

Report for Congress

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Domestic Intelligence in the United Kingdom: Applicability of the MI-5 Model to the United States

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Todd Masse
Specialist in Domestic Intelligence and Counterterrorism
Domestic Social Policy Division

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Domestic Intelligence in the United Kingdom: Applicability of the MI-5 Model to the United States

Summary

Intelligence failures frequently lead to calls for reforms in the United States Intelligence Community to remedy what are real or perceived functional, procedural, regulatory, systemic, and/or structural problems. While it can be debated whether the events of September 11, 2001 represent a tactical or strategic failure, it has been widely cited as a *prima facie* intelligence failure. One potential remedy that has been suggested in response to the events of September 11, 2001 is the establishment of a domestic intelligence agency akin to the British Security Service, also known as MI5. Some analysts maintain that because the British have had more experience with terrorism on their own soil and have a democratic form of government, there may be value in emulating the MI-5 organization and jurisdiction in the United States. During a recent visit to the United States, the British Home Secretary David Blunkett met with U.S. Homeland Security Secretary Tom Ridge and agreed to establish a Joint Anti-Terrorism Working Group, in part, to leverage the United Kingdom's anti-terrorism experience.

While there may be lessons to be learned from the British experience with domestic intelligence, there are also important differences between U.S. and British governmental, legal, cultural and political norms. At the political level, one fundamental difference between the British and United States' system of democratic governance is that while Britain does not have a written constitution which specifies the rights of individuals, the United States does. Moreover, the British system focuses national political power in a unitary Parliament, while in the United States power is shared through federalism. Such differences may have important consequences for how individual rights and freedom are weighed against a nation states' obligation to provide security for its population.

At the organizational level, the United Kingdom (U.K.) has chosen to separate its domestic intelligence entity (MI-5) from its various law enforcement agencies. The United States, however, has chosen to combine both federal law enforcement and domestic intelligence within the Federal Bureau of Investigation (FBI) – an agency of the Department of Justice. Each organizational approach is the result of a complex interaction among societal cultures, unique experiences with terrorism, law enforcement and intelligence organizational cultures, legal precedents, and other factors. A core question involves the possible integration of domestic intelligence and law enforcement functions. Integration may improve coordination of these two functions, but may also undermine the focus and development of skill specialization necessary to succeed in each area.

This paper summarizes pending legislation relating to domestic intelligence, briefly explains the jurisdiction and functions of MI-5, and describes some of the factors that may be relevant to a discussion regarding the applicability of the MI-5 domestic intelligence model to the United States.

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Domestic Intelligence in the United Kingdom: Applicability of the MI-5 Model¹ to the United States

Background

The events of September 11, 2001 have led to calls for U.S. Intelligence Community (USIC) Reform. A Joint Inquiry of the Senate Select Committee on Intelligence (SSCI) and the House Permanent Select Committee on Intelligence (HPSCI) closely examined the intelligence issues associated with the devastating attacks of September 11.² The Joint Inquiry Committee held 13 closed hearings and nine public hearings and reviewed thousands of highly classified documents relating to the incidents.³ In December 2002, the Joint Inquiry issued a 900 page classified report to the SSCI and HPSCI that is currently being reviewed and redacted to determine which portions are appropriate for public release.⁴ On December 11, 2002, the Joint Inquiry publicly released an interim unclassified report which included numerous findings covering factual, systemic and related matters, as well as recommendations to remedy some of the issues uncovered as a result of the Inquiry's activities.

One of the Joint Inquiry's recommendations concerns the extent to which the United States may have lessons to learn from how other democracies organize the conduct of domestic intelligence.⁵ The Joint Inquiry recommended:

¹ One element of whether there are lessons to be learned from how other democracies organize for domestic intelligence involves the extent to which these organizations have been effective and efficient in implementing their national security missions. While this element may be important in determining if a foreign model is worth of emulation, it is not addressed in this report as success or failure overseas does not necessarily mean that a similar organizational construct and mission would be acceptable to the United States or have similar performance results.

² See CRS Report RL31650, *The Intelligence Community and 9/11: Congressional Hearings and the Status of the Investigation*, by Richard Best.

³ See [<http://www.fas.org>] for a compendium of the Joint Inquiry hearings.

⁴ It is anticipated that this product (H.Rept. 107-792) may be released in the late summer of 2003. Furthermore, the Intelligence Authorization Act for Fiscal Year 2003 (P.L. 107-306) established a *National Commission on the Terrorist Attacks Upon the United States*, which will build upon the investigation of the Joint Inquiry and report its findings and remedial recommendations to the Congress and the president in 2004. For information on the new Commission, headed by Thomas H. Kean, see [<http://www.9-11.commission.gov>].

⁵ While the term domestic intelligence is used extensively in public policy discussions, it
(continued...)

The Congress and the Administration should carefully consider how best to structure and manage U.S. domestic intelligence responsibilities. Congress should review the scope of domestic intelligence authorities to determine their adequacy in pursuing counterterrorism at home and ensuring the protection of privacy and other rights guaranteed under the Constitution.

Moreover, the Joint Inquiry recommended that a new Director of National Intelligence be created. It recommended further that:

Congress should require that the new Director of National Intelligence,⁶ the Attorney General, and the Secretary of the Department of Homeland Security report to the President and the Congress on a date certain concerning ...

- *the experience of other democratic nations in organizing the conduct of domestic intelligence* (emphasis added)...
- the specific manner in which a new domestic intelligence service could be established in the United States, recognizing the need to enhance national security while fully protecting civil liberties ... and
- their recommendations on how best to fulfill the nation's need for an effective domestic intelligence capability, including necessary legislation.⁷

Pending Legislation

Although there are numerous bills pending relative to homeland security and domestic surveillance, one bill has been introduced with respect to the narrow issue of how the United States is organized to conduct domestic intelligence.⁸ S. 410, a bill to establish the Homeland Intelligence Agency (HIA); short title "Foreign Intelligence Collection Improvement Act of 2003" was introduced by Senator

⁵ (...continued)

is not currently defined in law or policy. A general interpretation of the term is the application of the full range of intelligence cycle elements (priority/requirement setting, collection, analysis and exploitation) to terrorist, foreign intelligence, and other clandestine activities taking place within the United States. Foreign intelligence is defined as information relating to the capabilities, intentions and activities of foreign powers, organizations or persons, but not including counterintelligence, except for information on international terrorist activities. See Executive Order 12333, "United States Intelligence Activities."

⁶ Or the Director of Central Intelligence should a Director of National Intelligence not be established.

⁷ See "Final Report – The Joint Inquiry: Recommendations," Dec. 10, 2002, p. 7.

⁸ Others in Congress have advocated a new focus on domestic intelligence, but have yet to introduce formal legislation. Some have stated a preference for an independent intelligence capability that focuses explicitly on domestic intelligence. See "Kerry to Offer Security Proposals," *Washington Post*, Mar. 18, 2003, p. A5.

Edwards and referred to the SSCI on February 13, 2003.⁹ The bill is summarized in **Table 1**. The proposed HIA appears to be loosely modeled on the British Security Service, commonly known as MI-5. An important commonality between the proposed HIA and the British Security Service is that neither have law enforcement powers, an approach to domestic intelligence which is a significant departure from the current co-location of federal law enforcement and domestic intelligence within the FBI.

Table 1. Summary of the Foreign Intelligence Collection Improvement Act of 2003 (S. 410)

Issue	Bill provisions
Organization	Establishes as a new member of the USIC a Homeland Intelligence Agency (HIA) within the Department of Homeland Security. The primary mission of the HIA would be the collection and dissemination of foreign intelligence and counterintelligence ^a inside the United States, including the plans, intentions and capabilities of international terrorist groups operating in the United States.
Powers	Limits the powers of the HIA to domestic intelligence collection, analysis, exploitation and dissemination. The organization would not have any police, subpoena, or law enforcement powers, except as explicitly authorized in the HIA Office of Inspector General and the HIA Office of Privacy and Civil Liberties Protection. These functions generally pertain to the conduct of internal HIA audits and the means of ensuring all necessary and related HIA information is made available in these pursuits.
Staff	Staffs the HIA with new personnel, and law enforcement or other personnel from other agencies, including the Federal Bureau of Investigation (FBI). All new personnel would be trained as Intelligence Officers, and the training would be modeled on the Central Intelligence Agency's (CIA) training of Intelligence Officers within its Directorate of Operations.
Functional transfers	Transfers the related HIA mission functions now found in the FBI, CIA, National Security Agency (NSA), and the Office of the National Counterintelligence Executive to the HIA. The bill would also prohibit the FBI from carrying out foreign intelligence, counterintelligence, and internal security functions, except as in support of its law enforcement mission. The bill would also abolish the existing FBI position of Executive Assistant Director Counterterrorism and Counterintelligence.

⁹ In a speech before the Center for Strategic and International Studies (CSIS), Senator Edwards expressed a preference to establish a "... new agency focused on gathering intelligence threats here at home. Great Britain, Canada, and many other Western democracies already have these agencies" See "Iraq, Terrorism and U.S. Global Leadership," CSIS, Oct. 7, 2002.

Issue	Bill provisions
State and local connectivity	Establishes within HIA an Office of Federal, State, and Local Law Enforcement Coordination to provide information to federal, state and local law enforcement officials. Consistent with all appropriate regulations, statutes and guidelines, including protection of intelligence sources and methods, classified information would be shared with state and local officials who would receive security clearances and training on classified information protection. The Secretary of Homeland Security and Director of Central Intelligence would determine which state and local personnel may be designated as eligible for security clearance applications.

^a Counterintelligence is defined as information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassination conducted for or on behalf of foreign powers, organization or persons or international terrorist activities, but not including personnel, physical, document or communication security programs.

The British Security Service (MI-5)

Brief History and Statutory Basis. The British Security Service is one of three intelligence services or “Agencies” – the Secret Intelligence Service (SIS), commonly known as MI6, the Governmental Communications Headquarters (GCHQ), and the Security Service (MI-5).¹⁰ While there are significant differences between the British and USIC structures, operations, jurisdictions, and functions, MI6 is most like the CIA, GCHQ resembles the NSA, and the Security Service most closely resembles the FBI.

The Service is headed by a Director General, and reports to the Home Secretary, an important member of the British Cabinet. Oversight of the Service is governed by three primary statutes, the Security Service Act of 1989, as amended in 1996, Intelligence Services Act of 1994 (ISA), and the Regulation of Investigatory Powers Act of 2000 (RIPA). The ISA established the Parliamentary Committee on Intelligence and Security which examines expenditures, administration and policy of all three “Agencies,” and must report to the Prime Minister on these activities annually.¹¹ The RIPA established Commissioners and Tribunals to review requests for warrants to intercept mail and telecommunications, as well as to investigate public complaints against all Agencies regarding interceptions.

The Security Service’s predecessor organization, the Secret Service Bureau, was established in 1909. In the periods leading up to World War I and during the Cold War, one of the organization’s most important missions was counter subversion, of

¹⁰ See *National Intelligence Machinery*, The Stationery Office, London, United Kingdom, Sept. 2001. The terms “Service” and MI-5 are used interchangeably throughout this report.

¹¹ The Committee is composed of members of Parliament (MPs) from both the House of Commons and House of Lords, and is appointed by the Prime Minister in consultation with the Leader of the Opposition. See *MI-5: The Security Service*, 4th edition, 2003, p. 28.

Germany first, and then of the former Soviet Union.¹² The Service operated under a governmental directive, until its functions were put on a statutory basis in the Security Services Act of 1989, subsequently amended in 1996.¹³ Over the years, the Service's jurisdiction shifted to reflect major national security issues affecting the U.K.¹⁴ In the aggregate, a large portion of its mission has been dedicated to countering covertly organized threats.¹⁵ According to the Security Service Act of 1989, its function is the "protection of national security and, in particular, its protection against threat from espionage, terrorism, and sabotage, from the activities of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means."¹⁶

The Security Service Act of 1996 was enacted during a time in which it was generally perceived that the Service had "excess capacity" as a result of the end of the Cold War and the temporary Irish Republican Army (IRA) cease fire.¹⁷ As it was thought that "serious"¹⁸ crime was an emerging threat to British national security, the new law extended the Services's statutory authority to include *supporting* law enforcement agencies in combating serious crime. Given British concerns about not establishing a "secret police" organization, an important part of the Act stipulates that the Service was not to act as an independent law enforcement agency. As such, the Service cannot initiate law enforcement activities or cases, nor arrest or detain law enforcement suspects.¹⁹ In the event an MI-5 case leads to a criminal prosecution,

¹² See *National Intelligence Machinery*.

¹³ See [<http://www.mi5.gov.uk>] for a brief history of MI5. The fact that the Security Service has a website is significant; for many years the government refused to acknowledge its existence.

¹⁴ Over time, resources have increasingly been rededicated from counter subversion to counterterrorism. The Security Service allocates approximately 60% of its resources to counterterrorism (32% Irish Counterterrorism and 28% International Counterterrorism). See [http://www.mi5.gov.uk/major_areas_work/]. See also *Intelligence and Security Committee Annual Report 2001-2002*, June 2002. And Michael Smith, *New Cloak, Old Dagger: How Britain's Spies Came in From the Cold*, Victor Gollancz, 1996 (hereafter cited as Smith, *New Cloak, Old Dagger*); also Her Majesty's Stationery Office, *MI5 The Security Service*, 4th edition, 2003.

¹⁵ See Mark Lowenthal, *Intelligence: From Secrets to Policy*, Congressional Quarterly press, 2nd edition, 2003.

¹⁶ See "Security Service Act of 1989," at [www.legislation.hms.gov.uk].

¹⁷ See Clare Feikert, *Legislative Framework of the British Security Service*, Library of Congress Law Library, Western Law Division. (Hereafter cited as Feikert, *Legislative Framework*.)

¹⁸ In order to be considered "serious," crime has to meet one of two tests: (1) it is an offense for which someone of at least 21 years of age with no prior convictions could reasonably be expected to be sentenced to imprisonment for a term of 3 years or more, or (2) the conduct involves the use of violence, results in substantial financial gain, or is conducted by a large number of persons in pursuit of common purpose. See *Regulation of Investigatory Powers Act 2000*.

¹⁹ See Feikert, *Legislative Framework* and [<http://www.mi5.gov.uk>].

prosecuting counsel generally has access to MI-5 records to determine those which may be appropriately disclosed to defense counsel.

MI-5's Counterterrorism Relationships with Law Enforcement.

Beginning in 1992, the Service was granted lead responsibility for *intelligence* work against the IRA and Loyalist terrorism in Great Britain and the rest of the world, while it works to support the Police Service of Northern Ireland (PSNI) on these matters.²⁰ The Service closely supports the law enforcement counterterrorism efforts of the U.K.'s 56 police forces, as well as other law enforcement entities including the National Criminal Intelligence Service, National Crime Squad and Her Majesty's Customs and Excise. The Service's closest counterterrorism relationships are with the "Special Branches" of the 56 police forces explicitly responsible for countering terrorism. The division of labor between the Service and the police forces generally is that the Service gathers clandestine and open source intelligence information about covert terrorist activities, assesses the threat resulting from such activities, may take intelligence actions to prevent and deter terrorist events, and shares information, as appropriate, with other U.K. agencies. The police forces generally are responsible for pursuing counterterrorism investigations by collecting evidence for introduction into a legal proceeding in which the desired end is criminal prosecution.²¹ MI-5 officers work closely with law enforcement authorities to ensure that intelligence information gathered in a national security case may be used as evidence in court.²²

U.K.- U.S.A. Points of Distinction

Differing Democratic Structure and Tradition. While there are clear similarities in function, oversight and jurisdiction between the British Security Service and U.S. approach to domestic intelligence, there are also some distinctions which should be considered in any discussion of the applicability of the British model to U.S. society. First, there is a clear difference in the British form of democratic governance, a unitary parliamentary democracy, versus the United States' presidential/congressional system with a strong tradition of federalism. The essence of the difference lies in the powers of the executive, which in the British system reside in the Cabinet and in the U.S. reside in the presidency. The British Prime Minister is the leader of a majority party in the House of Commons and forms the Cabinet. As a result of the primacy of the Cabinet and Parliament, the British executive has fewer constraints in policy development and implementation than has the U.S. president.²³ Perhaps an even more fundamental difference between

²⁰ See *MI-5: The Security Service*, 4th edition, 2003.

²¹ Over the years there has been some friction between British law enforcement and intelligence with respect to this division of labor. As one former Director General of MI-5 attempted to expand the Service's role in combating "serious" crime, some observed she was attempting to turn MI-5 into a British version of the FBI. See Smith, *New Cloak, Old Dagger*.

²² See *MI-5: The Security Service*, 4th edition, 2003.

²³ The authority of the Cabinet and support from the majority in the House of Commons allows the Prime Minister a degree of confidence that legislation and new policy initiatives
(continued...)

democratic forms of governance in the United States and United Kingdom, is the fact that the former has a formal, written constitution securing certain rights for individuals while the latter does not. Numerous Acts of Parliament, standards and traditions that have evolved over hundreds of years form the basis of British governance. The end result is that the Supreme Court in the United States has final say over the constitutionality of U.S. laws, including those involving governmental intrusion into the lives of U.S. citizens in the name of security and domestic intelligence, while in the United Kingdom, the Parliament is the final authority.²⁴

Unique Counterterrorism Experience and Cultural Factors.

Ultimately, how each country structures domestic intelligence is a function of its unique experience with terrorism and the culture's acceptance of government intrusion into their daily lives in the interest of securing freedom. Each state strikes a different balance between the twin public "goods" of freedom/civil liberty and security, and the balance between these goods invariably shifts with time and real or perceived threats to national security. Due to their unique experiences with IRA terrorism in the 1960s and 1970s, the British intelligence "Agencies" have dedicated a substantial portion of their intelligence efforts to counter both IRA and international terrorist groups, including those which benefit from state sponsorship. Moreover, the manner in which the U.K. has organized to combat terrorism and foreign intelligence activity (e.g., espionage) has differed from that of the United States, as it reached a different balance among the competing civil liberties and security goals. A tradition of maintaining separate law enforcement, domestic intelligence, and foreign intelligence services was established early on in the United Kingdom. This tradition evolved as a result of a predilection to guard against the establishment of a "police state," and through competitive relationships between domestic and internationally oriented intelligence and law enforcement agencies in the early 20th century.²⁵ Despite a similar U.S. predisposition to guard against the establishment of a secret police,²⁶ and the U.S.'s historical experiences with intelligence entities

²³ (...continued)

put forth by the Ministries will be well received in the parliament. See Gabriel A. Almond, and G. Bingham Powell, Jr, *Comparative Politics Today: A World View*, 1996.

²⁴ Moreover, from an individual versus states rights perspective, the United States has a Bill of Rights and Britain does not, but it is a signatory to the European Convention on Human Rights and Fundamental Freedoms. The Human Rights Act of 1998 incorporated the obligations of the European Convention on Human Rights to the United Kingdom. See Clare Feikert, *United Kingdom: Preventative Detention*" Law Library of Congress. This may have implications for how the interests of the state in providing domestic security may be weighed against the interest of the individual in civil liberty protection.

²⁵ See the *National Intelligence Machinery*. For a description of the evolution of relationships between MI-5, MI-6 and law enforcement entities within the United Kingdom, see Smith, *New Cloak, Old Dagger*.

²⁶ In the immediate wake of World War II and in the early years of the Cold War, the United States passed the National Security Act of 1947 and the Central Intelligence Agency Act of 1949. Mindful of the totalitarian practices of its adversaries, the United States was particularly careful in this legislation not to establish a U.S. equivalent of the German 'Gestapo' or Soviet KGB. These groups had substantial intelligence and law enforcement

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engaging in domestic activities later deemed inappropriate and illegal,²⁷ the United States chose to integrate law enforcement and domestic intelligence.²⁸ In another deviation from the British model, the primary counterintelligence and counterterrorism agency within the United States – the FBI is located within the Justice Department, which also has as a fundamental mission the protection of civil liberties.

Relationship Between Domestic Intelligence and Related Functions. Relationships between domestic intelligence and law enforcement on the one hand and between domestic and foreign intelligence on the other are another point of distinction between the U.K. and U.S. approaches to domestic intelligence.²⁹ As mentioned above, in the U.K. law enforcement and domestic intelligence are separate. Such a separation can lead to challenges in coordinating national security cases of the highest consequence. While these challenges may be manageable in Britain, a country with roughly 56 police forces, if domestic intelligence were to be separated from law enforcement in the United States, such coordination may be more problematic, particularly if the 13,000+ state and local law enforcement agencies³⁰ become more directly and formally engaged in contributing to the implementation of national counterterrorism initiatives.³¹

²⁶ (...continued)

powers and exercised totalitarian control. The U.S. did not “... wish to become what is was fighting.” See Stuart A. Baker, “Should Spies Be Cops?” in *Foreign Policy*, winter 1994/95. (Hereafter cited as Baker, *Should Spies Be Cops?*)

²⁷ See *Intelligence Activities and the Rights of Americans*, Final Report of the U.S. Congress, Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities (The “Church Committee”), Apr. 26, 1976.

²⁸ See Baker, *Should Spies be Cops?*, see also CRS Report RL30252, *Intelligence and Law Enforcement: Countering Transnational Threats to the U.S.*, by Richard Best.

²⁹ One study of how five countries (Canada, France, Germany, Israel, and the United Kingdom) organize to combat terrorism noted that “... All of the countries’ domestic intelligence organizations are separate from their law enforcement organizations.” See *Combating Terrorism: How Five Countries Are Organized to Combat Terrorism* (GAO/NSIAD 00-85). U.S. General Accounting Office, Apr. 2000., p. 8. This does not, however, mean this type of a system is warranted or would be accepted in the United States. The Department of Homeland Security (DHS) should not be considered a domestic intelligence agency because the collection of domestic intelligence is not central to its mission. Some elements of DHS, such as the Coast Guard and Customs Service do, however, collect intelligence in a collateral sense.

³⁰ See U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States 2000*, Oct. 2001, p. 291.

³¹ Currently, many local and state police officials participate in FBI-sponsored Joint Terrorism Task Forces. Some state and local law enforcement officials remained concerned about the lack of specific and timely sharing of terrorist threat information collected through national intelligence means. One endemic issue is, however, that intelligence regarding terrorist attacks is rarely specific about dates, times and terrorist targets. See John Sullivan, “Lessons in Counterterrorism,” *New York Times*, Apr. 27, 2003.

A related point of distinction between the U.K. and U.S. approaches to domestic intelligence is the relationship between domestic and foreign intelligence. This point is particularly salient in the wake of the events of September 11, 2001, which starkly illustrated the need for closer integration of foreign and domestic intelligence with respect to terrorist threats to the United States. As alluded to above, the USIC also has a unique history and development that led to the creation of an environment in which intelligence activities, both overseas and domestic are guided by a distinct and relatively complex sets of rules, regulations, guidelines as well as by congressional oversight. While the events of September 11, 2001 resulted in calls for intelligence reform, analysts continue to differ over the type, extent, and magnitude of changes necessary beyond what has already taken place.³²

In general, partly as a result of the global position of the United Kingdom vis-a-vis the United States, and partly as a result of unique cultural affinities and historical experiences with terrorism, the distinction between foreign and domestic intelligence is less pronounced in the United Kingdom than it is in the United States. Prior to September 11, 2001, with the exception of the first World Trade Center bombing in February 1993, and the bombing of the Alfred P. Murrah Federal Building in April 1995, the United States did not have to endure on its soil terrorist activities in which hundreds of Americans were injured or killed. Britain, on the other hand, battled with terrorism on its soil throughout much of the latter half of the 20th century. When national security is frequently threatened at home by politically motivated violence, the public policy pendulum tends to swing in the direction of closer integration of intelligence and possibly increased domestic surveillance, security and law enforcement activities.

Cultural Attitudes Toward Intelligence and Secrecy. Perhaps most importantly, a central theme of distinction between the U.K. and U.S. in the conduct of domestic intelligence is the strategic cultural difference with respect to the public's attitude towards foreign affairs in general and intelligence in particular. Possibly as a result of its historic geographic isolation from the rest of the world, many U.S. citizens may view intelligence as a subset of foreign policy – as something that happens “over there,” not necessarily an activity which must be engaged in domestically.³³

Another cultural element of the differentiation between U.S. and U.K. organization to conduct domestic intelligence in general is the different perspectives each society has toward secrecy. Notwithstanding relatively recent initiatives to acknowledge the existence of certain “Agencies,” including the posting of

³² At the broadest level, the events of Sept. 11, 2001 served as a catalyst for the following changes: creation of the Department of Homeland Security with attendant congressional oversight committees, enhancement of law enforcement and intelligence counterterrorism tools through the passage of the USA PATRIOT Act, creation of the Terrorist Threat Integration Center, and an ongoing reorganization of the FBI.

³³ Some would argue that the term and activities associated with domestic intelligence may be anathema to the American tradition of holding individual freedom dear. See “Time for a Rethink,” in *The Economist*, Apr. 20, 2002. See also “USA Studies UK Security Service,” in *Jane's Intelligence Review*, Feb.1, 2003.

information about these organizations on the Internet, the Official Secrets Act remains in effect in the United Kingdom. The Act makes it unlawful for British government employees and contractors to the British government to disclose information they have access to as a result of their employment, if such disclosure is deemed harmful to the national interest.³⁴ This law has broader jurisdiction than any U.S. law regarding the protection of classified information and consequences of sharing such information with unauthorized third parties.³⁵ Moreover, the European Convention on Human Rights allows the British Government the power to exercise prior restraint with respect to publication of any material which may be injurious to national security.³⁶ In general, the doctrine of prior restraint in the United States for purposes of national security has been found unconstitutional, as it has been judged inconsistent with the First Amendment.³⁷ In short, U.S. citizens may have a different level of tolerance for government intrusion in the name of national security than their U.K. counterparts. Although the balance between security and freedom likely shifted in the wake of September 11, 2001, the extent and duration of this newfound societal tolerance for enhanced security and surveillance remains to be seen, and will likely be driven by the presence or absence of future terrorist attacks on U.S. soil.

Global Role. In addition to national legal and cultural differences, there are distinctions in the global roles and powers each nation plays and exercises to consider. Nation states have unique global positions, histories, legal structures and norms, as well as distinct cultures that affect how they organize to conduct domestic intelligence. While the United States remains the world's sole superpower with unprecedented economic and military power, the United Kingdom is primarily a regional power which exerts regional influence. Although both powers have global interests, with its broader range of economic, security and political interests, the

³⁴ See Official Secrets Act 1989 (c.6) at [www.hms.gov.uk/acts/acts1989/]. In one prominent case, David Shayler, a former MI-5 Officer was convicted of violating the Official Secrets Act for public revelations regarding MI-5 activities. He was sentenced to 6 months imprisonment. See "Shayler Jailed for Six Months," *Guardian Limited*, Nov. 6, 2002.

³⁵ Title 18 US Code, Part I, Chapter 37, Section 793 makes the unauthorized sharing of classified national defense information with foreign powers "... with the intent or reason to believe that the information is to be used to the injury of the United States or to the advantage of any foreign nation ..." a criminal offense. Subsection (f)(1) outlines criminal penalties for "gross negligence" in the handling of national defense information by authorized parties.

³⁶ See Article 10, *Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11*. The European Court has, however, recognized the special responsibility of the Press as the "watchdog of society," See *Sunday Times v UK*.

³⁷ The landmark case in this matter is *New York Times Company v. United States* (1971). In this case, the New York Times and Washington Post published classified documents (collectively known as the "Pentagon Papers") relating to the Vietnam War beginning in June 1971. The government received a restraining order from a district court judge to prevent the media companies from publishing the documents. While recognizing that the doctrine of prior restraint may be constitutional in certain limited national security circumstances, in a 6-3 vote the Supreme Court found the injunction was an unconstitutional prior restraint on publication that violated the Constitution's First Amendment. See "The Doctrine of Prior Restraint," at [<http://caselaw.lp.findlaw.com/adta/constitution/>].

United States employs financial resources for intelligence that are roughly three times that of the United Kingdom per citizen.³⁸

Issues for Congress

The question of whether the United States adopts a domestic intelligence agency modeled on the United Kingdom's Security Service may be, in large part, a function of the presence or absence of future terrorist attacks on U.S. soil. If relative domestic tranquility characterizes the near future, it may be unlikely that there will be any significant changes to the U.S.'s current organization for domestic intelligence. That is, the FBI may continue to have lead responsibility for domestic intelligence within the United States, and may likely continue to have an activist international law enforcement role as well. However, should terrorism, catastrophic (commonly defined as involving weapons of mass destruction) or otherwise, become more prevalent on U.S. soil, the U.S. Congress may be confronted with the following fundamental issues:

The Relationship Between Law Enforcement and Domestic Intelligence. As can be seen from a brief comparison of the British and current U.S. organization for conducting domestic intelligence, there are different schools of thought on the appropriate relationship between domestic intelligence and law enforcement. In general, this question is usually resolved as a function of a country's unique experiences with terrorism and predilection to ensuring checks and balances on state power. Are there synergies between domestic intelligence and law enforcement that indicate that the two functions should be joined in one organization? Or, are the two functions so dissimilar that in order for each to reach maximum effectiveness and efficiency, they must be separate? As counterterrorism is an endeavor that has both law enforcement and intelligence equities, what organizational scheme relating these two functions is optimal? Have the traditionally different sets of law enforcement and intelligence consumers converged in such a manner as to render the argument for separation superfluous? If, as with the British Security Service, a decision is made to separate the two functions, what concrete actions can be taken or formal organizational processes can be developed to ensure close and cohesive case coordination when necessary and appropriate?

Joining federal law enforcement and domestic intelligence has two primary benefits: (1) at the most general level, it contributes to the cooperation and coordination between the two critical functions necessary in national security cases,³⁹

³⁸ See *CIA World Fact Book* for economic and demographic statistics, the *MI-5: The Security Service*, 4th edition, 2003 for the British Intelligence Budget, and for the USIC's budget "Statement of the Director of Central Intelligence Regarding the Disclosure of Aggregate Intelligence Budget for Fiscal Year 1998" at [www.fas.org/sgp/foia/intel98.html].

³⁹ The legal basis for this cooperation has recently been strengthened by the Foreign Intelligence Surveillance Court of Review's decision that there is no legal basis with the Foreign Intelligence Surveillance Act for a "wall" to exist between law enforcement and (foreign) intelligence/counterintelligence interests. See CRS Report RL30465, *The Foreign Intelligence Surveillance Act: An Overview of the Statutory Framework and Recent Judicial* (continued...)

and (2) it can be argued that the coupling of these two functions within a single organization creates a check and balance system whereby a common culture that respects the rule of law underlies each area. The greatest *potential* danger in combining law enforcement and intelligence is that if appropriate and aggressive oversight is not conducted, it is possible that such a service could become engaged in domestic political activities where the balance between dissent and subversion is nebulous.⁴⁰ Treating dissent as subversion undermines democracy.

The separation of law enforcement and domestic intelligence also has benefits and drawbacks. One primary benefit of separation is focus. Some observers argue because the cultures of law enforcement and intelligence are quite different (although each may have similar end goals) separate organizations with unique hiring requirements and development of particular professional skill sets would likely enhance organizational performance.⁴¹ One major drawback of separation is the coordination friction which may develop between the two functions as cases, particularly those involving counterterrorism, invariably move from intelligence to law enforcement or vice versa. What are the legal and regulatory thresholds for transition of a case from one function to another? If a decision was made in the United States to separate federal law enforcement from domestic intelligence, significant resources may be needed to, in essence, re-create the FBI's existing national and international structure, and to staff the new agency with professionals well versed and trained in exploiting all elements of the intelligence cycle to prevent terrorist attacks.

The Relationship Between Foreign and Domestic Intelligence.

Given the unique evolution of intelligence in the United States, there has always been a fairly clear distinction between domestic intelligence and foreign intelligence. Cooperation and coordination, particularly on the issue of counterterrorism, have improved markedly over time, yet the events of September 11, 2001 indicate that a more activist integration may be considered. The formation of the Terrorist Threat Integration Center (TTIC), and the Department of Homeland Security's Information Analysis and Infrastructure Protection Directorate are geared toward integrating the domestic and foreign intelligence on terrorism to conduct comprehensive threat and vulnerability assessments and disseminate information to policymakers and first responders, as appropriate.⁴² How this relationship will evolve and the extent to which it will be effective in preventing future terrorism either within the United States or directed against U.S. interest overseas remains to be seen. For many

³⁹ (...continued)

Decisions, by Elizabeth B. Bazan.

⁴⁰ The history of both the British Security Service and the U.S. FBI indicates that both organizations have at one time engaged in activities in which dissent may have been mischaracterized as subversion.

⁴¹ See Duncan Deville, "How to Split Up the Bipolar FBI," *New York Times*, June 18, 2002. Also William E. Odom, *Fixing Intelligence For a More Secure America*, Yale University Press, 2003.

⁴² See CRS Report RS21283, *Homeland Security: Intelligence Support*, by Richard A. Best Jr.

cultural, historical and overlapping jurisdictional issues, it appears that coordination between the British SIS and Security Service is arguably closer than that which occurs between the FBI and the CIA.⁴³

The Appropriate Balance Between Security and Civil Liberty/Freedom. This may well be one of the most challenging issues facing the country and the Congress today. It is clear that each society will reach its own balance between security and freedom which will be dynamic and shift over time. A fundamental question in this area is the extent to which the U.S. populace is willing to tolerate *over a sustained period of time* “preventative law enforcement,” as practiced in the U.K. The U.K.’s Anti-Terrorism Crime and Security Act permits the Home Secretary to certify that an individual is suspected of being an international terrorist and, as a result, detain that individual for what amounts to an indefinite period of time without a trial.⁴⁴ This element of the law applies only to foreign nationals within the U.K., yet these individuals do not necessarily have to have committed a crime to be detained. This preventative precedent may constitute a deviation from the European Convention on Human Rights.⁴⁵ Some analysts have argued that the long-term deleterious effects of enhanced security in the U.K. in response to terrorism may have undermined the state’s political legitimacy at a time it needed it most.⁴⁶

The United States is not, however, lacking either the law enforcement tools, or the will to exercise these tools in its efforts to prevent future terrorist attacks against U.S. interests. Indeed, U.S. officials have argued that the enhanced tools provided in the USA PATRIOT Act (P.L. 107-56), among other initiatives have made “... Americans safer because we have transformed the rules of engagement for investigating and prosecuting suspected terrorists within our borders.”⁴⁷ The USA PATRIOT Act redefined and expanded, in some cases, the criteria allowing the Attorney General to detain alien terror suspects, but only for a period of up to seven

⁴³ For a recent historical assessment of the relationship between U.S. (foreign) intelligence and federal law enforcement (which includes the domestic intelligence function), see “Intelligence and Law Enforcement,” in *IC21: The Intelligence Community in the 21st Century*, Staff Study of the House Permanent Select Committee on Intelligence, 104th Congress. See also Gregory F. Treverton, “Set Up to Fail,” *Government Executive Magazine*, Sept. 1, 2002.

⁴⁴ See Clare Feikert, “United Kingdom: Preventative Detention,” Law Library of Congress.

⁴⁵ A recent legal challenge to the detention provisions relating to suspected international terrorists in the Anti-Terrorism Crime and Security Act found that this element of the law was unlawful, not due to preventative detention per se, but because the law discriminates against foreign nationals in the United Kingdom. However, this finding was subsequently reversed and is now subject of a petition to the House of Lords. See Feikert, “United Kingdom: Preventative Detention,” Law Library of Congress. See also Lord Carlile of Berriew Q.C., “Anti-Terrorism, Crime, and Security Act 2001,” Part IV, Section 28, Review.

⁴⁶ See Laura K. Donohue, “The British Traded Rights for Security, Too,” *Washington Post*, Apr. , 2003, p. B1.

⁴⁷ Testimony of U.S. Attorney General John Ashcroft, in U.S. Congress, Senate Judiciary Committee, *The Terrorist Threat: Working Together to Protect America*, Mar. 4, 2003.

days. Within that time period, the alien in question must either be released or the Attorney General must initiate removal proceedings.⁴⁸ However, the U.S. Administration has also taken the position that the president can make a determination, especially during times of war, that an individual, U.S. citizen or otherwise, can be classified as an “enemy combatant.”⁴⁹ The Administration bases this position, in part, on the executive powers vested in the president by Article II of the U.S. Constitution.⁵⁰ It has been argued that “enemy combatants” can be detained indefinitely and have no right to legal counsel during detention.⁵¹ This contentious issue, and the Administration’s position on it, have been challenged by the American Bar Association’s Task Force on the Treatment of Enemy Combatants.⁵² Concerns have been raised that this initiative, particularly when applied to U.S. citizens, may undermine the Constitution’s due process clause and result in the *de facto* establishment of a parallel legal system.⁵³ Moreover, the administration’s expansive use of the “material witness” provision to detain indefinitely individuals who may know information that may be “material” to a criminal proceeding, has also raised legal questions.⁵⁴

Conclusion

In short, each democracy has had a unique evolution which directly affects its organization for conducting domestic intelligence. It is important to keep these political, legal, and cultural distinctions in mind when considering the adoption of foreign models of domestic intelligence. Particularly important are the unique and dynamic balances a society strikes between the twin public goods of security and

⁴⁸ See CRS Report RL31200, *Terrorism: Section by Section Analysis of the USA PATRIOT Act*, by Charles Doyle.

⁴⁹ See “Department of Defense Responds to ABA Enemy Combatant Report,” in DoD News, news release no. 497-0, Oct. 2002. This was DoD’s response to the ABA’s Preliminary Report; the final Report was issued in Feb. 2003.

⁵⁰ More specifically, two legal cases, *Ex parte Quirin* (Supreme Court 1942) and *In re Territo* (9th Circuit 1946) are cited primarily as supporting the detention of U.S. citizens as enemy combatants. See CRS Report RL31724, *Detention of American Citizens as Enemy Combatants*, by Jennifer K. Elsea.

⁵¹ Currently, it is publicly known that two U.S. citizens, Yaser Hamdi, and Jose Padilla, a.k.a. Abdullah al Muhajir, have been designated as “enemy combatants” and are being held in U.S. military custody. See American Bar Association (ABA) Task Force on Enemy Combatants, Criminal Justice Section, Section of Individual Rights and Responsibilities, Report to House of Delegates, Feb. 2003.

⁵² *Ibid.*

⁵³ See American Civil Liberties Union, “ACLU Comments on Draft Military Commission: Crimes and Elements for Trials by Military Commissions.” [<http://www.aclu.org/NationalSecurity/>] Mar. 19, 2003.

⁵⁴ See Title 18, U.S. Code, Part II, Chapter 207, Section 3144 “Release or Detention of a Material Witness.” The efficacy of the extensive use of law enforcement tools to prevent terrorism raises the question of the appropriate balance of law enforcement and intelligence techniques to deter, detect, disrupt and defeat terrorism directed against U.S. interests.

civil liberty/freedom. This balance will, in turn, be directly influenced by the state of security a nation state is experiencing.