Tougher Tactics," *Washington Post*, June 3, 2001, p. B1.

Law Enforcement and Intelligence in the War Against Terror: The Implications of September 11, 2001

In the wake of the terrorist attacks on September 11, 2001, some attention was given to the question of whether the Osama bin Laden network in Afghanistan should be dealt with as a law enforcement or a military matter. The Bush Administration, unable to persuade Afghan authorities to arrest and hand over Bin Laden, quickly decided on a military option supported by covert intelligence units.[77] The approach was directly approved by Congress by a joint resolution (P.L. 107-40). Recognizing that a need would continue for related efforts by law enforcement agencies, the Administration also pressed for passage of legislation to enhance their authority to acquire information on terrorist activities by monitoring various forms of communications in the United States and to detain non-U.S. persons suspected of terrorist ties.

In addition, the Administration sought authority to make available to intelligence agencies foreign intelligence information derived from grand jury disclosures and criminal investigations. This provision generated significant controversy based on concerns that such transfers would encompass extensive and sensitive personal information obtained by law enforcement agencies being made widely available to intelligence agencies. Some expressed concern about potential abuses, noting that such information could be related to "entirely lawful activities, business transactions, political relationships, or personal opinions."[78]

The resultant statute, the USA-Patriot Act (P.L. 107-56), eased restrictions on law enforcement agencies established in the Foreign Intelligence Surveillance Act (FISA) of 1978. FISA was modified to permit exploitation of changing information technologies–roving surveillance, pen registers, and trap and trace authorities.[79] Furthermore, it permits the transfer of foreign intelligence information obtained from law enforcement sources to intelligence agencies with such transfers of information conducted in accordance with regulations established by the Attorney General in consultation with the DCI (and with exceptions if the Attorney General determines that disclosure would jeopardize an ongoing law enforcement investigation or impair other significant law enforcement interests).[80]

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[77]This decision did not preclude the need to conduct trials of alleged terrorists captured in the course of the campaign against terrorism. For background on the Bush Administration's controversial proposal to try suspects by military commissions, see CRS Report RL31191, *Terrorism and the Law of War: Trying Terrorists as War Criminals Before Military Commissions*, by Jennifer Elsea, November 21, 2001.

[78]See comments of Sen. Leahy, *Congressional Record*, October 25, 2001, p. S10992.

[79]See Elizabeth Bazan, *The Foreign Intelligence Surveillance Act: an Overview of the Statutory Framework for Electronic Surveillance*, CRS Report RL30465, September 18, 2001.

[80]P.L. 107-67, Section 905. The need for this provision was strongly advocated by Stewart (continued...)

Although a potential for abuse is widely perceived, the premise of the USA-Patriot Act is that information about foreign terrorists acquired by law enforcement agencies, including grand jury information, should be available to intelligence agencies. Analysts would be able to put together the larger picture of groups plotting against U.S. interests. The appropriate response could be selected from a variety of options–diplomatic protests to a foreign country where terrorist activities were being planned, a military strike or a covert action intended to destroy a terrorist center or training facility, an arrest in the United States, or a request for extradition or rendition of a suspect in a foreign country for trial in this country. There will be advantages and disadvantages of any choice, but the goal would be for the U.S. government to have as complete a picture as possible of the nature of a threat. (As noted above, a particular concern regarding the use in judicial proceedings of information originated by, or shared with, intelligence agencies is the possibility that a defense attorney might seek access to intelligence documents whose release could seriously compromise sources and methods.)

Conclusion

Post-Cold War realities—geopolitical and technological—challenge not only the statutory foundations of law enforcement and intelligence agencies, but also, more fundamentally, constitutional separations of power. The sorting out of roles and missions, as well as oversight responsibilities, has been under review by the executive branch in recent years, and various coordinative mechanisms have been created. Nevertheless, areas of overlap and uncertainty will undoubtedly remain for some time to come.

Many observers argue that this uncertain situation should be allowed to evolve in practice before serious attempts are made to establish a statutory framework for cooperation between intelligence and law enforcement agencies. On the other hand, some suggest that ambiguities in the roles and missions of both intelligence and law enforcement agencies should be resolved, and that greater congressional oversight may be warranted. They further argue that it may be easier to address complex jurisdictional issues and oversight responsibilities at a time when relationships are malleable, rather than to wait until bureaucratic rigidities set in or undesirable precedents are set during grave crises that require immediate decisions.

Efforts to enforce international law and the extraterritorial provisions of domestic laws are increasingly important in the response of the U.S. Government to the transnational threats of the post-Cold War world. Few expect, however, that they

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[80](...continued)
Baker who argued that "barriers to information-sharing between intelligence and law-enforcement agencies have already cost us dearly in the fight against terror." "Grand-Jury Secrecy Rules Help the Terrorists, *Wall Street Journal*, October 5, 2001, p. A14. Baker quoted former DCI Woolsey who claimed that the Justice Department had not shared information about an earlier World Trade Center bombing in 1993 with intelligence agencies because of grand jury secrecy requirements. R. James Woolsey, "Blood Baath: the Iraq Connection," *New Republic*, September 24, 2001.

will become the only recourse; virtually all observers anticipate that other instruments of national power will remain essential if the security of the country is to be preserved. Choosing between law enforcement agencies, and defense and intelligence agencies presents important difficult challenges to those responsible for policymaking. Competing interests have to be weighed and balanced; compromises have to be made. Up until the present, these delicate decisions have largely been made by the executive branch which has argued that no statutory changes are needed. Some observers believe, however, that the time has come for a larger role for the legislative branch. Whether major legislation is needed remains uncertain, but, some believe that far more extensive congressional oversight would ensure that competing values as well as institutional concerns are more thoroughly considered, and that choices are subject to some public discussion.

The events of September 11, 2001, made it clear that international terrorism is a serious national security threat and have prompted a major reassessment of cooperation and information exchange among all major intelligence and law enforcement agencies. In the aftermath of the attacks, Congress took new steps to remove barriers among agencies. In particular, Congress moved to ensure that information available from law enforcement sources, including grand jury testimony, would be made available to intelligence agencies. In pursuit of the Al Qaeda network, all information was to be utilized to support a multi-phased attack by law enforcement, military, and intelligence agencies.

Most observers believe that the destruction of the Al Qaeda network in Afghanistan will not mean the end of international terrorism, much less all transnational threats. Countering them will undoubtedly require the collaborative efforts of intelligence and law enforcement agencies. Very few observers believe that the two efforts can be simply conflated. Important constitutional distinctions will remain. Careful analysis of the campaign against Al Qaeda will undoubtedly inform congressional oversight of the relationship between the two communities.