

CRS Report for Congress

Intelligence Reform at the Department of Energy: Policy Issues and Organizational Alternatives

July 25, 2008

Alfred Cumming
Specialist in Intelligence and National Security
Foreign Affairs, Defense, and Trade Division



**Prepared for Members and
Committees of Congress**

Intelligence Reform at the Department of Energy: Policy Issues and Organizational Alternatives

Summary

After the repeated urging of the Department of Energy (DOE), Congress in 2006 agreed to temporarily consolidate separate counterintelligence (CI) offices at the Department of Energy and the National Security Administration (NNSA) into a single CI office under DOE control. DOE had complained that the dual office structure was ineffective. In permitting DOE to consolidate the two offices, Congress reversed its 1999 authorization to establish a separate NNSA CI office — a decision that at the time was prompted by congressional concerns over repeated departmental security and counterintelligence lapses.

At the same time, in 2006, DOE combined its separate Offices of Intelligence, and Counterintelligence into a new DOE office called the Office of Intelligence and Counterintelligence. The Department reasoned that combining the disciplines of counterintelligence and foreign intelligence under one integrated office would foster synergistic cooperation that would lead to a more strategic and ultimately more effective counterintelligence program.

This report analyzes both consolidations — the first authorized by Congress at DOE's request; the second initiated by DOE — and examines the impact of each on the effectiveness of the Department's CI program. A major oversight issue for Congress is whether either, or both, organizational changes will strengthen the Department's CI program as intended. Some observers are concerned that the two consolidations may have undercut CI capabilities.

Congress could maintain the status quo or choose from several alternative organizational approaches, some of which continue to be discussed despite the most recent organizational changes to the Department's CI program. Such alternatives range from maintaining the consolidated DOE/NNSA CI office but reversing DOE's decision to combine its formerly independent offices of foreign intelligence and counterintelligence, to eliminating both consolidations.

Congress also could exercise several oversight options, ranging from conducting classified CI briefings to commissioning a formal assessment of DOE's current CI reorganization.

This report will be updated as warranted.

Contents

Introduction	1
DOE Counterintelligence Critiques	1
Critics Blame Weak Counterintelligence (CI) on Several Factors	2
Fears That China Stole Nuclear Secrets Sparks CI Changes 1998	3
The Turning Point	4
Congress Adopts PFIAB Recommendation	6
Is a “Bifurcated” CI Structure Effective?	7
Debate Over Twin Office Effectiveness Continued	8
Congress Changes Course; Eliminates DOE/NNSA Bifurcation and Authorizes Program Consolidation	9
Proponents of DOE/NNSA Consolidation Say It Strengthens CI	10
Critics Cite Negative Impacts of DOE/NNSA CI Consolidation	11
DOE Implements Internal Consolidation, Combining Offices of Intelligence and Counterintelligence	13
Proponents of FI/CI Consolidation Say it Has Strengthened CI	14
Critics of FI/CI Consolidation Argue It Has Undercut CI Capabilities and Authorities	15
Possible Organizational Alternatives	18
Alternative One: Eliminate the 2010 Sunset; Retain DOE’s FI/CI Consolidation	18
Alternative Two: Maintain the 2010 Sunset But Establish an Independent NNSA CI Office; Retain DOE’s FI/CI Consolidation	19
Alternative Three: Eliminate Both the 2010 Sunset and DOE’s FI/CI Consolidation	19
Alternative Four: Maintain the 2010 Sunset Provision But Consolidate All CI Within NNSA; Retain DOE’s Consolidated FI/CI Program	20
Alternative Five: Maintain 2010 Sunset; Eliminate DOE’s Consolidated FI/CI Program	20
Alternative Six: Place FBI in Charge of DOE CI	20
Maintain the Legislative Status Quo	21
Possible Oversight Alternatives	21
Alternative One: Classified Congressional CI Briefings	21
Alternative Two: Commission a Formal Assessment of FI/CI Consolidation	21
Alternative Three: Review DOE Compliance With the Law	22
Alternative Four: Codify Relevant Parts of PDD-61	22
Appendix	23
Table 1: Statutory Role of the FBI in the DOE CI Program	24

Intelligence Reform at the Department of Energy: Policy Issues and Organizational Alternatives

Introduction

DOE Counterintelligence Critiques

Since its establishment in 1977, DOE has been repeatedly criticized for its security and counterintelligence efforts — viewed as being so seriously deficient that some observers believe DOE, through its actions, has “invited attack by foreign intelligence services.”¹ The General Accounting Office,² the President’s Foreign Intelligence Advisory Board, and the Intelligence Community, as well as DOE’s own inspector general and security experts, collectively have issued numerous classified and public reports — according to some estimates, more than 100 — in the last 30 years that have highlighted a litany of DOE security and counterintelligence vulnerabilities. Because of these vulnerabilities, many believe that sensitive nuclear weapons information has “certainly” been lost to espionage. In countless other instances such information has been left vulnerable to theft and duplication.³ Although the damage to national security resulting from such lapses has been difficult to calculate, DOE has been warned on many occasions that its “lackadaisical oversight” could lead to an increase in the nuclear threat to the United States.⁴

According to some analysts, given DOE’s unwieldy bureaucratic structure, security lapses should not be viewed with surprise. DOE was established in 1977 by combining 40 diverse government organizations. The intention was to harness the Nation’s research laboratories as part of a coordinated government effort to confront an energy crisis brought on in part by creation of OPEC.⁵ Each agency, however, came with its own bureaucratic structure and culture, and many had different if not conflicting missions.

¹ See President’s Foreign Intelligence Advisory Board, *Science At Its Best/Security At Its Worst*, June, 1999, pp. 2-3. The report, one of the most comprehensive of its kind, is often referred to as “The Rudman Report,” in recognition of former U.S. Senator Warren B. Rudman, who served as Chairman of the President’s Foreign Intelligence Advisory Board at the time the report was issued.

² The U.S. General Accounting Office is now known as the U.S. Government Accountability Office.

³ See President’s Foreign Intelligence Advisory Board, *Science At Its Best/Security At Its Worst*, June, 1999, p. 13.

⁴ *Ibid*, p. II.

⁵ The Organization of Petroleum Exporting Countries.

The agencies also differed in the importance they attached to security and CI. Some, such as the Energy Research and Development Administration, home to the Nation's highly sensitive nuclear weapons program, viewed such matters as being relatively more important. Others, such as the as the Interior Department's Power Marketing Administrations, attached a low priority to such matters. These sometimes starkly diverging views, although having moderated over time, arguably contribute to the cross-currents and conflicting pressures that have bedeviled DOE's security program and contributed to its lapses from the outset.

These varying views in turn may stem from certain built-in and enduring tensions which to a large degree are inherent in DOE's four principal missions. Three of those missions — fundamental science, energy resources, and environmental quality — thrive, indeed depend on open scientific inquiry. It is DOE's fourth mission, national security, that demands that security be the backdrop for scientific inquiry.⁶ The result is an ever-present potential for conflict and an enduring challenge to strike the right balance between open collaboration and partnership, and security. So serious have been the ramifications of this challenge, that one study has concluded DOE has never fully recovered from some of the internal contradictions growing out of its own complicated creation.⁷

Critics Blame Weak Counterintelligence (CI) on Several Factors

Although many critics blame DOE's security problems generally on the tension within DOE between open scientific inquiry and security, they tend to focus on what they characterize as, *inter alia*, three specific issues: a high turn-over of inexperienced top leadership, bloated and dysfunctional management, and an agency culture that views the discipline of counterintelligence with disdain.

High leadership turn-over has been an enduring problem, according to Department critics. They point to the eleven secretaries who have led the department over an almost 30-year period. Although some secretaries have pushed aggressive security reforms, they often have left office before having fully implemented their proposals. Following their departures, the proposed reforms may be discarded or forgotten. Another cited problem has been a lack of experience in national security among some of those who have served as Secretary. Although DOE spends almost a third of its budget — roughly 30 percent — on nuclear related functions, many of its top leadership have lacked prior experience in such matters. As a result, security and CI problems may often have been seen as lesser priorities, and decisions on such matters left to lower-ranking officials who often have lacked either the incentive or authority to take quick, decisive action.⁸

⁶ DOE's national security program also depends on open scientific inquiry and international collaboration, but in a secure and classified environment.

⁷ President's Foreign Intelligence Advisory Board, *Science At Its Best/Security At Its Worst*, June, 1999, p. 8.

⁸ *Ibid*, p. 5.

A second factor cited, related to DOE's security record is the Department's management structure which has been characterized by critics as bloated and dysfunctional. Multiple bureaucratic layers reportedly have so diffused authority and left accountability so erratic that "it [accountability] is now almost impossible to find."⁹ Consequently, security and CI shortcomings appear to have gone unaddressed.

Finally, critics blame DOE's culture for contributing to an environment in which legitimate CI concerns are viewed with ambivalence, at best, and open hostility, at worse. The environment, it is suggested, is in large measure a natural and somewhat ironic outgrowth of brilliance from DOE scientists, some of whom "bridle under the restraints and regulations imposed by administrators and bureaucrats who do not entirely comprehend the precise nature of the operation being managed."¹⁰ Thus, to some extent the very brilliance of its employees is cited as a significant contributing factor to a bureaucratic culture which they say is thoroughly saturated with cynicism and disregard for authority, and cavalier in its attitude toward security.¹¹

Fears That China Stole Nuclear Secrets Sparks CI Changes 1998

DOE's CI program received a particular serious jolt in 1998, when intelligence evidence surfaced that indicated the People's Republic of China (PRC) had successfully stolen nuclear weapons secrets from the Department's weapons complex. This information led the Clinton Administration to conclude that the Department's CI program was in serious trouble and that a program overhaul could not be put off.

In February 1998, President Clinton issued a decision directive (PDD-61) instructing DOE to implement 13 reforms, the balance of which was geared to strengthening the Department's CI program. Among the most significant of the reforms was one that required DOE to establish its first-ever independent counterintelligence office — known formally as the Office of Counterintelligence (OCI). The mission of the new office was to develop and implement a coherent and comprehensive CI policy. A senior Federal Bureau of Investigation (FBI) executive, with access to the Energy Secretary, was put in charge.

The President's directive contained several additional initiatives. One authorized the OCI director to oversee and fund all DOE's CI functions, including all direct CI operations and all of DOE's laboratory-based CI field offices.¹² A

⁹ Ibid, p. 4.

¹⁰ Ibid, p. 11.

¹¹ Ibid, p. 6.

¹² According to DOE, the Department currently operates 19 CI field offices, which are located at its laboratories, science centers, plants, and site offices throughout the complex. CI Field Offices are headed by Senior Counterintelligence Officers, seven of whom are senior federal officers, with the balance being laboratory contract workers with extensive CI experience. The mission of a CI Field Office is to develop and implement a CI program.

(continued...)

second initiative required that DOE laboratories be contractually obligated to meet certain CI goals, objectives, and performance standards. And lastly, senior laboratory CI personnel were given direct access to laboratory directors.

Under a 1999 follow-on implementation plan, the OCI director's authority was expanded to include control over all CI programming, funding, and personnel matters at DOE field offices.

PDD-61 represented an effort to address long-standing weaknesses in DOE's CI program. DOE's CI program historically had never had a bureaucratic home of its own. Instead, the program, invariably characterized as a "junior partner," was a component of a larger office – in the 1980s, the Office of Security, which was tasked with physically protecting DOE facilities, and in the 1990s, the Office of Intelligence, whose principal mission was to assess foreign weapons of mass destruction programs. In each instance, the offices' principal respective missions did not include the development of an aggressive, unified, and comprehensive CI program aimed at preventing espionage. And the development of such a program is generally considered not to have begun until President Clinton issued PDD-61.

PDD-61 addressed other perceived weaknesses as well. Among them: insufficient CI funding; inadequate Headquarters control and authority over its CI field offices; uneven and irregular access by the Department's CI officials to senior-level DOE management; inadequately trained DOE CI employees; and a strained relationship with the FBI, the agency DOE relied on for much of its counterintelligence investigative expertise and resources.¹³

The Turning Point

Concerns about DOE's CI program came to a boil in 1999, a year in which Congress became more fully aware of DOE's espionage vulnerabilities.¹⁴ In March

¹² (...continued)

DOE also operates a cyber operational analysis center (OAC), which is managed by a senior federal CI officer.

¹³ For a more detailed examination of the FBI's counterintelligence role at DOE, see Appendix 1.

¹⁴ Media reports of a recent allegation of espionage with a DOE connection involved PRC spy Katrina M. Leung, who the FBI reportedly said was a 20-year Bureau informant they now suspect was a "double agent" who provided classified material to the PRC. Leung allegedly had affairs with two former FBI agents, William Cleveland Jr., who, until he resigned his post on April 10, 2003, was Director of Security, at DOE's Lawrence Livermore National Laboratory, and James Smith. Leung received probation after pleading guilty to a tax charge and lying. Smith pleaded guilty to a felony false statement charge in 2004 and was sentenced to probation and three months home confinement. Cleveland was never charged with a crime. See Josh Gerstein, "Court Hears Arguments Over FBI Agent Accused of Exposing Probe," *New York Sun*, March 8, 2006. FBI officials reportedly said at the time that every PRC counterintelligence case investigated by the Bureau since 1991

(continued...)

of that year, allegations surfaced that a scientist employed by the Los Alamos National Security Laboratory had failed to notify DOE officials of his contacts with officials of the People's Republic of China (PRC). It also was alleged that the scientist, a Taiwanese-born American named Wen Ho Lee, had failed to properly safeguard classified material and had refused to cooperate with authorities with regard to certain security matters. Lee was fired from his research position at Los Alamos National Laboratory after allegedly failing a polygraph examination. He later pleaded guilty to one felony count of unlawful retention of national defense information.¹⁵

In May 1999, a bipartisan House Select Commission¹⁶ charged that the PRC had stolen design information on the United States' most advanced thermonuclear weapons and was using the information to speed the building of its next generation of thermonuclear weapons. The Commission concluded that the PRC had been penetrating U.S. national weapons laboratories for years, and continued to do so.¹⁷

In June 1999, the President's Foreign Intelligence Advisory Board (PFIAB) issued an extraordinarily harsh assessment of DOE's security practices. The Board criticized DOE for the "worst" security record on secrecy that members said they had ever encountered.¹⁸ It also reported that its examination had revealed a department in denial over its security and counterintelligence vulnerabilities and failures, and blamed DOE's decades-long record of security failures on poor organization and a failure of accountability. The Board concluded that with regard to security matters, DOE was dysfunctional and incapable of reform.¹⁹

Despite its harsh criticism, the PFIAB dismissed assertions that DOE had suffered wholesale losses of nuclear weapons technology as a result of espionage. The Board, concurred, however, with an earlier U.S. Intelligence Community assessment that had concluded the PRC had stolen classified U.S. nuclear weapons

¹⁴ (...continued)

may have been compromised by Leung, including that involving Wen Ho Lee. See Susan Schmidt and Dan Eggen "FBI Assesses Potential Damage From Spy Scandal," *Washington Post*, April 13, 2003, p. A04.

¹⁵ See James Sterngold, "Nuclear Scientist Set Free After Plea in Secrets Case; Judge Attacks U.S. Conduct," *New York Times*, September 14, 2000, p. A-1.

¹⁶ The Commission was known formally as the Select Commission on U.S. National Security and Military/Commercial Concerns With the People's Republic of China and was chaired by then Rep. Christopher Cox.

¹⁷ See the Select Commission on U.S. National Security Military/Commercial Concerns With the People's Republic of China, *Cox Commission*, H.Rept. 105-851, May 25, 1999, Overview, p. ii.

¹⁸ See President's Foreign Intelligence Advisory Board, *Science At Its Best/Security At Its Worst*, June, 1999, p. 1.

¹⁹ *Ibid.* pp. II-III.

information that probably enabled it to accelerate its development of nuclear weapons.²⁰

To fix DOE's security problems, the PFIAB recommended that policymakers consider two options. The first option called for the creation of a semi-autonomous agency within DOE that would be strictly segregated from the rest of the department, be more mission focused and bureaucratically streamlined, and that would be devoted principally to nuclear weapons and national security matters. The Board cited the National Security Agency and Defense Advanced Research Projects Agency, both elements of the Defense Department, as models of this approach.

A second option called for the creation of a new agency that would be entirely independent of DOE and would be headed by an administrator who would report directly to the President. The National Aeronautics and Space Administration and the National Science Foundation were cited as models of this approach.

Congress Adopts PFIAB Recommendation

Over the opposition of the executive branch, which argued that PDD-61 offered the best approach to resolving DOE's security problems by mandating the establishment of a single, unified Office of Counterintelligence — Congress approved the PFIAB's first option and created a semi-autonomous agency within DOE. Designated the National Nuclear Security Administration (NNSA),²¹ NNSA was placed in charge of all DOE national security-related nuclear programs.²²

In establishing the new agency, Congress also created two separate counterintelligence offices — placing the first one at NNSA and the second at DOE, thus essentially codifying the Office of Counterintelligence initially established under PDD-61. DOE's office was made responsible for developing overall CI policy for both DOE and NNSA, but implementing that policy only at non-weapons facilities. NNSA's CI office, designated the Office of Defense Nuclear Counterintelligence (ODNCI), was given responsibility for implementing OCI-developed policy at NNSA's facilities, principally at the DOE weapons laboratories. The NNSA CI office was to focus on protecting classified nuclear and related defense technology at NNSA facilities, while DOE's CI office was to concentrate on safeguarding all other technology and DOE sites. The two offices were to share analytic and

²⁰ Ibid. p.4.

²¹ NNSA facilities include the national laboratories (Los Alamos National Laboratory, Los Alamos, NM; Lawrence Livermore National Laboratory, Livermore, CA; and Sandia National Laboratories, Albuquerque, NM and Livermore, CA); NNSA's CI programs are located principally at these national laboratories, which also are referred to as DOE's "weapons laboratories." NNSA facilities also include the nuclear weapons production facilities (the Plantex Plant, Amarillo, TX; Kansas City Plant, Kansas City, MO; the Y-12 Plant, Oak Ridge, TN; the tritium operations facilities at the Savannah River Site, Aiken, SC; and the Nevada Test Site, NV); and a service center at Albuquerque, NM. The U.S. Navy reactor facilities also fall under NNSA.

²² See S. 1059; conference report, H.Rept. 106-301; and P.L. 106-65, signed into law on October 5, 1999.

investigative resources, leading some observers to characterize the arrangement as a “partially bifurcated” CI program.

Is a “Bifurcated” CI Structure Effective?

Critics of the new structure questioned its effectiveness and in 2002, the Commission on Science and Security,²³ issued a report criticizing the bifurcated program. The Commission’s report recommended that DOE reestablish a single, unified program under the Department’s control that would be responsible for counterintelligence across the DOE complex, including NNSA. The Commission’s report stated:

Counterintelligence must be an enterprise-wide function, responsible for counterintelligence issues anywhere within the DOE complex. Furthermore, counterintelligence investigations, analysis, and all other counterintelligence information must be developed within a unified organization and provided to the Secretary and other senior officials without bureaucratic delays. This vital function necessitates one organization with one chief of counterintelligence reporting to the office of the Secretary.²⁴

In urging the adoption of a unified CI program, the Commission said foreign adversaries do not limit their espionage efforts to NNSA but search out attractive targets across the DOE/NNSA complex. Moreover, they stated that visiting foreign scientists, many from countries thought to be interested in conducting espionage at DOE facilities, often travel to both DOE and NNSA sites.

A second study, issued in 2003 by the Office of the National Counterintelligence Executive (NCIX),²⁵ similarly concluded that the bifurcated structure “not only served to further complicate the formidable challenge of managing CI at DOE, but also endangered the goals and implementation of an effective CI program.”²⁶

²³ The Commission on Science and Security was established in October 2000 at the request of then-Energy Secretary Bill Richardson to “...assess the new challenges facing the Department of Energy in operating premier scientific institutions in the twenty-first century in a manner that fosters scientific excellence and promotes the missions of the Department, while protecting and enhancing national security.” See Commission on Science and Security, *Science and Security in the 21st Century, A Report to the Secretary of Energy on the Department of Energy Laboratories*, April 2002, p. 82. By the time the Commission completed its report in 2002, former U.S. Sen. Secretary Spencer Abraham had replaced Bill Richardson as DOE Secretary.

²⁴ Commission on Science and Security, *Science and Security in the 21st Century, A report to the Secretary of Energy on the Department of Energy Laboratories*, April 2002, p. 26.

²⁵ The Office of the National Counterintelligence Executive is part of the Office of Director of National Intelligence. One of its principal missions is to develop, coordinate, and produce an annual national CI strategy for the U.S. Government.

²⁶ See National Counterintelligence Executive, *An Assessment of the Effectiveness of the Division of the CI Programs at the Department of Energy and the National Nuclear Security Administration*, 2003. p. 1.

The NCIX report also stated that, “In light of the history of CI investigations that foundered because of mis-communications within well-established agencies, the two-office arrangement has raised the odds of missteps and problems.”²⁷

NCIX blamed the dual-office structure for numerous day-to-day problems, including duplicative and, at times, contradictory messages to field sites; mis-routed sensitive CI information related to investigations; uncoordinated communications to the FBI and the Intelligence Community; and dual, sometimes, inconsistent, program tasking.²⁸

According to one law enforcement officer interviewed by NCIX during the preparation of its report, the two-office configuration “might some day lead the department to miss a serious CI breach or prevent the conduct of an effective investigation.”²⁹ NCIX recommended that the two CI offices be consolidated within DOE under one senior counterintelligence officer who would be responsible for a Department-wide CI program and report directly to the Energy Secretary.³⁰

The Directors of Central Intelligence and the FBI endorsed the NCIX findings in separate letters to the Chairman and Vice Chairman of the Senate Select Committee on Intelligence.³¹

In 2003, DOE Secretary Spencer Abraham publicly joined the debate, arguing that partially bifurcated structure was “not optimal.” DOE had continued to complain that the structure impeded the smoother functioning of the Department’s security operations. The Secretary recommended that the two offices be combined and placed under the control and authority of DOE.³²

Debate Over Twin Office Effectiveness Continued

Despite the criticism, proponents of the new CI structure touted its effectiveness, arguing that the NNSA office was focusing the kind of sustained attention on CI at the laboratories that Congress had been demanding. They argued that NNSA’s separate, dedicated CI office was vital if CI at NNSA’s weapons laboratories was to receive the sustained attention Congress expected. They also said

²⁷ Ibid. p. 2

²⁸ Ibid. p. 10.

²⁹ Ibid. p. 13.

³⁰ Ibid. p. 3

³¹ See letters from Director of Central Intelligence George Tenet, June 9, 2003, and from FBI Director Robert Mueller, July 11, 2003. Both letters were introduced into the record during a July 13, 2004 hearing on DOE counterintelligence consolidation conducted by the House Energy and Commerce Subcommittee on Energy and Air Quality.

³² For a more complete discussion of DOE’s position on the issue of CI bifurcation, see testimony presented by Linton Brooks, Administrator, National Nuclear Security Administration, before the House Energy and Commerce Committee, Energy and Air Quality Subcommittee, July 13, 2004.

that the bifurcated structure had proven successful in other DOE programs that shared jurisdiction. They instead blamed any significant problems on ineffective and non-cooperating program managers, rather than on the structure itself.

As each of the offices began to take on their own identities, Members of Congress also appeared to develop diverse views of the effectiveness of the two office structure. Rather than recombine the two offices under DOE control, as Secretary Abraham had recommended, the Senate Armed Services Committee approved the establishment of a single CI office, but placed it under NNSA control. The House Armed Services Committee objected, and the Senate's proposal died in conference. But, the Conferees did agree to urge the two offices to improve cooperation, noting in their report:

....that the NNSA was originally set up as a semi-autonomous agency, in large part, to ensure that there would be adequate focus and priority placed on counterintelligence activities. The conferees urge the counterintelligence offices at DOE and NNSA to work together to ensure security of both DOE and NNSA programs and facilities.”³³

Congress Changes Course; Eliminates DOE/NNSA Bifurcation and Authorizes Program Consolidation

In 2007, Congress reversed course, albeit reluctantly, and consolidated the two CI offices into a single office within DOE.³⁴ In agreeing to DOE's recommendation, however, Congress said it remained unpersuaded the Department had “fully and faithfully” implemented the counterintelligence structure authorized in 1999, and it stated that any of the perceived problems thought to stem from having two CI offices could have been resolved by applying “greater management resourcefulness.”³⁵

Congress said it remained skeptical that DOE could implement a strong security program. Alluding to the Wen Ho Lee case, the Conference warned that re-consolidation, together with DOE's internal decision to combine its own Offices of Intelligence and Counterintelligence under a new Office of Intelligence and Counterintelligence, would leave DOE's counterintelligence functions “organized as

³³ The 108th Congress voted to retain the bifurcated CI structure. See Conf. Rept. 108-767, p. 897, accompanying H.R. 4200, the FY2005 defense authorization bill.

³⁴ P.L. 109-364, Sec. 3117. The legislation approved by Congress calls for the disestablishment of NNSA and the transfer of its Office of Defense Nuclear Counterintelligence to DOE's Office of Counterintelligence, but under a sunset provision, would reestablish NNSA's CI office in 2010. As result of DOE's internal consolidation of its intelligence and counterintelligence offices in March 2006, the Office of Counterintelligence no longer exists, per se. Counterintelligence is now overseen by the Directorate of Counterintelligence, which is a component of DOE's recently established Office of Intelligence and Counterintelligence.

³⁵ Conference Rept. 109-702 (2nd Sess.), p. 769, accompanying H.R. 5122, the FY2007 John Warner Defense Authorization Act, which became P.L. 109-364.

they were when the Department experienced significant counterintelligence problems.”³⁶

Congress adopted legislation that included some “safeguards.” First, the legislation contained a “sunset” provision that effectively would reestablish NNSA’s CI office in 2010. Second, the legislation established an Intelligence Executive Committee within DOE to develop and promulgate CI policies. The NNSA Administrator was designated a committee member. Third, the legislation established a new position — the Intelligence and Counterintelligence Liaison — within the staff of the NNSA Administrator to act as a liaison between NNSA and DOE’s Office of Intelligence and Counterintelligence. Lastly, the legislation required that DOE detail in its annual congressional budget submission the level of funding requested for counterintelligence activities overall and the amount of such counterintelligence funding requested by NNSA.³⁷

Proponents of DOE/NNSA Consolidation Say It Strengthens CI

Proponents of consolidating all counterintelligence programming within DOE argue that such a unified structure has provided a number of benefits.

One such benefit, according to proponents, is increased accountability. Rather than relying on two CI program managers with divided accountability, the Energy Secretary and the NNSA Administrator now can hold a single individual ultimately accountable for a single, unified Department-wide CI program.

Another benefit proponents cite — one that the Commission on Science and Security underscored in its reported in 2002 report — is that consolidation has provided DOE a unified bureaucratic structure through which the Department can more effectively centralize control over CI programming across the DOE complex. Under the previous partially bifurcated structure, responsibility for CI was shared between the two offices. DOE’s Office of Counterintelligence developed CI policy, which NNSA’s CI office then implemented at NNSA facilities. The arrangement was said to lead to disagreements between the two offices, and DOE’s CI officials questioned whether its NNSA counterparts were exceeding their mission and developing their own CI policies. On this point, NNSA officials countered that DOE failed to develop comprehensive and effective policies, and they therefore were left with no choice but to develop their policies when necessary. Proponents and critics appear to agree that the bifurcated structure contributed to the development of divergent management philosophies, priorities, and interpretations and

³⁶ Ibid.

³⁷ P.L. 109-364, Sec. 323 states, “...In the budget justification materials submitted to Congress...the amounts requested for the Department for intelligence and the amounts requested for the Department for counterintelligence functions shall each be specified in appropriately classified individual, dedicated program elements. Within the amounts requested for counterintelligence functions, the amounts requested for the National Nuclear Security Administration shall be specified separately from the amounts requested for other elements of the Department.”

implementation of DOE CI guidance, and resulted in inconsistent CI practices across the DOE/NNSA complex.³⁸

A third benefit, one highlighted by NCIX in its 2003 report, is that consolidation has eliminated, or certainly reduced, the occurrence of certain day-to-day problems that stemmed from a two-office structure in which responsibilities sometimes overlap. These problems reportedly included duplicative and at times contradictory messages issued to field sites, mis-routed sensitive investigative CI information, and uncoordinated communications to the FBI and the Intelligence Community.

Finally, consolidation, it is argued, has provided the official in charge of DOE's CI program — the Secretary of Energy's Senior Intelligence Officer (SIO) — exclusive authority to develop and implement a more strategically-oriented DOE-wide CI policy. This is particularly important, it is suggested, given that NNSA's program was perceived as largely tactical, reactive, and ultimately geared to uncovering espionage after the fact. According to proponents, consolidation has resulted in the development of a more strategic, and therefore stronger CI program — one that focuses predominantly on using foreign intelligence to determine what DOE information and computer networks are most at risk of espionage. Equipped with this knowledge, CI officials, the argument goes, increasingly have been able to construct an aggressive CI program focused on preventing espionage before it occurs. "We want to harness foreign intelligence to support counterintelligence," said one CI official. "If we can understand the offense (the plans and intentions of foreign intelligence services), we can harness it."³⁹ Proponents point to the development of the "Common Operational Picture" tool as an example of the kind integrative initiatives that have been launched as a result of consolidation. This particular tool provides CI officials a method by which to represent the CI threat geo-spatially, permitting that CI analysis can be captured collaboratively and comprehensively across the DOE/NNSA complex.

In pointing to the benefits of the NNSA/DOE consolidation, however, proponents caution that a recent decision to transfer a substantial number of CI headquarters staff to another location within the Washington metropolitan area could have the effect of undercutting some of those benefits. The transfer, they argue, the result of limited classified space at Headquarters, could undermine efforts to improve program integration and ironically create another type of bifurcation.

Critics Cite Negative Impacts of DOE/NNSA CI Consolidation

Consolidation critics do not dispute that a unified office and single chain of command improves accountability, but they cite several reasons why DOE/NNSA consolidation has undercut the CI capabilities.

First, NNSA's CI office focused exclusively on counterintelligence. In contrast, DOE treats CI as a component of a larger integrated office — the Office of

³⁸ Interviews with DOE officials, September-October, 2007.

³⁹ Interview with senior DOE official, July 11, 2007.

Intelligence and Counterintelligence — that also includes a Foreign Intelligence Directorate (FI), which, among other tasks, assesses intelligence in order to identify those DOE technologies most likely to be the target of espionage.⁴⁰ As result of placing CI within a larger structure, according to critics, DOE is unable to match NNSA's more focused treatment. On this point, consolidation proponents argue that DOE has always used all appropriate information and resources from the intelligence, security and law enforcement communities to address CI concerns.

Compounding what they view as a structural bias is DOE's decision to devote comparatively more time, attention, and resources to developing its foreign intelligence capabilities. This, critics suggest, has come at the expense of CI capabilities.

Critics describe an emerging programmatic imbalance between foreign intelligence (FI) and CI. They point to DOE's history, which is one in which CI often has been relegated to a secondary or supporting role, first to the DOE's physical security program in the 1980s and 90s, and now possibly to its FI program. These critics argue that it is this historic trend that prompted Congress to establish NNSA's CI office in the first place. It was not lost on Congress, according to one senior CI official, that DOE headquarters was "detached from the field reality" when it came to dealing with CI issues. DOE Headquarters officials concede they have decided to increase the focus on FI but that they are doing so as part of an overarching strategic effort, the goal of which is to more effectively harness FI to support of CI. They dispute that such support has come at the expense of counterintelligence.

Second, NNSA CI managers, some suggest, simply were more effective than their DOE counterparts have been under the consolidated arrangement. It is suggested that NNSA managers developed and implemented a number of laudable practices. Among them: frequent communication between NNSA headquarters and field personnel; regular laboratory visits by NNSA Headquarter CI officials; consensus building on CI tactics and strategy; effective follow-up; and relatively quick decision-making. Even in the one area some critics credit DOE's consolidated program for emphasizing — strategic CI — they fault DOE for what they argue has been its failure to take and resolve some of strategic issues that are integral to any successful strategic plan.

Third, NNSA's CI methods and techniques were generally more effective than those now being employed by DOE. Critics say the difference is one of emphasis. NNSA placed greater reliance on non-confrontational briefings and debriefings of laboratory employees, an approach that consolidation critics contend is more effective in ferreting out espionage. DOE, it is suggested, is taking a harder-edged, investigative approach. One critic, for example, compares DOE's approach to "dragnet tactics that assume folks are guilty until proven innocent."⁴¹ NNSA, according to this critic, pursued investigations when necessary, but generally relied

⁴⁰ The Intelligence Directorate operates Field Intelligence Elements, which are located at some DOE laboratories and assess intelligence related to science and technology trends and foreign nuclear weapons systems.

⁴¹ Interview with senior DOE official, December 13, 2007.

on less aggressive techniques, in the belief that such an approach would generate more useful information about possible espionage. “[NNSA’s philosophy] relied on the workforce to help you,” this observer suggested. On this point, consolidation proponents contend that DOE’s CI program has always employed a multi-disciplined approach incorporating various CI tools such as investigations, analysis, cyber activities, and CI training and awareness. They also argue that both programs were mandated to follow the same CI procedures.

Despite these disagreements, critics and proponents appear to agree that a unified CI program under a single chain of command is preferable. Consolidation critics, however, suggest that the ultimate success of any CI program depends more on effective leadership than its does on any particular bureaucratic structure. In this regard, they state that DOE in the past has overseen a consolidated program and argue that program effectiveness was undermined by ineffective leadership. One consolidation critic conceded that the establishment of NNSA’s CI office may have represented little more than an effort to “work around” what some viewed as DOE’s historically weak CI management.⁴²

Consolidation proponents counter that the DOE/NNSA consolidation has been in place only since the beginning of 2007, and that it is taking root in the aftermath of a prolonged period of organizational turmoil characterized in part by high management turnover.⁴³ As a result, they argue, efforts to build consensus, improve communication, and foster collaboration are still in their infancy. They also question the quality of some of the CI evaluation assessments conducted by NNSA CI office and say that such assessments are now being undertaken in accordance with DOE and IC CI standards.

DOE Implements Internal Consolidation, Combining Offices of Intelligence and Counterintelligence

In 2006, the same year Congress agreed to consolidate the DOE and NNSA counterintelligence offices, DOE decided to combine its Offices of Intelligence and Counterintelligence under a new Office of Intelligence and Counterintelligence. The mission of the new office is to provide the Secretary, his staff, and other DOE policymakers with timely, technical intelligence analyses on all aspects of foreign nuclear weapons, nuclear materials, and energy issues worldwide.⁴⁴ The office is led by the Department’s Senior Intelligence Officer, who reports directly to the Secretary of Energy.

The Office of Intelligence and Counterintelligence is comprised of four directorates: intelligence, counterintelligence, management, and energy and

⁴² Interview with senior DOE official, December 12, 2007.

⁴³ Consolidation proponents say that four directors have led DOE’s CI program since 1998, one of whom served only one year.

⁴⁴ See [<http://www.energy.gov/organization/staffoffices.htm>]. Although this particular Internet site contains no apparent mention of the Office’s CI mission, the Office does contain a CI Directorate.

environmental security. The Directorate of Intelligence is tasked with assessing the capabilities, intentions, and activities of foreign powers, organizations, and persons who may be targeting DOE for espionage purposes. The Counterintelligence Directorate is charged with protecting DOE's classified information from espionage. The Management Directorate houses support activities for the other two directorates, including human resource services, contract support, and facility planning. And the Energy and Environmental Security Directorate is charged with examining the impact of certain energy and environmental issues on U.S. national security.

Proponents of FI/CI Consolidation Say it Has Strengthened CI

Proponents of this consolidation say that by establishing intelligence and counterintelligence directorates in a single office, DOE has strengthened its CI program.

Specifically, proponents contend a more integrated FI/CI structure will make it easier for the Department's Senior Intelligence Officer to foster cooperation between the two disciplines and to develop and implement a CI program that is both more synergistic and strategic in approach. Previously, the two programs worked together, but on a more independent basis that consolidation proponents argued was detrimental to both. Under the new arrangement, they say, communication, cooperation, and collaboration between two disciplines already have improved. As result, officials have been able to more effectively harness foreign intelligence analysis and use it to fashion more strategically focused CI plans that concentrate on what DOE information and computer networks are most at risk of espionage. Specifically, proponents point to increases in CI and FI collection, the number of investigative cases opened, and in the pace of offensive operations against national security targets. Further, DOE officials say the consolidation program conforms with the intent of the FY2004 Intelligence Reform and Terrorism Prevention Act, a major goal of which was to encourage the Intelligence Community to adopt a more integrated corporate approach.

Proponents also say that FI/CI consolidation has helped to correct a prevailing mis-perception within the Intelligence Community that DOE had two Senior Intelligence Officers — one for intelligence and one for counterintelligence. Although the Department always has had a single SIO, the organizational confusion reportedly contributed to weakening the SIO's overall program authority which in turn undercut accountability and the operational cohesion between FI and CI. "...Can we do the mission if CI and FI are separate?" one official asked. "I'm convinced you cannot."⁴⁵

Proponents further suggest that consolidation has enabled DOE to begin the process of establishing an "intelligence brand," thus simplifying the challenge of distinguishing DOE's intelligence products from those of other Intelligence Community agencies. Doing so, according to these proponents, will help to reverse a commonly held Intelligence Community view that DOE's FI program is a mere extension of the CIA, and that its CI program an extension of the FBI, since detailees

⁴⁵ Interview with senior DOE official, July 17, 2007.

from the CIA and FBI respectively historically headed the two DOE programs. The argument is that establishing a “branding” will enable DOE to more effectively highlight DOE’s unique contributions to policymakers.

Lastly, proponents suggest, consolidation has enabled DOE, through its SIO, to begin formulating and implementing a training program that eventually will lead to the development of DOE cadres of senior intelligence and counterintelligence professionals, thus ending its historic reliance on CIA and FBI detailees.⁴⁶

Critics of FI/CI Consolidation Argue It Has Undercut CI Capabilities and Authorities

Critics point to what they contend are at least three indicators that CI/FI consolidation has undercut counterintelligence capabilities and authorities.

First, critics insist that CI resources at some laboratories have been cut, and they blame the reductions in part on increased FI spending. They point to at least two FI initiatives — the Energy Attache Program⁴⁷ and the Collection Management Initiative⁴⁸ — and suggest that funding for both has been provided at the expense of the CI program.

They also point to CI budget constraints, citing several other factors. Among them: a continuing resolution that kept CI spending flat, despite DOE requests for increase⁴⁹; the transition of some DOE laboratories from non-profit to a for-profit status, which has resulted in higher payroll and other costs; and a reported DOE Headquarters CI contingency fund, which has resulted in 10 percent of the overall CI budget being held in reserve to cover unexpected costs.⁵⁰

DOE Headquarters officials deny that CI funding has been diverted to support FI. Rather, they say they have increased spending for CI, but that those increases have gone unrealized because DOE has operated under short-term continuing resolutions since 2006. But they appear to generally agree with consolidation critics who attribute at least some of the blame for budget constraints on the non-profit to for-profit transition that is underway at some laboratories and the CI contingency fund. They contend, however, that no laboratory CI office is doing with less but that “each

⁴⁶ Interview with senior DOE official, July 17, 2007.

⁴⁷ This initiative is designed to place overt DOE Intelligence Attaches in U.S. embassies where they will focus on energy security issues.

⁴⁸ The Collection Management Initiative involves the production and dissemination of increased quantities of Intelligence Information Reports, raw intelligence reports derived from DOE intelligence collected passively from DOE personnel by DOE CI personnel.

⁴⁹ Critics assert that any lingering impact of the Continuing Resolution is long over and, yet, no field CI office has received any budget relief. They further contend that DOE’s overall level of CI effort is decreasing, including at the NNSA laboratories.

⁵⁰ DOE CI and FI budget data are classified, preventing a more detailed unclassified examination.

office has gotten little more than the year before.”⁵¹ Critics counter that CI offices at each of the six largest laboratories — Los Alamos, Lawrence Livermore, Argonne, Pacific Northwest, Oak Ridge, and Sandia — have absorbed 10 percent funding cuts over the last year, despite increases in the DOE Headquarters CI budget and despite the fact that the Department is no longer operating under a continuing resolution.⁵²

Second, critics say the authorities of CI Deputy Director have been eroded since the previously existing independent CI office was eliminated and absorbed by the Office of Intelligence and Counterintelligence. Whereas the director of that independent office controlled CI spending and staff, the CI Deputy Director in the new Office of Intelligence and Counterintelligence does not and that control resides with the Deputy Director of Administration. And while the Deputy Director, like his independent office predecessor, continues to have access to the Energy Secretary — generally viewed as one of PDD-61’s more significant provisions — his access to the Secretary appears to be at the pleasure of the Director of Intelligence and Counterintelligence, to whom the Deputy Director now reports.

Third, critics say they are concerned by suggestions made to senior DOE officials that PDD-61 is dated and should therefore be placed on “an inactive status.” Critics contend that some of the directive’s most important provisions have been ignored, allowing the document to be characterized as “dated.” They cite as an example the elimination of independent Office of Counterintelligence, a principal provision originally contained in the directive. Critics believe certain provisions, however, remain in effect and should be preserved. One such provision requires that DOE’s laboratory contracts contain certain CI program goals, objectives, and performance measures. Another requires senior CI officials at the laboratories to have direct access to laboratory directors.

Those advocating that PDD-61 should be placed on an “inactive status” say they embrace the CI vision embodied in the directive but insist that some of its key provisions have been superseded by changes in law.⁵³ One change is that the role of the FBI director in selecting a DOE CI chief has been eliminated. [See Appendix for a general discussion of the FBI’s role in DOE CI.] Under current law, the Secretary of Energy has that authority. Another change is that there is no longer a requirement that the CI chief be a senior FBI executive, which PDD-61 required. Finally, in another change, the Secretary is expected to “coordinate” his selection with the Director of National Intelligence, a relatively new position which was created under the FY2004 Intelligence Reform and Terrorism Prevention Act, and which did not exist at the time PDD-61 was issued in 1998. Under PDD-61, the FBI Director recommended a selection to the Attorney General.

Despite these concerns, critics say they agree that communication between FI and CI officials could be improved. But, they question whether this goal could have

⁵¹ Interview with senior DOE official, December 19, 2007.

⁵² E-mail exchange with senior DOE official, February 25, 2008.

⁵³ Interview with senior DOE official, July 17, 2007.

been achieved through means other than a wholesale reorganization which they characterize as highly disruptive.

Concerns of some CI officials that FI/CI consolidation has weakened CI capabilities and authorities appear to run deep.⁵⁴ One senior CI official has reportedly resigned because of cuts to his laboratory's CI program. According to another CI official, budgets for CI programs at DOE's six largest laboratories were cut at the beginning of FY2008, despite a double-digit increase in the Department's overall CI budget.⁵⁵ These funds, according to this official, are being used to fund projects at DOE Headquarters. As a result of the cuts, this official said, CI analytic capability has been degraded.

Some CI officials argue that CI program managers increasingly are being asked to carry out FI assignments, the result of which, in some cases, is to reduce the time and resources devoted to CI. "We watched this (de-emphasis of CI) go into peaks and valleys...it is a huge mistake to demote CI to FI."⁵⁶ One laboratory CI official, concerned by what he perceived to be a diminution of CI, but also by the general level of disruption resulting from consolidation, complained that, "Until the (CI/FI) reorganization, I spent 10 percent of my time on Headquarters stuff. Now it's reversed." He said the CI/FI consolidation itself was "unraveling." "(DOE) Headquarters doesn't appreciate how deep the field concerns are," another said, referring the views of CI officials at DOE's weapons laboratories.⁵⁷

These officials contend that communication between Headquarters and the laboratories — never very good — has been made worse by the consolidation. Finally some officials complain that although one of the principal objectives of consolidation was to foster a more strategic approach to CI, that certain strategic goals are not being met. They cite as examples DOE's inability to adequately address issues of personnel security clearances, and the CI implications of DOE interactions with foreign scientists, whether such interactions occur with visiting scientists in the Department's laboratories, or when DOE laboratory employees travel overseas.

Consolidation proponents acknowledge such criticisms, but suggest they underscore continuing communication problems between DOE Headquarters and CI field offices rather than an actual diminishment in CI operational capabilities.⁵⁸ They also suggest that there are "misperceptions about how DOE Headquarters is managing overall CI spending, but insist that the each of DOE's six largest

⁵⁴ This impression was derived from a series of interviews conducted with senior DOE officials in October of 2007.

⁵⁵ According this official, since the beginning of the fiscal year funding in the case of some laboratories has been restored, at least in part.

⁵⁶ Interview with senior DOE official, November 2, 2007.

⁵⁷ Interview with senior DOE official, October 17, 2007.

⁵⁸ E-mail from senior CI official, April 28, 2008.

laboratories has received “budget/spending” authority increases in FY2008.⁵⁹ Finally, they concede that some observers could conclude that some CI funding is being used to support FI efforts — critics have cited CI spending in support of the new collection management initiative — but argue that such spending ultimately has served CI interests.⁶⁰

Finally they characterize the consolidated business model DOE Headquarters has adopted as sound and emphasize that consolidation is a work in progress beset by normal organizational growing pains.⁶¹

Possible Organizational Alternatives

Congress may deem the current approach to be the appropriate one, which would have the effect of reestablishing NNSA’s CI office in 2010 and retaining DOE’s FI/CI program consolidation. If organizational changes are sought, policymakers might consider several questions. First, should the 2010 sunset provision currently in law be retained and NNSA’s CI office be reestablished in 2010? Second, should DOE’s FI/CI consolidated program be retained, or should Congress direct DOE to reestablish independent FI and CI offices within DOE? Within the context of these two overarching questions, the range of possible options include (1) eliminate the 2010 sunset provision contained in P.L. 109-364 and *not* reestablish NNSA’s CI office in 2010; retain DOE’s FI/CI consolidated program; (2) maintain the 2010 sunset provision and reestablish NNSA’s CI office, but as an office *independent* of DOE, dropping the previously existing bifurcated CI structure; retain DOE’s FI/CI consolidated program; (3) eliminate both the 2010 sunset provision and DOE’s FI/CI consolidated program, reestablishing independent FI and CI offices within DOE; (4) maintain the 2010 sunset provision and reestablish NNSA’s CI office, but *consolidate within that office* DOE’s CI directorate; retain DOE’s FI/CI consolidated program; (5) maintain the 2010 sunset provision and reestablish NNSA’s CI on a bifurcated basis under which NNSA and DOE would share certain CI resources; eliminate DOE’s FI/CI consolidated program and reestablish independent FI and CI offices within DOE; and (6) place the FBI in charge of DOE CI.

Alternative One: Eliminate the 2010 Sunset; Retain DOE’s FI/CI Consolidation

This approach would eliminate the sunset provision contained in P.L. 109-364 and *not* reestablish NNSA’s CI office in 2010 while retaining DOE’s FI/CI consolidated program. Proponents could argue that in doing so, the gains resulting from the DOE/NNSA consolidation — improved accountability and enhanced CI capabilities — could be preserved and expanded. With regard to DOE’s consolidated

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

FI/CI program, they could argue that gains made as a result of consolidation could be preserved and expanded by retaining the current structure.

Opponents could argue that retaining the sunset provision and reestablishing NNSA's CI program would bring needed attention and focus to CI in DOE's weapons laboratories. With regard to DOE's consolidated FI/CI program, they could argue that gains made as a result of consolidation could be preserved and expanded by retaining the current structure.

Alternative Two: Maintain the 2010 Sunset But Establish an Independent NNSA CI Office; Retain DOE's FI/CI Consolidation

A second alternative would be to maintain the sunset provision and to reestablish NNSA's CI program in 2010, but as an independent entity unencumbered by the previously existing bifurcated structure; DOE's FI/CI consolidated program would be retained. Under the previously existing structure, NNSA's CI office was restricted to implementing DOE CI policy, and it shared certain analytic and investigative resources with its DOE counterpart.

Proponents could argue that an independent NNSA CI office could be more effective than its predecessor, since, under this alternative, the office would have the responsibility for both developing and implementing CI policy at all NNSA facilities. They could assert that this approach could eliminate the tensions and bureaucratic inefficiencies that resulted from the previous twin office structure. With regard to DOE's consolidated FI/CI program, they could argue that gains made as a result of consolidation could be preserved and expanded by retaining the current structure.

Opponents could argue that re-establishing NNSA's CI office could disrupt the continuity and progress that have resulted under the current consolidated arrangement. They also could assert that establishing an independent CI office at NNSA could require additional funding, since the office would no longer be sharing certain resources with its DOE counterpart. With regard to DOE's consolidated FI/CI program, they could argue that gains made as a result of consolidation could be preserved and expanded by retaining the current structure.

Alternative Three: Eliminate Both the 2010 Sunset and DOE's FI/CI Consolidation

A third alternative would be to eliminate the sunset provision contained in P.L. 109-364 and to *not* reestablish NNSA's CI office in 2010. DOE's FI/CI consolidated program also would be eliminated under this alternative and an independent CI office with budget control reestablished. Proponents could argue that eliminating the sunset provision would eliminate redundancies and additional costs that result from a dual or bifurcated CI program management structure. Eliminating DOE's consolidated FI/CI program, it could be argued, would address the concerns expressed by some that CI interests have been subordinated to FI priorities.

Alternative Four: Maintain the 2010 Sunset Provision But Consolidate All CI Within NNSA; Retain DOE's Consolidated FI/CI Program

A fourth alternative would be to maintain the sunset provision and reestablish NNSA's CI office in 2010, but shift control over all CI program functions, including DOE's, to the new NNSA office; DOE's FI/CI consolidated program would be retained.

Proponents could argue that the reestablishment of an NNSA office under which all CI, including DOE's, would improve program effectiveness because of NNSA's record focusing more attention on CI. With regard to DOE's consolidated FI/CI program, they could argue that gains made as a result of consolidation could be preserved and expanded by retaining the current structure.

Opponents could contend that such an approach could disrupt DOE's continuing efforts to construct a strategic CI program within the Department and jeopardize the gains that have been achieved. They also could argue that NNSA's previously existing CI office was overly tactical in its approach to CI and failed to place sufficient emphasis on strategic issues. With regard to DOE's consolidated FI/CI program, they could argue that gains made as a result of consolidation could be preserved and expanded by retaining the current structure.

Alternative Five: Maintain 2010 Sunset; Eliminate DOE's Consolidated FI/CI Program

This approach would eliminate both organizational consolidations — the NNSA/DOE CI consolidation as well as DOE's FI/CI consolidation. Proponents could argue that such an approach would strengthen CI authorities and capabilities by restoring NNSA's CI office and an independent CI office within DOE.

Opponents could argue that reversing the two consolidations could undermine the benefits derived from having a more CI integrated program interacts more closely with the FI discipline.

Alternative Six: Place FBI in Charge of DOE CI

Under this approach, Congress could eliminate DOE's CI program altogether and place it under the FBI's authority. Although the FBI currently has special agents co-located at certain laboratories, under this alternative, these agents would take on more assertive leadership roles.

An advantage of such an alternative is that the FBI is the government's premiere CI organization, and therefore is arguably uniquely suited by training and experience to undertake this task.

A disadvantage could be that an FBI-controlled CI program could have a chilling effect on the possible cooperation of DOE employees, particularly scientists

and engineers, who historically have chafed at FBI's involvement in DOE's CI program.

Maintain the Legislative Status Quo

Under this approach, the NNSA/DOE CI consolidation would be reversed in 2010 and NNSA's CI office reestablished; DOE's FI/CI consolidated program would be retained.

Proponents of the status quo could contend that the NNSA/DOE consolidation has failed to improve accountability and overall CI program effectiveness. With regard to DOE's consolidated FI/CI program, they could argue that gains made as a result of consolidation could be preserved and expanded by retaining the current structure.

Opponents could argue that NNSA's CI program was effective and should be reestablished. With regard to DOE's combined FI/CI program, they could argue that consolidation has undermined CI authorities and capabilities and had the effect of relegating CI to a "second-class" status within the Department.

Possible Oversight Alternatives

The Congress also could consider adopting one or more of several oversight alternatives. The range of alternatives includes (1) instituting classified CI briefings; (2) commissioning a formal assessment of the benefits derived from DOE's FI/CI consolidation; (3) ensuring DOE compliance with current law; and (4) codifying portions of PDD-61.

Alternative One: Classified Congressional CI Briefings

Congress could require that DOE brief the appropriate congressional committee or committees on the types of CI methods being used, especially on the Department's most significant pending CI cases.

An advantage of such an approach would be that it could provide Congress with significant new insight into DOE's overall CI efforts. Such briefings could also lead to a better understanding of the strategic interests of certain foreign powers and could provide insights into how effectively DOE is interacting and cooperating with the Intelligence Community at large.

A disadvantage of this alternative would be that such briefings could be considerably time-consuming; the number of such cases can be numerous, detailed, and complicated. Such cases also are invariably quite sensitive. DOE might try to restrict such briefings to committee leadership. As a result, committee leadership could find themselves assuming a significant oversight responsibility.

Alternative Two: Commission a Formal Assessment of FI/CI Consolidation

A second approach would be for Congress to commission an assessment of any benefits that have been derived from the DOE FI/CI consolidation. Such an assessment could enable Congress to better evaluate whether the consolidation has indeed improved communication between the two disciplines, as DOE has suggested. As part of such an assessment, the Department's Senior Intelligence Officer could be requested to demonstrate with concrete examples how the Department's FI/CI consolidated program has led to certain program synergies which could not have otherwise been achieved through greater management resourcefulness.

Other than the cost that may be associated with conducting such an assessment, there is no apparent disadvantage to such approach.

Alternative Three: Review DOE Compliance With the Law

Another approach Congress could pursue is to ensure that DOE complied with the law when it consolidated the Office of Intelligence and Counterintelligence under the new Office of Intelligence and Counterintelligence. Some have questioned whether the consolidation is consistent with current law, suggesting that consolidation amounted to a "transfer of function" from the Office of Counterintelligence or the Office of Intelligence to a new layer of bureaucracy within the Office of Intelligence and Counterintelligence.⁶²

Alternative Four: Codify Relevant Parts of PDD-61

Under this approach, Congress could codify certain PDD-61 provisions. Two such provisions could be viewed as being particularly relevant. The first requires that DOE's laboratory contracts contain specific CI goals, objectives, and performance standards. The second provision stipulates that senior laboratory CI personnel be granted direct access to laboratory directors. Codifying these provisions would ensure that they are legally binding and not subject to termination by administration fiat.

A possible disadvantage of such a approach is that it could limit certain executive branch flexibility.

⁶² For a more detailed treatment of this issue, see S.Rept. 109-259, which accompanied S. 3237, the FY2007 Intelligence Authorization Act, pp. 44-45. The Senate Select Committee asserted that DOE's "consolidation effort is arguably inconsistent with current law." The Committee said that such an inconsistency would exist if the consolidation amounted to a "transfer of function" from the Office of Counterintelligence or the Office of Intelligence to a new layer of bureaucracy within the Office of Intelligence and Counterintelligence.

Appendix

The Historical Role of the FBI⁶³ in the Development of the DOE CI Program. The 1998 PDD-61 formalized what until then had been a more informal FBI role in supporting DOE's CI Program. The directive established an independent Office of Counterintelligence and directed that the FBI director select and place in charge of the office a senior FBI representative.

A more recent example of the FBI's formal role is the joint FBI-DOE "Agents-in-the Labs" (AIL) Program. The AIL Program is designed to support the FBI Counterintelligence Division's strategic priorities, which include:

1. Preventing or neutralizing the foreign acquisition of weapons of mass destruction (WMD) technology or equipment;
2. Preventing the penetration of the Intelligence Community, U.S. Government, or contractors;
3. Preventing the compromise of U.S. critical national assets; and
4. Conducting aggressive CI operations against most significant threat nations.⁶⁴

Under this program, the FBI has 16 Special Agents at 12 DOE locations working with DOE CI professionals to execute the CI mission.⁶⁵

Despite its expanded role, the FBI has more recently lost some of its authority over the program. Congress eliminated the FBI director's authority to select a director for DOE's CI program, and the individual serving in that role is no longer required to be a senior FBI executive. Under current law, the Secretary of Energy now exercises the selection authority. (See Table 1 below).

Whether the congressional action eliminating the FBI's role in the selection process will result in the diminishment of the FBI's role in DOE's CI program continues to be debated. Whether FBI assumes a diminished role turns in part on whether DOE develops the capability to recruit, train, and retain its own CI

⁶³ The FBI has played and continues to play an important role in the CI Program because it is lead agency for counterintelligence within the United States, where all DOE labs are located. It should be noted, however, that even within the discipline of counterintelligence there are differing approaches. Arguably, the FBI's approach relies heavily, although not exclusively, on CI investigations and operations to prevent espionage. While foreign intelligence agencies recognize the importance of investigations, generally, their CI focus is on understanding how the adversary operates to collect intelligence and proactively engaging in tactics to prevent the adversary's techniques from being successful. Military CI organizations, generally, tend to view CI through the prism of force protection and use a variety of CI tools to reach that end. CRS is unaware of any empirical studies which have assessed how these approaches have performed relative to one another.

⁶⁴ Interview with FBI officials, November 6, 2007.

⁶⁵ Ibid.

professionals and thus reduce its historical reliance on the FBI. If it is unable to do so, FBI's potentially diminishing role could be viewed in a less positive light.

Table 1: Statutory Role of the FBI in the DOE CI Program

Authority	Role of the FBI	Personnel Authority
PDD-61 (Feb. 1998)	A new Office of CI (OCI) was created. The Director of the new OCI <i>will be</i> [emphasis added] a senior executive from the FBI. The Director of the FBI, along with other officials, including the Director of Central Intelligence, as involved principles, will provide support to the Secretary of Energy in the implementation (of PDD-61) and continuation of an effective CI Program.	Attorney General nominated, at the recommendation of the Director, an FBI SES-level Special Agent to assume OCI leadership. Three OCI leaders from the FBI served under this authority.
Section 3232, National Defense Authorization Act of 2000 (P.L. 106-65). Codified at 50 U.S.C, Section 2422.	Provided statutory basis for separate Office of Intelligence and OCI, both reporting directly to Secretary. Stated that the Director of the FBI <i>may detail</i> [emphasis added], any employee of the FBI to the Department for service as Director, OCI. Bifurcated CI Program by establishing a separate Office of Defense Nuclear CI (ODNCI) within the NNSA. Secretary to appoint Dir., ODNCI, <i>in consultation with</i> Dir. of the FBI.	Diluted the requirement that the Director, OCI be an official of the FBI. FBI has consultative role in appointment of leader of new NNSA - ODNCI.

Authority	Role of the FBI	Personnel Authority
<p>Section 3117, National Defense Authorization Act of 2007 (P.L. 109-364). Codified at 42 U.S.C., Section 7144(b) note.</p>	<p>Consolidated CI across NNSA and DOE (reversing NDAA of FY2000). Dissolved ODNCI within NNSA, and transferred personnel and functions to DOE CI. Established Intel Executive Committee. CI budgets to be tracked separately, according to that which is requested for CI for NNSA facilities and other DOE facilities.</p>	<p>Amended NNSA Act to reflect that the Secretary of Energy may choose the Director OCI and Director OI from SES, SIS, SNIS, or “any other Service that the Secretary, in coordination with the Director of National Intelligence, considers appropriate.”</p> <p>Outside of being part of the Intelligence Community and, therefore, possibly having indirect influence with the DNI, the FBI no longer has any formal statutory role in the recommendation of candidates for the Director, OCI position.</p>