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The CIA Mandate and the War on Terror

Grant T. Harris†

I. INTRODUCTION

The American intelligence infrastructure is in the midst of its most radical overhaul since the formation of the modern intelligence community following World War II. The Intelligence Reform and Terrorism Prevention Act of 2004,¹ the political compromise resulting from the nation’s post-September 11 intelligence soul searching, has fundamentally transformed the U.S. intelligence bureaucracy. Yet the policy debate to date has paid insufficient attention to whether the fifty-eight-year-old mandate of the Central Intelligence Agency (CIA) requires amendment in light of the contemporary fight against terrorism.

A primary impetus for reform of the U.S. intelligence infrastructure was the breakdown of critical distinctions upon which the division of labor among national security agencies is based. The current national security context and the war on terrorism have blurred the line between intelligence and law enforcement, and it has become hackneyed to note that terrorist plots do not observe the foreign and domestic divisions that exist in the jurisdictional duties of U.S. agencies. Still an important area of analysis has so far escaped any serious public debate or legislative attention: Do the limits of CIA authority outlined in the National Security Act of 1947² meet the needs of the modern national security environment?

Policymakers should revisit the CIA’s statutory mandate in light of the current struggle against terrorism in order to clarify the limits of CIA authority.

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The CIA charter contains categorical yet undefined prohibitions against "police, subpoena, or law enforcement powers or internal security functions."\(^3\) Ambiguity as to the boundaries of these proscriptions presents a double-edged sword. If left unchecked, the exigencies of the fight against terrorism may draw the CIA into prohibited law enforcement activities at the price of missed criminal convictions and violations of civil liberties. At the same time, vague limits of CIA authority may unnecessarily impede more effective cooperation with law enforcement agencies to counter terrorism and other transboundary national security threats. Statutory clarification of the CIA mandate provides the best hope of improving efficiency while preventing abuses and represents an important ingredient in the recipe for successful intelligence reform in the long run.

This Note’s analysis is divided into three parts.\(^4\) Part II examines the genesis and meaning of the CIA mandate as defined in the National Security Act of 1947, as well as how the ambiguity in that mandate has facilitated abuses in the past. Part III explains how the current national security context challenges many of the jurisdictional and conceptual distinctions upon which the National Security Act is based. Finally, Part IV outlines the risks inherent in maintaining the ambiguity in the status quo, examines alternative solutions, and proposes specific statutory revisions to clarify the CIA charter.

II. THE ORIGINS AND FUNCTIONING OF THE CIA MANDATE

General Dwight Eisenhower described the U.S. intelligence apparatus before World War II as "a shocking deficiency that impeded all constructive planning."\(^5\) It was clear at the war’s conclusion that the United States needed to fundamentally overhaul its intelligence infrastructure. The attempt to do so became intertwined with broader initiatives to redesign the bureaucratic architecture of foreign policymaking and to combine the disparate military branches into a single department. These efforts culminated in a landmark piece of legislation: the National Security Act of 1947, which created the CIA and defined its mandate.\(^6\)

3. IRTPA § 1011 (to be codified at 50 U.S.C. § 403-4a(d)(1)).
4. The methodology of this Note is partially dictated by the sensitive nature of the subject matter. The availability of “open source” information on specific CIA activities is limited, and oftentimes internal regulations or other materials pertinent to the topic at hand are classified. This Note therefore supplements the limited availability of relevant unclassified literature with interviews of current and former practitioners in the field of intelligence law from the Office of the Inspector General and the Office of the General Counsel at the Central Intelligence Agency, the Office of the General Counsel at the National Security Agency, the U.S. Senate Subcommittee on Terrorism, Technology & Homeland Security, and the Office of Intelligence Policy and Review and Office of Legal Counsel at the Department of Justice. These interviews were conducted with both current and former intelligence officials with diverse professional experiences in the intelligence community in order to receive as broad a set of views as possible.
5. DWIGHT D. EISENHOWER, CRUSADE IN EUROPE 32 (1948).
6. Additionally, the Central Intelligence Agency Act of 1949 created and clarified procurement
A. The National Security Act of 1947

The creation and design of the Central Intelligence Agency were inspired by lessons of World War II and by the national security environment of the late 1940s. The CIA was thus born from the collective memory of the surprise attack on Pearl Harbor, the realization that the national intelligence capacity needed improvement, and a growing fear of communism. To that end, Congress sought to delineate clear jurisdictional roles: The CIA would focus exclusively on foreign intelligence matters while the Federal Bureau of Investigation (FBI) would retain its status as the premier federal domestic law enforcement agency.

The National Security Act originally created the position of Director of Central Intelligence (DCI) to serve three roles as: (1) the president’s principal advisor on intelligence matters; (2) the nominal head of the intelligence community; and (3) the head of the Central Intelligence Agency. As the nation’s foremost intelligence official, the DCI was charged with providing “national intelligence” to appropriate members of government based upon all information available. As head of the intelligence community, the DCI was given the responsibility to “protect intelligence sources and methods from authorities and employee issues and dealt with other miscellany. See CENT. INTELLIGENCE AGENCY, FACTBOOK ON INTELLIGENCE, available at http://www.cia.gov/cia/publications/facttell/genesis.html (last visited Feb. 15, 2005) [hereinafter FACTBOOK ON INTELLIGENCE].

7. See Rhodri Jeffreys-Jones, Why Was the CIA Established in 1947?, in ETERNAL VIGILANCE? 50 YEARS OF THE CIA 21, 25-29, 36 (Rhodri Jeffreys-Jones & Christopher Andrew eds., 1997) (arguing that the executive branch was largely inspired by its fear of communism, while “Pearl Harbor was the burning issue” for the Congress).
9. See Jonathan M. Fredman, Intelligence Agencies, Law Enforcement, and the Prosecution Team 16 YALE L. & POL’Y REV. 331, 335 (1998) (“The strict delineation between intelligence and law enforcement was facilitated by the fact that, simply stated, there was relatively little overlap between the two in 1947.”). Long-serving FBI Director J. Edgar Hoover lobbied to defend the Bureau’s intelligence programs in Latin America and to reduce the power of the CIA during plans for its creation. Despite Hoover’s efforts, the reordering of the intelligence community under the National Security Act stripped the FBI of its foreign intelligence work abroad. See generally CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS 324-27 (1991) (relating Hoover’s machinations to protect FBI turf); AMY B. ZEGART, FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC 168-69 (1999) (describing FBI intelligence programs abroad).
10. The terms “national intelligence” and “intelligence related to the national security,” referred to “intelligence which pertains to the interests of more than one department or agency of the Government” and did “not refer to counterintelligence or law enforcement activities conducted by the Federal Bureau of Investigation except to the extent provided for in procedures agreed to by the Director of Central Intelligence and the Attorney General, or otherwise as expressly provided for in this title.” 50 U.S.C. § 401a(5) (2000) (amended 2004).

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and to "perform such other functions as the President or the National Security Council may direct." Critics of this structure long decried the gap between the DCI's broad statutory duties (e.g., coordination of the intelligence community) and the limited power given to that position (particularly the fact that the DCI lacked budgetary control over agencies other than the CIA). Despite this criticism, the three separate roles remained centralized in the DCI position until the intelligence overhaul in 2004.

The National Security Act created and outlined the statutory responsibilities of the Central Intelligence Agency. In doing so, the Act was careful to carve out a sphere of activity for the Agency meant to remain separate from domestic law enforcement. As head of the CIA, the DCI was required to "collect intelligence through human sources and by other appropriate means, except that the Agency shall have no police, subpoena, or law enforcement powers or internal security functions." Also as head of the CIA, the DCI was required to "provide overall direction for the collection of national intelligence through human sources by elements of the intelligence community authorized to undertake such collection," and "correlate and evaluate intelligence related to the national security and provide appropriate dissemination of such intelligence." The National Security Act also included important catchall language mandating that the DCI, as head of the CIA, would "perform such other functions and duties related to intelligence affecting the national security as the President or the National Security Council may direct."

B. Categorical but Ambiguous Prohibitions

The critical realization in understanding the formation of the CIA is that its prohibitions—like its mandated functions—were cast in broad and sometimes vague terms. The National Security Act was clear and explicit in its desire to prevent the CIA from partaking in law enforcement and internal security functions and, to that end, marked the limits of the CIA mandate in a single sentence: "[T]he Agency shall have no police, subpoena, or law enforcement

16. See infra Section II.F.
powers or internal security functions." This proscriptive language is categorical in nature. The prohibitions draw no distinction with respect to citizenship (as to if and how CIA authority changes when dealing with a "United States person"). Likewise, these seemingly per se prohibitions are silent as to geography. Thus, it is unclear what CIA activities may be appropriate within the United States, and there is no indication these prohibitions would apply any less forcefully to CIA activities abroad. By not defining the critical terms ("police powers," "subpoena powers," "law enforcement powers," and "internal security functions"), the National Security Act did not delineate the border between intelligence and law enforcement or define what domestic CIA actions are acceptable. For these reasons, "the limits of what the CIA can and cannot do are not clear."

The legislative history of the National Security Act provides little insight into the prohibitions on CIA activity. Congressional intent with respect to these prohibitions is opaque due to a relative lack of public debate on the issue. For instance, "the wording of the prohibition [on domestic activity] was not specifically discussed in congressional hearings or debates," even despite the fact that "several congressmen and witnesses expressed their concern that the CIA neither invade the FBI's jurisdiction nor become a secret police."

The Agency's mandate was addressed in only general terms largely due to the circumstances of the creation of the 1947 Act. Bureaucratic wrangling on unrelated issues often eclipsed the creation of the CIA. The Truman Administration sought to keep the details relevant to the CIA "brief and vague"

22. The term "United States person" is usually a term of art in laws pertaining to intelligence collection and is often defined by statute. See, e.g., 50 U.S.C. § 403-5a(c)(2) (2000) (defining the term as: "A United States citizen. An alien known by the intelligence agency concerned to be a permanent resident alien. An unincorporated association substantially composed of United States citizens or permanent resident aliens. A corporation incorporated in the United States, except for a corporation directed and controlled by a foreign government or governments.").
23. Though Congress clearly did not intend for the CIA to assist law enforcement domestically, "[c]ongressional statutes have been more ambiguous on the issue of overseas assistance by the CIA towards investigations of foreign individuals and entities." Daniel Richard, Overseas Tasking of the CIA for Domestic Law Enforcement, NAT'L SEC. STUD. Q. 1, 6 (Summer 1996). In 1996, Congress passed a statute allowing for greater cooperation with law enforcement overseas. See infra notes 132-135 and accompanying text. A geographical distinction was also drawn in a portion of the CIA mandate in the recent intelligence reform legislation. See infra notes 105-108 and accompanying text.
24. Telephone Interview with Jeffrey H. Smith, former General Counsel of the Central Intelligence Agency (May 18, 2004).
25. For background on the legislative history of the creation of the CIA, see generally Grover S. Williams, Legislative History of the Central Intelligence Agency as Documented in Published Congressional Sources (1975).
26. Courts have also remarked on the dearth of insightful legislative history. The Court of Appeals for the District of Columbia described the legislative history of the CIA charter as "sketchy." Weissman v. Central Intelligence Agency, 565 F.2d 692, 695 (D.C. Cir. 1977). For additional background on the lack of public debate, see Williams, supra note 25, at 2.
27. Comm'n on CIA Activities Within the U.S., Report to the President 54 (1975) [hereinafter Rockefeller Commission]. See also Williams, supra note 25, at 87-89.
because the intricacies of the CIA’s mandate were viewed as less important than “more contentious issues such as the secretary of defense’s powers or the Navy’s autonomy.” Likewise, Congress “accepted the CIA provisions with little comment or debate” because “[a]verage legislators had little incentive to probe deeply into the CIA’s design, and national security intellectuals had bigger fish to fry” with respect to the unification of the military.

Contorted attempts to extract judicial wisdom as to the limits of CIA authority are futile for various reasons. First, courts have been unwilling to define relevant terms, set clear boundaries, or provide guidelines that would be of ex ante value in determining the limits of CIA authority. Courts have generally eschewed clear definitions and parameters on CIA domestic activity to the point that many such decisions parallel a running joke about jurisprudence on the definition of obscenity: Courts essentially declare they will “know it when they see it” and rely on case-by-case determinations of whether the CIA has overstepped its statutory bounds. Though courts have been quick to cite the need for domestic CIA activity in pursuance of its “foreign mandate,” they have refused to define the boundaries for such activity, including on issues such as the extent to which the CIA can conduct national security intelligence investigations within the United States. Even in the few decisions that directly touch on the limits of CIA authority, courts refuse to define the terms of the National Security Act.

29. ZEGART, supra note 9, at 183.
31. As a case in point, Birnbaum v. United States, 588 F.2d 319, 331 (2d Cir. 1978), held that certain CIA mail interception activities during the Cold War violated the Agency’s charter because they sought to obtain “information on matters of domestic, as well as foreign, concern.” The “matters of domestic concern” formulation is symptomatic of a one-time only test that does not clarify the threshold or provide meaningful guidelines for the future.
32. In Fitzgibbon v. CIA, 911 F.2d 755, 764 (D.C. Cir. 1990), the court made what it called a “rather pedestrian observation” that the CIA “must, at times, pursue domestically its foreign intelligence mandate,” without defining what domestic activities would be permissible. Sirota v. CIA, 1981 WL 158804 (S.D.N.Y. 1981), echoed a similar sentiment when it declared that “[t]he CIA can and does use domestic sources for foreign intelligence activities” without further elaboration. Id. at *3.
33. The Court of Appeals for the District of Columbia said the prohibitions of the National Security Act were “intended, at the very least, to prohibit the CIA from conducting secret investigations of United States citizens, in this country, who have no connection with the Agency.” Weissman v. Cent. Intelligence Agency, 565 F.2d 692, 695 (D.C. Cir. 1977). The court returned to the issue a year later in recognition of the uncertain limits of the propriety of domestic CIA investigation of American citizens who have some connection to the Agency in Marks v. Cent. Intelligence Agency, 590 F.2d 997 (D.C. Cir. 1978). In Marks, the court implied there may be “reasonable exceptions” to the seemingly categorical prohibitions in the National Security Act but, rather than flesh out that assertion, concluded only that “the interpretation of the 1947 law is a legal issue that relates to an area of tension.” 590 F.2d at 1002-03.
34. In United Presbyterian Church in U.S.A. v. Reagan, the District Court for the District of
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Second, relevant cases are almost without exception decades old, an additional strain in light of a changing lexicon and the modern national security environment.35 Third, most court decisions that touch on CIA activity were decided in the context of the Freedom of Information Act (FOIA).36 FOIA has separate statutory considerations, including exemptions from disclosure of information that do not necessarily depend on the specific intelligence collection technique or the legality of CIA activity.37 Fourth, relevant cases illustrate the tendency of courts to defer to the executive branch in issues of national security and highlight how various doctrines used by courts to abstain from national security cases pose roadblocks for potential plaintiffs.38 In the words of Judge Goettel from the District Court for the Southern District of New York in Sirota v. Central Intelligence Agency: “It has been previously recognized that the judiciary is not the proper forum for investigating intelligence gathering methods.”39

Even the primary assumption made in the statutory CIA mandate—that the Agency would only concern itself with foreign intelligence—was unstated in the National Security Act of 1947. The Act did not use the word “foreign” in its statutory grant of authority, though the “legislative history of the Act clearly shows that Congress intended the activities... to be related to foreign intelligence.”40 Several statements in the floor debate underscored the belief that the CIA “deals with intelligence outside the United States,” is involved “only with external security,” and is “supposed to operate only abroad.”41 Yet whether, to what extent, and by what means foreign intelligence collection

Columbia dismissed on grounds of equitable discretion a claim by Congressman Ronald V. Dellums (D-Cal.), et al., that challenged the constitutionality of Executive Order 12,333. 557 F. Supp. 61, (D.D.C. 1982). Congressman Dellums argued, inter alia, that deletion of a particular phrase used in a previous executive order authorized the CIA “to conduct domestic activities constituting ‘internal security functions’ prohibited by the National Security Act.” 557 F. Supp. at 65. Rather than address the definition of that prohibition, the court simply punted the issue and declared it was “unclear” whether such domestic activities would violate the National Security Act. Id. 35. See infra Part III. 36. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (2000)). 37. See Sirota at *3. 38. As illustrations of this point, see United Presbyterian Church, 557 F. Supp. at 65-66; Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977); Halkin v. Helms, 690 F.2d 977, 982-84 (D.C. Cir. 1982). See also STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 146-91 (3d ed. 2002) (explaining that courts “have often avoided deciding the merits of” national security cases “or have decided the merits in favor of the government after only the most cursory review” using the doctrinal devices of political question, standing, equitable or remedial discretion, and ripeness). One reason for this deference is that constitutional issues lurk beneath the surface; intelligence activities involve inherent executive authorities into which courts are often reluctant to delve. Telephone Interview with James W. Zirkle, Associate General Counsel, Central Intelligence Agency (Oct. 12, 2004). 39. Sirota, 1981 WL 158804, at *3. 40. 1 SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, at 136, 436 (1976) [hereinafter 1 CHURCH COMMITTEE]. See also ROCKEFELLER COMMISSION, supra note 27, at 11. 41. 1 CHURCH COMMITTEE, supra note 40, at 136 n.31.
could occur within U.S. borders was left ambiguous. "The fact that the CIA is restricted to activities relating to 'foreign intelligence' does not, of course, tell us what those activities are and whether they may be conducted within the United States."

The National Security Act sowed confusion not only in the meaning of its terms, but also as to how those terms interact and coexist with each other. The broad protection of "sources and methods" —a mandate of the DCI position as head of the intelligence community until the recent intelligence reform— interacted with and sometimes modified other parts of the National Security Act's limitations on CIA activity. The restrictions on domestic activities in the 1947 Act were not clearly defined, nor was the potential conflict between these limits and the Director's authority to protect 'sources and methods' of intelligence gathering resolved. The Act also did not delineate the CIA's "role in conducting counterintelligence" or how those responsibilities were affected by its other statutory mandates and prohibitions.

C. The Cost of Ambiguity

Ambiguous statutory restrictions, lax oversight, and political pressure from the highest levels of government opened the door for a series of abuses by various agencies in the intelligence community, including the CIA, during the Cold War. Reports of domestic surveillance of U.S. citizens at home and covert

42. ROCKEFELLER COMMISSION, supra note 27, at 52. The Rockefeller Commission explained that Congress expected some CIA activity would inevitably take place domestically despite the Agency's focus on foreign intelligence because, at a minimum, the CIA "necessarily maintains its headquarters here, procures logistical support, recruits and trains employees, tests equipment, and conducts other domestic activities in support of its foreign intelligence mission," as well as conducts domestic investigations "to maintain the security of its facilities and personnel." Id. at 11. Yet the Rockefeller Commission went on to note that "whether Congress contemplated that the CIA would collect foreign intelligence within the United States by clandestine means" was "[l]ess clear from the legislative history," in part because "there was a general reluctance to discuss openly the subject of clandestine collection." Id. at 53. Thus, "the absence of discussion of the subject provides little guidance." Id. According to George Clarke, former Senior Attorney in the Office of the General Counsel at the CIA, "Executive Order 12,333 made it very clear that if it was foreign intelligence, it was a legitimate concern, interest, and mission of the CIA," so the CIA can collect foreign intelligence domestically if the foreign powers in question "have a presence in the U.S." Interview with George W. Clarke, former Senior Attorney, Office of the General Counsel, Central Intelligence Agency (Oct. 12, 2004). In such cases, "it is still foreign intelligence, though there may be additional steps or procedures for the CIA to follow" to collect information on those groups domestically. Id.

43. See infra notes 98-99 and accompanying text.

44. The Court of Appeals for the District of Columbia declared the phrase "intelligence sources and methods" to be "ambiguous" and set forth a definition of "intelligence source" within the context of the National Security Act in Sims v. CIA, 642 F.2d 562, 570-71 (D.C. Cir. 1980), aff'd in part, rev'd in part, 471 U.S. 159 (1985). The Supreme Court, however, found that definition to be overly narrow and held that "[a]n intelligence source provides, or is engaged to provide, information the Agency needs to fulfill its statutory obligations." 471 U.S. at 177.

45. 1 CHURCH COMMITTEE, supra note 40, at 436.

46. Id. See also DYCUS ET AL., supra note 38, at 713 (explaining the National Security Act provided "no rules to say when the CIA could play a counterintelligence role in the United States").
actions against non-communist countries abroad sparked extensive public and political uproar and prompted a series of governmental investigations in the 1970s. These commissions uncovered an infusion of politics in domestic intelligence collection as well as numerous acts on the part of intelligence agencies based on what ranged from creative interpretations of key terminology in statutory mandates to flagrant disregard of statutory prohibitions. A wide variety of abuses perpetrated by the CIA and other components of the intelligence community was unearthed, including that the CIA had operated multiple “spying operation[s] against Americans” and “had been opening mail, burglarizing homes, wiretapping phones, and secretly watching the movements of unsuspecting individuals within the United States, all in violation of its legislative charter.”

The CIA participated in a mail intercept program to examine mail sent to and from the Soviet Union beginning in 1952 and lasting until 1973. In the last year of operation of this program, there were 4,350,000 mail items sent to and from the Soviet Union. Of those, the CIA examined the outside of 2,300,000 items, photographed 33,000 and opened 8,700. In addition to the constitutional issues related to the First and Fourth Amendments, U.S. statutes specifically forbid obstruction or delay of the mails. The CIA’s mail intercept program did not comply with postal regulations allowing for examining and copying envelopes for the purposes of national security, and the CIA acted in knowing violation of federal criminal laws.

The most oft-referred to domestic program of the CIA carried the ominous acronym of “CHAOS.” At the request of the President, the DCI established a Special Operations Group within the CIA in August 1967 to examine the role of foreign influence on domestic disorder. The activities of this group came to be known as Operation CHAOS. Presidents Johnson and Nixon were concerned by the civil disorder and violence that wracked the United States in

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47. The most famous of the governmental committees was the Church Committee, which was named after its chair, Senator Frank Church (D-Idaho). The House corollary was the Pike Commission, headed by Congressman Otis Pike (D-N.Y.). President Gerald Ford also created a commission, the Rockefeller Commission, chaired by Vice President Nelson Rockefeller.


49. ROCKEFELLER COMMISSION, supra note 27, at 20.


52. ROCKEFELLER COMMISSION, supra note 27, at 20.

53. For an overview of the nature of the CIA’s activities in Operation CHAOS, see Halkin v. Helms, 690 F.2d 977, 982-84 (D.C. Cir. 1982).
the late 1960s and early 1970s and “were convinced American unrest was being fomented and financed by communist sources.” In six years, Operation CHAOS assembled approximately 13,000 total files (of which 7,200 files were on American citizens), and a computerized database contained the names of more than 300,000 persons and groups based on those files and related materials. The Rockefeller Commission concluded that the “domestic activities of Operation CHAOS unlawfully exceeded the CIA’s statutory authority” because the domestic data collected “exceeded what was reasonably required” to determine if domestic groups had links to foreign powers. Other commentators have been less nuanced in their assessment; Brian Freemantle declared that Operation CHAOS “was a direct and positive contravention of the CIA’s charter, and it was thus illegal.”

In addition to the domestic activities of Operation CHAOS, a separate program within the Agency run by the Office of Security monitored and infiltrated domestic dissident groups in and around Washington, D.C. between February 1967 and December 1968 “to determine if the groups planned any activities against CIA or other government installations.” The Rockefeller Commission concluded that such infiltration of dissident groups “went far beyond steps necessary to protect the Agency’s own facilities, personnel and operations, and therefore exceeded the CIA’s statutory authority.”

Violations of the CIA mandate also occurred in the field of counterintelligence. The FBI and CIA maintained an uneasy shared responsibility in counterintelligence, and the division of labor during the Cold War was such that individual intelligence agencies “would be responsible for the security of their own employees.” This meant the DCI, “with statutory responsibility for protecting intelligence sources and methods, but with limitations on internal security functions, was presented with something of a dilemma.” The exact “handoff” between the FBI and CIA posed problems and, more to the point, sometimes involved the CIA in prohibited law enforcement activities. The Rockefeller Commission “found nothing to indicate that the CIA abused the function given it by the agreement” with the FBI pertaining to initial investigation of CIA employees suspected of spying

54. BRIAN FREEMANTLE, CIA 122 (1983).
55. ROCKEFELLER COMMISSION, supra note 27, at 23.
56. Id. at 24-25.
57. FREEMANTLE, supra note 54, at 122.
58. ROCKEFELLER COMMISSION, supra note 27, at 26.
59. Id.
61. Id.
62. Id. at 267. See also Frederick P. Hitz, Unleashing the Rogue Elephant: September 11 and Letting the CIA Be the CIA, 25 HARV. J.L. & PUB. POL’Y 765, 770 (2002) (“The principal force pulling the CIA into the domestic arena prior to the end of the Cold War was its shared jurisdiction with the FBI in counterintelligence matters involving U.S. citizens and U.S. persons.”).
but that "[t]he agreement, however, involved the Agency directly in forbidden law enforcement activities."  

D. Lessons and Outcomes

The thousands of pages of reports and recommendations made by the various commissions of the 1970s suggest that the vague terminology of the CIA mandate was an important cause of CIA abuses perpetrated during the Cold War. The lack of clear boundaries of authority provided no clear guideposts to prevent good-faith efforts to protect the nation's security from crossing the line to become overzealous and unnecessarily infringe civil liberties. Similarly, statutory ambiguity provided fertile ground for political abuse of the Agency at the behest of the highest levels of government. The abuses were caused by a mix of convenient and disingenuous interpretations of the CIA mandate and outright violations of the law. For these reasons, clarified statutory limits as proposed in Part IV of this Note would provide better boundaries for well-intentioned activities as well as a more meaningful shield by which the CIA could ward off bad-faith directives intended to serve personal or political ends.

Vague statutory language proved all too malleable in the face of the nation's overriding fear of communism. The drive to win the Cold War and undefined prohibitions with ambiguous parameters opened the door to creative interpretations of authority. CIA excesses during the Cold War were excused if not encouraged by the drive to defeat communism, which emanated from the country's highest levels of political leadership. This created a situation of lax oversight of CIA activities and a "climate of tolerance" in which there was a "let them do what they need to do to get the job done" ethic in place from the passage of the National Security Act in 1947 until the congressional inquiries of the 1970s.

Such a national security environment allowed the CIA to justify domestic and law enforcement activities through alternating overly narrow and overly broad interpretations of its ambiguous statutory mandate. The executive branch "interpreted foreign intelligence broadly" to include domestic intelligence-gathering programs directed at U.S. nationals designed "to determine foreign influence on dissident domestic groups." The same activity was also

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63. ROCKEFELLER COMMISSION, supra note 27, at 14. The counterintelligence dilemma was largely resolved after both the CIA and the FBI received criticism for their handling of the investigation of Aldrich Ames. See DYCUS ET AL., supra note 38, at 714-16; 50 U.S.C. § 402a (2000); Exec. Order No. 12,333, supra note 12, at 59,945, 59,949.

64. Interview with Frederick P. Hitz, former Inspector General, Central Intelligence Agency, in Princeton, N.J. (May 7, 2004). In the drive to root out internal subversion, even domestic intelligence activities entering the realm of law enforcement produced no "outcry" on Capitol Hill because "everyone wanted the CIA to get that job done." Id.

65. 1 CHURCH COMMITTEE, supra note 40, at 136.
condoned by a "narrow[]" CIA interpretation of "internal security functions," despite the fact that "history indicates that at the time of enactment of the National Security Act, threats to 'internal security' were widely understood to include domestic groups with foreign connections" and "[t]here is no evidence that by 1947 these investigations were considered foreign intelligence."66 The Agency later used an expansive interpretation of the DCI's obligation to protect "sources and methods" as an additional statutory justification for operations targeting domestic groups "whose activities, including demonstrations, have potential, however remote, for creating threats to CIA installations, recruiters, or contractors."67

Certain abuses perpetrated by the CIA were committed at the direction of the highest levels of the nation's political leadership. An unreleased report of the House Select Committee on Intelligence in January 1976 stated "[a]ll evidence in hand suggests that the CIA, far from being out of control, has been utterly responsive to the instructions of the President and Assistant to the President for National Security Affairs."68 Similarly, the Rockefeller Commission concluded there was "a pattern for actual and attempted misuse of the CIA by the Nixon Administration" shown by White House requests for (and CIA provision of) various documents and equipment (including alias and disguise materials) that were used for "various improper activities," including activities meant solely to "serve the President's personal political ends."69 Not all of the intelligence abuses are attributable to "poor law," as "some of the abuses by both the CIA and FBI were not because the governing law was lax, but because senior officials" at the time "were willing to intentionally violate existing law."70 Without excusing the moral culpability of those who flagrantly violated the law, the CIA's ambiguous statutory mandate inadequately shielded the Agency from high-level political pressure to perform "improper" activities.71 Though obviously no solution to willful disregard of the law, statutory clarification as proposed in Part IV would better define the boundaries of lawful activity, and thereby facilitate more effective congressional oversight as well as internal checks within the executive branch.72 A clarified law

66. Id. at 138.
67. Id. See also HALPERIN ET AL., supra note 48, at 137.
69. ROCKEFELLER COMMISSION, supra note 27, at 32-33.
70. E-mail from Steven A. Cash, Chief Counsel & Staff Director, Subcomm. on Terrorism, Technology & Homeland Security of the Senate Comm. on the Judiciary (Dec. 23, 2004, 10:03:30 EST) (on file with author).
71. Despite the transgressions documented in the 1970s, the prohibitions of the National Security Act have been useful to the Agency in limiting the extent to which it engages in domestic and law enforcement activity in which it does not want to involve itself. The prohibitions have traditionally served as a "shield as much as a sword," meaning the "CIA always found that language very useful" because the Agency did not want to get pulled into domestic activities. Telephone Interview with Jeffrey H. Smith, supra note 24.
72. See infra Section IV.C; see also infra note 100 and accompanying text.
enforcement prohibition might also better protect CIA employees acting in
good faith from the risk of criminal prosecution. 73

The lessons of the Cold War should not be forgotten in the modern struggle
to defeat terrorism. An all-consuming national security goal, a malleable
mandate, a lack of effective oversight, and political encouragement to “get the
job done” from on high create a recipe for abuse. Ambiguity of mandate denies
clear guideposts to Agency officials and those in positions of oversight of
Agency activity (even assuming the existence of the will to exercise oversight).
Nonetheless, as the next Section demonstrates, the CIA mandate remains
essentially unchanged to this day.

E. The Teflon Mandate

The CIA mandate was not altered in the wake of the uncovering of the
intelligence abuses, despite calls to do so by the relevant commissions. The
Church Committee lambasted the CIA mandate as “confusing and ill-defined,”74
and declared that the National Security Act of 1947 was “no longer an adequate
framework for the conduct of America’s intelligence activities” because it
“failed to provide an adequate statement of the broad policy and purposes to be
served by America’s intelligence effort.”75 The Rockefeller Commission called
for further clarification of CIA authority to collect foreign intelligence within
the U.S. because the National Security Act “neither expressly authorizes such
collection nor expressly prohibits it.”76 In 1972, the President’s Foreign
Intelligence Advisory Board (PFIAB) recommended that “the jurisdictional
lines” between FBI and CIA be clarified in order to facilitate the undertaking of
specific domestic intelligence activities.77

A significant result of the outcry over intelligence abuses was the creation
of a labyrinth of congressional oversight of the intelligence community.78 Once

73. During the Cold War, FBI agents W. Mark Felt and Edward S. Miller faced criminal charges
after performing acts requested by the country’s political leadership but for which there was no statutory
authorization. See Gray v. Bell, 712 F.2d 490 (D.C. Cir. 1983). The prosecutions of Felt and Miller
“caused concern among those in the intelligence world because it created uncertainty whether CIA
officers, who believed that they too were acting at the direction of the President, would run the same risk
of prosecution.” E-mail from Robert O. Davis, former Deputy Counsel, Office of Intelligence Policy and
Review, Department of Justice (Feb. 22, 2005, 15:25:02 EST) (on file with author). A clearer statutory
mandate would provide protection to CIA employees superior to that offered by classified guidelines
pursuant to executive order. See infra Section IV.C.3.

74. CHURCH COMMITTEE, supra note 40, at 436.

75. Id. at 426.

76. ROCKEFELLER COMMISSION, supra note 27, at 59.

77. Id. at 73.

78. Congressional oversight of the CIA centers primarily in the Senate Select Committee on
Intelligence (SSCI) and the House Permanent Select Committee on Intelligence (HPSCI). The SSCI was
established on May 19, 1976 under S. Res. 400, and the HPSCI was created on July 14, 1977 under H.
Res. 658. The CIA “also reports regularly to the Defense Subcommittees of the Appropriations
Committees in both Houses of Congress” and “provides substantive briefings to the Senate Foreign
Relations Committee, House Committee on Foreign Affairs, and the Armed Services Committees in
in place, the congressional intelligence committees immediately took up the mantle of intelligence reform, and a lengthy bill was introduced in each house to create statutory charters for various components of the intelligence community, including the CIA. Yet the “Charter Legislation” was strongly criticized from all sides in hearings; some arguing that it would legitimate covert actions inconsistent with American ideals and others suggesting that its complex restrictions would unduly hamper the protection of vital American interests. In the end, the bills were never reported out of committee. Similar legislation proposed in the next Congress “came under even heavier criticism” and ultimately met the same fate.

Several factors explain the downfall of the Charter Legislation. Its broad sweep and comprehensive nature exposed it to criticism on many fronts, and the size of the undertaking prevented agreement on its terms. The legislation was supported, “in principle” by the President and the Congress, “but after almost four years of legislative proceedings, the Congress and the Carter Administration could not reach agreement on a comprehensive proposal for the Intelligence Community’s structure.” The legislation also included many “hot button” issues, such as the historically contentious issue of covert action. An additional problem was the slow speed with which Congress acted.

Instead of statutory revision of the CIA mandate, action came in the form of executive orders. “Concurrent with, and subsequent to, these legislative initiatives, the Executive Branch, in part to head off further congressional action, implemented some of the more limited recommendations contained in their respective proposals.” Three key executive orders were issued by Presidents Ford, Carter, and Reagan, respectively (with each successive Order superseding the former) to organize and provide guidance to the intelligence community. The last of the series, Executive Order 12,333, was promulgated


81. Id.


83. For background on the debate over covert action within the context of the proposed Charter Legislation, see DYCUS ET AL., supra note 38, at 459-61. For additional background on the issue of covert action, see Harry Rositzke, America’s Secret Operations: A Perspective, FOREIGN AFFAIRS (Jan. 1975) reprinted in 1 CHURCH COMMITTEE, supra note 40, at 539 (“No chapter in the history of the CIA is as public or controversial as its covert action program.”).

84. Bruemmer, supra note 82, at 884.

85. BEST, INTELLIGENCE REORGANIZATION, supra note 80, at 26.

by President Reagan on December 4, 1981 and remains in effect to this day.  

Executive Order 12,333 addresses both domestic collection of intelligence and the relationship between the intelligence community and law enforcement. With respect to the former, the Order attempted to clarify the division of labor between the CIA and FBI with respect to domestic intelligence. According to the Order, the CIA shall “collect, produce and disseminate foreign intelligence and counterintelligence, including information not otherwise obtainable,” but collection of such intelligence within the United States “shall be coordinated with the FBI as required by procedures agreed upon by the Director of Central Intelligence and the Attorney General.” The FBI shall “conduct within the United States . . . activities undertaken to collect foreign intelligence or support foreign intelligence collection requirements of other agencies within the Intelligence Community.” Yet the door for domestic collection by other agencies remains open “when significant foreign intelligence is sought . . . provided that no foreign intelligence collection by such agencies may be undertaken for the purpose of acquiring information concerning the domestic activities of United States persons.” Subsequent to Executive Order 12,333, internal CIA guidelines issued by the DCI and approved by the Attorney General placed additional restrictions on collection of intelligence information directed at U.S. citizens by the CIA.

Executive Order 12,333 also provides guidance as to law enforcement activities. The Order authorizes agencies within the intelligence community “unless otherwise precluded by law or this Order, [to] participate in law enforcement activities to investigate or prevent clandestine intelligence activities by foreign powers, or international terrorist or narcotics activities.” This language indicates that participation of intelligence agencies would be limited in scope and would not necessarily include bringing someone to justice to enforce U.S. laws. Intelligence agencies are also authorized to “provide specialized equipment, technical knowledge, or assistance of expert personnel for use by any department or agency, or, when lives are endangered, to support local law enforcement agencies” provided that assistance by expert personnel is

88. Id. at 59,945.
89. Id.
90. Id. at 59,950. Executive Order 12,333 also gave the FBI an explicit role in the production and dissemination of foreign intelligence and counterintelligence. Id. at 59,949.
91. CENT. INTELLIGENCE AGENCY, CIA FREQUENTLY ASKED QUESTIONS, at http://www.cia.gov/cia/public_affairs/faq.html#6 (last visited Mar. 8, 2005). Dating back to the 1970s, “collection of intelligence information directed against U.S. citizens . . . is allowed only for an authorized intelligence purpose; for example, if there is a reason to believe that an individual is involved in espionage or international terrorist activities.” Id. CIA procedures in such cases “require senior approval.” Id.
approved by the General Counsel of the providing agency. There is also catchall language allowing intelligence agencies to "render any other assistance and cooperation to law enforcement authorities not precluded by applicable law."  

F. The Intelligence Reform and Terrorism Prevention Act of 2004

Major intelligence reform came in the waning days of the 108th Congress in the form of the Intelligence Reform and Terrorism Prevention Act. The Act is largely based on the recommendations made in the final report of the National Commission on Terrorist Attacks Upon the United States (the "9/11 Commission"), which took center stage in the legislative deliberation of intelligence reform. Yet the 9/11 Commission did not speak to clarification of the law enforcement prohibition or the domestic role of the CIA, and that issue has so far escaped the attention of policymakers.

The Intelligence Reform and Terrorism Prevention Act restructured the organizational chart of the country's intelligence community. The principal

93. Id. "The CIA may also provide support to other federal agencies through the temporary detailing, essentially loaning, of Agency personnel, who then work under the authority of the receiving agency rather than the CIA." Telephone Interview with James W. Zirkle, supra note 38.


95. The implementation of the Act's provisions—as well as the meaning of some of those provisions—is to some extent still being worked out. "[T]here are a lot of government attorneys still trying to figure out what some of the provisions mean." E-mail from James W. Zirkle, Associate General Counsel, Central Intelligence Agency (Jan. 31, 2005, 17:29:33 EST) (on file with author). See also Douglas Jehl, The Spymaster Question, N.Y. TIMES, Dec. 27, 2004, at A28 (quoting former CIA General Counsel Jeffrey H. Smith as saying he found significant "confusion and contradiction" within the Act and that "[l]awyers across the intelligence community will be arguing about what these provisions mean for many months to come"); Philip Shenon, Next Round Is Set in Push to Reorganize Intelligence, N.Y. TIMES, Dec. 20, 2004, at A25 (describing the "daunting logistics" and potential "turf battles" to be addressed in implementing the Act); Walter Pincus, Bush's Intelligence Panel Gains Stature, WASH. POST, Feb. 7, 2005, at A19 (explaining "there is a recognition" on Capitol Hill that the Act "may need some changes before implementation can be completed").

96. Porter Goss submitted legislation in the 108th Congress when he was chairman of the House Permanent Select Committee on Intelligence (Goss was later appointed DCI) that would have reconfigured the prohibitions on CIA activity. The proposed bill read in relevant part: "except that the Agency may not exercise police, subpoena, or law enforcement powers within the United States, except as otherwise permitted by law or as directed by the President." H.R. 4584, 108th Cong., tit. I, § 102(c)(1). The presidential exception caveat in the Goss language would have fundamentally undercut the force of the prohibitions (unlike the proposals made in Part IV of this Note, which would clarify rather than abandon sub silentio the prohibitions). The proposed bill received a generally negative reaction in the media and on Capitol Hill. See Michael Isikoff & Mark Hosenball, Terror Watch: Goss's Wish List, NEWSWEEK, Aug. 11, 2004, at http://www.msnbc.msn.com/id/5675992/site/newsweek. With the brief exception of the Goss proposal, the idea to amend the prohibitions of the National Security Act has received virtually no attention in the debates surrounding intelligence reform. E-mail from Steven A. Cash, Chief Counsel & Staff Director, Subcomm. on Terrorism, Technology & Homeland Security of the Senate Comm. on the Judiciary (Feb. 17, 2005, 07:47:36 EST) (on file with author). See also Isikoff & Hosenball, supra.

97. Title I of the legislation, separately titled the National Security Intelligence Reform Act of 2004, replaced sections 102 through 104 of the National Security Act of 1947. IRTPA § 1011. For the most part, the provisions of the National Security Intelligence Reform Act are required to take effect within six months of enactment of the Act. IRTPA § 1097.
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change was the creation of a Director of National Intelligence (DNI) as the nation’s chief intelligence official. The three roles formerly consolidated in the position of Director of Central Intelligence were parsed so that the DNI heads the intelligence community and serves as the principal advisor to the President on intelligence matters pertaining to national security.\textsuperscript{98} The former position of Director of Central Intelligence was stripped of those two roles and is now simply the Director of the Central Intelligence Agency (and is therefore subordinate to the DNI). The DNI is charged with the responsibility (previously held by the DCI) to “protect intelligence sources and methods from unauthorized disclosure.”\textsuperscript{99} Among other duties, the DNI is also required to “ensure compliance with the Constitution and laws of the United States by the Central Intelligence Agency.”\textsuperscript{100}

Despite its dramatic restructuring of the organization of the intelligence community, recent intelligence reform did not significantly alter the CIA mandate. The key statutory language from the National Security Act of 1947 pertaining to the limits of CIA authority was preserved verbatim. The Intelligence Reform and Terrorism Prevention Act mandates that the Director of the CIA shall “collect intelligence through human sources and by other appropriate means, except that the Director of the Central Intelligence Agency shall have no police, subpoena, or law enforcement powers or internal security functions.”\textsuperscript{101} This differs from the old version by only a slight change in phraseology: the prohibitions were previously directed at “the Agency” rather than specifically at “the Director of the Central Intelligence Agency.”\textsuperscript{102} This discrepancy appears attributable to an innocuous change in drafting,\textsuperscript{103} and there is no evidence of any congressional intent to alter the limits of CIA authority from the meaning intended in the National Security Act of 1947.\textsuperscript{104}

\textsuperscript{98} IRTPA § 1011 (to be codified at 50 U.S.C. § 403). For background on the 9/11 Commission recommendation to create a DNI, see 9/11 COMMISSION REPORT, supra note 15, at 407-416.

\textsuperscript{99} IRTPA § 1011 (to be codified at 50 U.S.C. § 403-1(i)).

\textsuperscript{100} IRTPA § 1011 (to be codified at 50 U.S.C. § 403-1(f)).

\textsuperscript{101} IRTPA § 1011 (to be codified at 50 U.S.C. § 403-4a(d)(1)).


\textsuperscript{103} Replacement of “the Agency” with “the Director of the Central Intelligence Agency” appears to have been simply an inadvertent choice of phrasing most likely attributable to the hurried drafting of the legislation. E-mail from James W. Zirkle, Associate General Counsel, Central Intelligence Agency (Jan. 28, 2005, 18:05:17 EST) (on file with author). According to Zirkle, the new law “is simply laying out the authorities of the DCI in his new (and diminished) role as Director of the CIA, and imposing the same restrictions as before.” Id. For additional information on the rushed nature in which this legislation was completed, see Philip Shenon & Rachel L. Swarns, House Approves Intelligence Bill, N.Y. TIMES, Oct. 9, 2004, at A1 (explaining that, as of October 2004, many lawmakers thought it would “be impossible to reconcile” the House and Senate versions of the intelligence reform bills); Richard W. Stevenson, Confident Bush Outlines Ambitious Plan for 2nd Term, N.Y. TIMES, Nov. 5, 2004, at A1 (explaining that President Bush called on the House and Senate to come to an agreement before the end of the congressional term); Richard A. Posner, Important Job, Impossible Position, N.Y. TIMES, Feb. 9, 2005, at A23 (explaining the Intelligence Reform and Terrorism Prevention Act was passed in “haste”).

\textsuperscript{104} The legislative history of the Intelligence Reform and Terrorism Prevention Act and previous versions of intelligence reform using identical language indicate that Congress intended to continue the
The Intelligence Reform and Terrorism Prevention Act does make one notable statutory amendment with respect to the domestic authority of the CIA. The phrase “outside the United States” was added to the responsibility of the Director of the CIA to coordinate intelligence collection through human sources. The amended language now reads, in relevant part: “The Director of the Central Intelligence Agency shall . . . provide overall direction for and coordination of the collection of national intelligence outside the United States through human sources by elements of the intelligence community authorized to undertake such collection. . . .”105 The impetus for this addition appears to have been the amended definition of “national intelligence,” which was broadened in scope in the Intelligence Reform and Terrorism Prevention Act. The terms “national intelligence” and “intelligence related to the national security” as originally defined in the National Security Act of 1947 did “not refer to counterintelligence or law enforcement activities conducted by the Federal Bureau of Investigation” except under limited circumstances.106 The scope of those terms was enlarged in 2004 and now refers to:

all intelligence, regardless of the source from which derived and including information gathered within or outside the United States, that (A) pertains, as determined consistent with any guidance issued by the President, to more than one United States Government agency; and (B) that involves (i) threats to the United States, its people, property, or interests; (ii) the development, proliferation, or use of weapons of mass destruction; or (iii) any other matter bearing on United States national or homeland security. 107

Thus, inclusion of the term “outside the United States” then became necessary to preserve the role of the FBI in counterintelligence and domestic collection of intelligence through human sources (by making clear that the CIA does not direct the Bureau’s domestic human intelligence collection activities).108 Furthermore, this provision as revised speaks only to the direction and coordination of human intelligence (as opposed to other forms of intelligence collection) and does not otherwise define what domestic activity by prohibitions of the CIA activity as they were laid out in the National Security Act of 1947. For instance, the House Committee on the Judiciary “supported the continued limitation that the CIA shall not have police, subpoena, or other law enforcement powers” in discussing a proposed intelligence reform bill with identical language to that codified in the Intelligence Reform and Terrorism Prevention Act. H.R. REP. NO. 108-724, pt. 5 (2004) (emphasis added). The Senate Committee on Governmental Affairs expressed a similar sentiment when considering a previous version of the intelligence reform bill also containing identical language: “The bill preserves the existing protections of civil liberties and prescribes that the CIA shall have no police, subpoena or law enforcement powers or internal security functions.” S. REP. NO. 108-359 (2004).

105. IRTPA § 1011 (to be codified at 50 U.S.C. § 403-4a(d)(3)) (emphasis added).
107. IRTPA § 1011 (to be codified at 50 U.S.C. § 401a(5)) (emphasis added).
108. This point is substantiated by the legislative history explaining the addition of an “overseas or outside the United States” caveat in an earlier version of intelligence reform containing similar language. The addition of the caveat was explained in terms of preserving the original prohibitions in the National Security Act of 1947. See H.R. REP. NO. 108-724, pt. 6 (2004); H.R. REP. NO. 108-724, pt. 5 (2004).
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the CIA would be acceptable.

The recent intelligence reform overhaul left unresolved the critical ambiguities that have circulated since the CIA’s inception in 1947. Key terms are repeated and a longstanding question lingers: What exactly are the limits on the CIA to operate domestically or conduct activity approaching law enforcement? If anything, the Intelligence Reform and Terrorism Prevention Act adds further ambiguity to the limits of the CIA mandate. The lack of explicit geographical limitation with respect to the term “intelligence” in the CIA’s mandate to “collect intelligence through human sources and by other appropriate means” is continued unaffected by recent reform.109 Meanwhile, the greatly expanded terms of art “national intelligence” and “intelligence related to the national security” are only qualified in one of their two uses in the CIA mandate. The Act maintains the responsibility of the CIA “to correlate and evaluate intelligence related to the national security and provide appropriate dissemination of such intelligence” but does not add a geographical or functional qualification.110 In other words, the enlarged definition of “intelligence related to the national security” arguably expands the scope of the provision because it includes all intelligence (ostensibly even counterintelligence and intelligence obtained from FBI law enforcement activities) and there are no caveats (e.g. addition of the phrase “outside the United States,” as was inserted in the provision on human intelligence). This further blurs the “handoff” between the FBI and CIA as to responsibility for correlating and disseminating domestically collected foreign intelligence and counterintelligence.

In sum, the legal mandate of the CIA has remained largely unchanged since its inception in 1947. Though the abuses uncovered in the 1970s resulted in the creation of explicit congressional oversight and limitations on CIA intelligence activities involving U.S. citizens, there has been little definitional clarification of the limits of CIA authority. That is to say, the abuses spawned regulation preventing CIA infiltration of domestic groups but clarified little else. It is now widely recognized that the CIA undertakes some activities domestically,111 but the exact nature of those activities is not clearly spelled out, and the frontier delineating where intelligence ends and law enforcement or internal security functions begins remains murky. Part III examines how modern national security threats are further complicating the issue.

109. IRTPA § 1011 (to be codified at 50 U.S.C. § 403-4a(d)(1)). See supra notes 40-42 and accompanying text.
110. IRTPA § 1011 (to be codified at 50 U.S.C. § 403-4a(d)(2)).
111. The view that the Agency is not allowed any domestic functions “has no serious support any longer.” BRECKINRIDGE, supra note 60, at 259.
III. THE CURRENT NATIONAL SECURITY ENVIRONMENT

The meaning of the prohibitions of the National Security Act is even less clear in the modern national security context. Previously, the national security environment was dominated by the context of the Cold War and the specter of Soviet espionage; domestic terrorism did not rank among the top national security concerns. Indeed, in 1980, American Civil Liberties Union attorney Frank Donner decried an alleged domestic terrorist threat as merely a justification for intelligence excesses: "Political terrorism in its modern form—politically motivated exemplary violence, indifference to human life, symbolic targets, the intended creation of overwhelming fear—is not a serious problem in the United States."112 The national security environment that birthed the CIA mandate faded into history with the end of the Cold War and the attacks on the World Trade Center towers and Pentagon in 2001. The prospect of espionage conducted by fellow nation-states in the context of a bipolar world has given way to threats such as terrorism conducted by non-state actors operating both domestically and abroad and pervasive transnational criminal networks. These modern threats challenge both our lexical and jurisdictional distinctions.

Placing the CIA mandate in its proper place in the modern national security environment serves two goals. First, it demonstrates that the modern national security context has changed the usage and meaning of many national security terms and concepts. This makes it even more complicated to understand the boundaries of a poorly defined mandate approaching its sixtieth birthday. Second, the modern national security context—primarily the fight against international terrorism—has caused the U.S. government to reconfigure its national security strategy. This new strategy aspires to create a seamless web of capacity and information by bringing to bear all government resources—including those of intelligence and law enforcement—in a unified approach to counter terrorism and other transnational threats.113 Though laudable and necessary to win the war on terrorism, this new strategy will be less efficient and risks unintended and deleterious consequences to the extent it mixes the tools of intelligence and law enforcement without clarifying the vaguely defined but categorical prohibitions in the CIA mandate.

Section III.A examines how modern threats challenge the traditional


language used in the field of national security. Sections III.B and III.C highlight the melding of the spheres of “intelligence” and “law enforcement,” and “foreign” and “domestic” to further illustrate how the modern national security context places added stress on the language of the CIA mandate and calls into question the compatibility of new CIA roles in the fight against terrorism with its fifty-eight-year-old mandate.

A. The Transformation of the National Security Lexicon

The national security lexicon needs updating. Terms and concepts such as “intelligence” and “law enforcement,” “foreign” and “domestic,” and “foreign intelligence” and “counterintelligence” are losing their clarity of meaning. The meaning of the vague terms of the National Security Act have changed as the fight against terrorism blurs the border between law enforcement and intelligence and breaks down the distinction between the foreign and domestic spheres. The definition of “foreign intelligence” is not nearly as crisp as it once was, nor for that matter is the term “national security.” Even the few terms actually defined in the National Security Act are under stress in the new security environment. For instance, both components of “intelligence” (“foreign intelligence” and “counterintelligence”) as defined in the Act include “international terrorist activities” within their definition.

In a signal that the term “foreign intelligence” may be losing its currency, recent intelligence reform redesignated the “National Foreign Intelligence Program” as simply the “National Intelligence Program.” As mentioned above, the extremely broad definition of the terms “national intelligence” and “intelligence related to national security” further blurs the lines between foreign intelligence, the domestic collection of intelligence including counterintelligence, and law enforcement activities. Even more broadly, the dispute as to whether the struggle against terrorism is properly conceptualized...
as a "war" and the varying definitions of the word "terrorism" itself provide fitting book ends to these challenges to the national security vocabulary. 118

The definitional quagmire of the national security lexicon further complicates the interpretation of the CIA mandate as laid out in 1947. If guidance as to the meaning of the undefined terms in the CIA mandate could be gleaned at least partially from their context and contemporaneous use in 1947, the situation is complicated even further by the changes in context and contemporaneous meaning of those same terms in the post-Cold War, post-September 11 environment. For instance, the meaning of the term "internal security" is even harder to decipher in the modern age; its connotation is inexorably rooted in the Cold War and the term has fallen out of common parlance. 119 It should therefore come as no surprise that the language of the National Security Act is strained to adjust to an entirely different national security environment over half a century later. 120

B. The Breakdown Between Intelligence and Law Enforcement

The strict bifurcation between law enforcement and intelligence activities assumed by the National Security Act no longer exists. The distinction between intelligence and law enforcement activities is growing increasingly hazy as the "long arm" of U.S. extraterritorial statutes reaches ever further abroad and international intelligence issues reach ever closer to home. "Any distinction between the requirements of domestic law enforcement and foreign intelligence gathering are becoming hopelessly blurred in these new world disorders of terrorism and proliferation." 121 Modern national security threats bring the CIA


119. The term "internal security" is historically associated with insurrection, particularly in the context of communism (as in the Internal Security Act of 1950). "Internal security," according to Cash, "is a term that dates back to the 1950s that is very rarely used anymore." Telephone Interview with Steven A. Cash, Chief Counsel & Staff Director, Subcomm. on Terrorism, Technology & Homeland Security of the Senate Comm. on the Judiciary (Dec. 20, 2004). Hence, "there is ambiguity in [use of the term "internal security"] because it is not a commonly used term with a commonly understood meaning." Id.

120. Indeed, the National Security Act of 1947 "did not anticipate" the extensive growth and evolution of the modern intelligence community or the initiation of congressional oversight. Telephone Interview with James W. Zirkle, Associate General Counsel, Central Intelligence Agency (May 11, 2004).

to the edge of the frontier of foreign intelligence and have engaged the Agency in activities that skirt if not enter the realm of law enforcement.

In the context of countering terrorism, there are "bright but dimming lines" between the FBI and CIA.\textsuperscript{122} The struggle against terrorism as well as other transnational threats has brought close cooperation between the CIA and the FBI (as well as other agencies), including combined centers designed to pool resources and enhance the agencies' effectiveness. In short, the fight against terrorism and other transnational threats has dawned an era of co-location, cooperation, and combined resources. In continuing this trend, the Intelligence Reform and Terrorism Prevention Act of 2004 established a National Counterterrorism Center (NCTC),\textsuperscript{123} a National Counter Proliferation Center,\textsuperscript{124} and a Human Smuggling and Trafficking Center,\textsuperscript{125} and also empowered the DNI to establish National Intelligence Centers.\textsuperscript{126} The recent intelligence reform also calls for the establishment of a formal relationship between the intelligence community and the National Infrastructure Simulation and Analysis Center.\textsuperscript{127} Co-location and/or close cooperation of CIA and FBI officials in joint centers on transnational threats raises statutory questions related to law enforcement activities because of the nexus between CIA intelligence and criminal prosecutions.\textsuperscript{128}

The Intelligence Reform and Terrorism Prevention Act of 2004 also supports an Information Sharing Environment (ISE) to promote the sharing of terrorism information throughout the Federal Government.\textsuperscript{129} One of the policy

\textsuperscript{122} Telephone Interview with Rick Cinquegrana, Counsel to the Inspector General, Central Intelligence Agency (May 11, 2004).

\textsuperscript{123} IRTPA § 1021 (to be codified at 50 U.S.C. § 4040). The primary missions of the NCTC are inter alia: (1) "To serve as the primary organization in the United States Government for analyzing and integrating all intelligence possessed or acquired by the United States Government pertaining to terrorism and counterterrorism, excepting intelligence pertaining exclusively to domestic terrorists and domestic counterterrorism," (2) "To conduct strategic operational planning for counterterrorism activities, integrating all instruments of national power, including diplomatic, financial, military, intelligence, homeland security, and law enforcement activities within and among agencies." IRTPA § 1021 (to be codified at 50 U.S.C. § 4040(d)(1)-(2)) (emphasis added). The NCTC will subsume the Terrorist Threat Integration Center (TTIC), a counterterrorism center created in 2003. IRTPA § 1092. Establishment of an NCTC was recommended by the 9/11 Commission. See 9/11 COMMISSION REPORT, supra note 15, at 403-406.

\textsuperscript{124} IRTPA § 1022 (to be codified at 50 U.S.C. § 4040-1). This provision includes a national security waiver at the president's discretion. \textit{Id}.

\textsuperscript{125} The Human Smuggling and Trafficking Center shall, inter alia, "ensure cooperation among all relevant policy, law enforcement, diplomatic, and intelligence agencies . . . to improve effectiveness and to convert all information" into intelligence that can be used to combat terrorist travel, migrant smuggling, and the trafficking of persons. IRTPA § 7202 (to be codified at 8 U.S.C. § 1777).

\textsuperscript{126} IRTPA § 1023 (to be codified at 50 U.S.C. § 4040-2).

\textsuperscript{127} IRTPA § 8101.

\textsuperscript{128} The lateral sharing of information by the CIA to law enforcement agencies for use in criminal prosecutions "sounds a lot like law enforcement powers." Telephone Interview with Jeffrey H. Smith, supra note 24.

\textsuperscript{129} IRTPA § 1016 (to be codified at 6 U.S.C. § 485). The legislative creation of an ISE continued previous initiatives to improve the sharing of such information between government agencies. See Exec. Order No. 13,356, 69 Fed. Reg. 53,599 (Aug. 27, 2004); Homeland Security Information Sharing Act,
goals of the ISE is to "address and facilitate information sharing between and among departments and agencies of the intelligence community, the Department of Defense, the homeland security community and the law enforcement community." The security of sources and methods of intelligence is not mentioned as an explicit goal of the ISE, though the ISE’s stated attributes are to include protections of privacy and civil liberties.

The linkage of intelligence and law enforcement was explicitly recognized by Congress in 1996 with a statutory addition to the National Security Act of 1947 directly pertaining to the collection of intelligence for law enforcement purposes. The revision, codified in 50 U.S.C. § 403-5a, provides that "elements of the intelligence community may, upon the request of a United States law enforcement agency, collect information outside the United States about individuals who are not United States persons." Such information may be collected "notwithstanding that the law enforcement agency intends to use the information collected for purposes of a law enforcement investigation or counterintelligence investigation." The Senate report noted that the “CIA and the [National Security Agency] currently interpret their legal authorities as permitting them to engage in intelligence collection only for a ‘foreign intelligence’ purpose” and noted the Aspin-Brown Commission’s conclusion “that the Intelligence Community may be taking too restrictive a view regarding whether intelligence assets can be tasked by law enforcement agencies to collect information overseas about non-United States persons.”

The tearing down of “the wall” between intelligence and law enforcement in the wake of September 11 allows for much greater sharing of information between the two communities. The Uniting and Strengthening America by
Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) amended the National Security Act to direct law enforcement agencies to disclose to the DCI (now the DNI) foreign intelligence acquired in the course of a criminal investigation pursuant to guidelines and with some possible exceptions.\textsuperscript{137} Rule 6 of the Federal Rules of Criminal Procedure was amended to allow grand jury information involving foreign intelligence or counterintelligence to be shared with “any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving the information in the performance of that official’s duties.”\textsuperscript{138} The USA PATRIOT Act also made it lawful for foreign intelligence and counterintelligence to be shared more broadly among federal officials.\textsuperscript{139} Additionally, the USA PATRIOT Act allows federal officers conducting electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act (FISA)\textsuperscript{140} greater consultation and coordination with federal law enforcement officers.\textsuperscript{141} “The matters to be consulted upon must pertain to terrorist threats, but there is opportunity for definitional creep as the pressure for preventive action in this area of concern intensifies.”\textsuperscript{142}


\textsuperscript{138} USA PATRIOT Act § 203(a). Rule 6 further allows the sharing of grand jury information involving “a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent.” FED. R. CRIM. P. 6(e)(3)(D).

\textsuperscript{139} USA PATRIOT Act § 203(d) (codified as amended at 50 U.S.C. § 403-5d). As passed in the USA PATRIOT Act, this provision is due to sunset on December 31, 2005. USA PATRIOT Act § 224. The Homeland Security Act extended the reach of that provision to allow information obtained as part of a criminal investigation to be more easily shared with federal, state, local, and foreign government officials. Homeland Security Act of 2002 § 897 (codified at 50 U.S.C. § 403-5d (West Supp. 2003)).


\textsuperscript{141} USA PATRIOT Act § 504 (codified as amended at 18 U.S.C. §§ 1806, 1825 (West Supp. 2003)).

\textsuperscript{142} Hitz, supra note 62, at 773.
The law enforcement prohibition in the National Security Act may make part of the destruction of “the wall” somewhat theoretical, despite the expansion of coordination and information sharing between the FBI and CIA. According to Stewart Baker, former General Counsel at the National Security Agency, the CIA’s dependence on law enforcement agencies for domestic activities “may still be having an effect on what information they routinely get access to, although that seems to be a controversial question because any suggestion that there is still a ‘wall’ is not considered politically correct.”

Baker is “not totally convinced” that “the wall” is gone because it is difficult if not impossible to work hand-in-glove with law enforcement without getting into some issues that touch on law enforcement areas and would therefore be prohibited by the National Security Act. Nevertheless, the changes wrought by the USA PATRIOT Act and subsequent legislation have received harsh criticism from civil liberties groups and others who believe the USA PATRIOT Act “puts the Central Intelligence Agency back in the business of spying on Americans” and that abuses will result.

C. The Artificial Distinction Between “Foreign” and “Domestic”

Modern transnational threats are placing great stress on the jurisdictional lines drawn between intelligence and law enforcement agencies. More to the point, the foreign/domestic divide is oftentimes a distinction without a difference in the fight against terrorism and other transboundary threats. This causes ambiguities in the “handoff” and, in some areas, the division of labor between the FBI and CIA in both the domestic and foreign realms.

It is conventional wisdom that previous distinctions between “foreign” and “domestic” are archaic and counterproductive when addressing modern national security threats. This creates overlap between the interests of foreign

143. Telephone Interview with Stewart A. Baker, former General Counsel, National Security Agency (May 10, 2004).
144. Id.
146. See James X. Dempsey, Civil Liberties in a Time of Crisis, 29 HUM. RTS. 8, 9-10 (2002) (arguing the USA PATRIOT Act’s changes give the CIA “the benefit of the grand jury’s powers with none of the protections of the criminal justice system”).
147. See, e.g., John Deutch, Arnold Kanter, & Brent Scowcroft, Strengthening the National Security Interagency Process, in KEEPING THE EDGE 265, 268 (Ashton B. Carter and John P. White eds., 2001) (explaining “there is no longer a clear distinction between foreign and domestic matters; an example is combating terrorist groups, which have no national identity and may operate both in the United States and abroad, and may include members that are U.S. citizens”); COUNCIL ON FOREIGN RELATIONS, MAKING INTELLIGENCE SMARTER: THE FUTURE OF US INTELLIGENCE, REPORT OF AN INDEPENDENT TASK FORCE (1996), available at http://www.fas.org/irp/cfr.html (last visited Mar. 8, 2005) (explaining “[t]he line between domestic and foreign issues is blurred if it exists at all” and that the logic and evidence leading to such a conclusion “undermine the notion that only the CIA operates abroad (and only abroad) while only the FBI operates domestically (and only domestically)”).
intelligence collection and domestic law enforcement. "The principal targets of intelligence concern are no longer just political and economic developments abroad that impinge on American national interests, but terrorism, the proliferation of weapons of mass destruction, and drug-trafficking, all of which have domestic law enforcement ramifications." There is also some tension in the cooperation between the CIA and the intelligence arm of the FBI. The Bureau’s efforts to reexamine its traditional division of labor with the CIA regarding management of intelligence sources abroad and foreign intelligence-gathering within the United States have been a source of friction between the two agencies.

Over time, the U.S. has enacted “long arm” statutes that extend the FBI’s investigative authority overseas and give the FBI worldwide jurisdiction over terrorist incidents directed at U.S. interests. The FBI’s presence abroad has steadily increased as FBI personnel work in U.S. embassies, interact and cooperate directly with foreign law enforcement agencies, and often take lead roles in overseas investigations of terrorist activities directed against United States interests. FBI activity has increased outward while there has been no corresponding shift of CIA responsibility inward. That is to say, the rhetorical breakdown between the foreign and domestic spheres is recognized as a two-way street but for the most part only has traffic heading in one direction.

Problems in the intelligence mission of the FBI received great scrutiny following September 11, and numerous policy proposals were floated,

148. Hitz, supra note 62, at 771-72. Technological advancements in intelligence collection techniques have exacerbated this phenomenon, as both the CIA and FBI can intercept both foreign and domestic communications, thereby further “blurring the lines between that which is clearly domestic and foreign.” Id. at 771.


152. See, e.g., Markle Foundation Task Force, Protecting America’s Freedom in the Information Age 21 (Oct. 7, 2002) (concluding that “the FBI has no effective process for providing intelligence on terrorism to policymakers or others outside the law enforcement community”); 9/11 Commission Report, supra note 15, at 423-27 (explaining “the concern about the FBI is that it has long favored its criminal justice mission over its national security mission” and making recommendations as to how to improve the Bureau).
including the creation of a domestic intelligence agency that would entirely subsume the FBI's intelligence functions. Ultimately, the Intelligence Reform and Terrorism Prevention Act chose to continue the basic jurisdictional breakdown between the nation's intelligence community (including the existing domestic/foreign division of labor between the CIA and FBI) while seeking to improve the FBI's intelligence capabilities and, more broadly, information sharing among intelligence and law enforcement agencies.

Continuation of the present course will mean closer cooperation between the CIA and FBI law enforcement officials abroad on issues of interest to both the intelligence and law enforcement communities and increased sharing of information between CIA and FBI intelligence and law enforcement officials at home. The closer this cooperation becomes, the greater the risk of running afoul of the categorical prohibitions of CIA activity laid out in the National Security Act. The modern national security environment—and the U.S. strategy as a result—call for an overlap and flexibility of approach and a level of cooperation that is impeded by the CIA mandate. For that reason, the contours of CIA activity domestically and internationally—be they in cooperation with FBI officials abroad that approach law enforcement activities or dissemination of intelligence on terrorist cells operating in the United States that could approach internal security or law enforcement functions—should be based on an explicit national conversation rather than the statutory legacy of a bygone era.

IV. THE CASE FOR STATUTORY CLARIFICATION

Neither the reforms instituted after the intelligence transgressions in the Cold War nor the Intelligence Reform and Terrorism Prevention Act of 2004 fully addressed the boundaries of CIA authority. Ambiguities have persisted for far too long, and the struggle against terrorism and other transnational threats provides even greater impetus to clarify the CIA charter. This Part examines in closer detail the risks inherent in ambiguity of mandate and proposes draft statutory language to clarify the CIA charter.

A. The Risks of Swimming in Muddy Waters

The demise of "the wall," an aggressive counterterrorism policy, increased coordination between intelligence and law enforcement, and an already blurry line between where one leaves off and the other begins may be setting the stage for violations of the law enforcement prohibition in the CIA mandate. At the


154. See IRTPA Title II.

155. See supra note 113 and accompanying text; supra Section III.B.
same time, thorough review of the line between intelligence and law enforcement is necessary in order to ensure the proper balance between protection of state secrets and due process in criminal proceedings.

1. **Running Afoul of the Law Enforcement Prohibition**

Various CIA activities could, depending on the circumstances, draw the Agency into the proscribed realm of law enforcement. The overlap in interests and the nature of international threats oftentimes lead to overlap in agency jurisdictions between the CIA and FBI as well as other agencies. The CIA and FBI may be interested in the same person or group for intelligence purposes or for law enforcement purposes respectively. In such cases, the unclear boundaries of the law enforcement prohibition require ad hoc decision-making on the part of the Agency.

In general, the CIA has taken the line that it can "cooperate with and provide assistance to law enforcement as long as the Agency does not conduct the activity itself." According to James Zirkle, Associate General Counsel at the Central Intelligence Agency, the CIA has been "very scrupulous" in its interpretation of the law enforcement prohibition and has avoided having to "finely tune" exactly where that line is drawn.

The closest thing approaching a bright line test to date is the issue of tasking (federal prosecutors directing the CIA to gather evidence on specific

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156. See supra Section III.B. To add to the complexity, both the law enforcement and intelligence divisions of the FBI may be interested in the same person for both law enforcement and intelligence reasons. Moreover, the CIA and the intelligence arm of the FBI may be interested in the same individuals or groups for intelligence purposes. See supra note 149 and accompanying text.

157. In the 1980s, CIA officials in the CIA Counterterrorism Center often relied on a classified memorandum authored by Kenneth Bass (known as "the Ken Bass memo") that "set out the precepts of the test for deciding whether or not an activity violated the law enforcement proviso." Telephone Interview with Robert O. Davis, former Deputy Counsel, Office of Intelligence Policy and Review, Department of Justice (Nov. 12, 2004). The first step required by the memo was "that the activity take place outside of the United States and that the activity be coordinated with the FBI so that it did not infringe on their enforcement activities outside of the U.S." Id. The second requirement was whether the proposed activity "was otherwise within the charter of the Agency" or, alternatively stated, whether the CIA had its "own independent reason for doing this." Id.

158. Telephone Interview with James W. Zirkle, supra note 120.

159. Telephone Interview with James W. Zirkle, supra note 38. Those conversant with CIA practice regarding the law enforcement prohibition frequently define certain activities, such as making an arrest, as clear violations of the National Security Act. The line seems less clear for various other activities that seem to approach police and law enforcement powers. "Traditionally, 'law enforcement powers' has meant the ability to execute a search warrant, to make an arrest, and those kinds of traditional law enforcement activities that are integral steps in the prosecution of criminal activity." Telephone Interview with George W. Clarke, supra note 42. Activities that involve "arrests, searches, seizures, [and] monitoring of purely domestic groups would cross the line" into prohibited law enforcement activities. Id. Cash was more categorical, opining that, in terms of its usage in the National Security Act, "we do not have a great idea of what law enforcement means." Telephone Interview with Steven A. Cash, supra note 119. With respect to domestic electronic surveillance, the regime and boundaries for such activity are much more clearly defined. See Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783, (codified as amended at 50 U.S.C. § 1801 et seq. (West Supp. 2003)); United States v. Truong Dinh Hung, 629 F.2d 908, 915-16 (4th Cir. 1980).
individuals or groups to build a criminal case). Tasking would clearly represent involvement in law enforcement and the CIA is reluctant to take operational direction from law enforcement agencies. However, as former CIA Inspector General Fred Hitz explained: “I think we have resisted [tasking] to date but we are a stone’s throw away from it now.”\(^1\)\(^6\)\(^0\)\(^1\)\(^6\)\(^1\)\(^6\)\(^2\)\(^6\)\(^3\)\(^6\)\(^4\)\(^6\)\(^5\)\(^6\)\(^6\)\(^7\) Aside from direct tasking, CIA and FBI operations to acquire evidence admissible in criminal trials also raise questions as to whether such activities constitute “law enforcement functions.”\(^1\)\(^6\)\(^8\)

CIA involvement in the apprehension of persons sought by law enforcement authorities for purposes of prosecution can raise a host of thorny issues. Though the exact nature of CIA participation is not often made public, CIA planning and participation in raids and other operations designed at least partly to bring suspects to justice in U.S. courts inevitably approaches law enforcement activities. \(^6\)\(^3\) This is particularly true in the case of “irregular renditions.”\(^6\)\(^4\) “Renderings” in the context of political terrorism date back to

\(^{160}\) A CIA letter quoted by the Federal Circuit in 1989 explained that, due to the law enforcement prohibition of the National Security Act, “Agency employees are not tasked with responsibilities relating to enforcement of U.S. laws or the apprehension or detention of persons suspected or convicted of offenses against the criminal laws of the United States.” Carew v. Office of Personnel Management, 878 F.2d 366, 368 (Fed. Cir. 1989).

\(^{161}\) Interview with Frederick P. Hitz, supra note 64.

\(^{162}\) Joint FBI and CIA counterterrorism operations to recover evidence for use in criminal trials have been ongoing for some time. See Counter-Terrorism Efforts and the Events Surrounding the Terrorist Attacks of September 11, 2001 Before the Joint Hearing of the House Permanent Select Comm. on Intelligence and the Senate Select Comm. on Intelligence, 107th Cong. (2002) (statement of Louis J. Freeh, former Director, Federal Bureau of Intelligence), 2002 WL 31266173 (explaining “[a]s these Committees have known for several years, the FBI and the CIA have carried out joint operations around the world to disrupt, exploit and recover evidence on Al Qaeda operatives who have targeted the United States,” and such operations were “in part designed to obtain admissible evidence”).

\(^{163}\) See Best, Intelligence and Law Enforcement, supra note 121 (“The [Congressional Research Service] report notes the employment of covert actions by intelligence agencies in certain law enforcement efforts”); and Dir. of Cent. Intelligence, Support to the War on Terrorism and Homeland Security, in THE 2002 ANNUAL REPORT OF THE UNITED STATES INTELLIGENCE COMMUNITY (Jan. 2003), available at http://www.cia.gov/cia/reports/Ann_Rpt_2002.swtandhas.html (“CIA, with FBI and the Department of Defense (DoD), devised a campaign of coordinated raids on several al-Qa’ida-affiliated nongovernmental organizations (NGOs) that led to the indictment and arrest of at least one group leader.”).

\(^{164}\) “Irregular renditions . . . occur outside the parameters of extradition treaties,” often as a result of “frustration at either the pace of the extradition process or the unwillingness of a country with whom the United States has a valid extradition treaty to render an individual to the United States to face trial.” COUNTERTERRORISM THREAT ASSESSMENT AND WARNING UNIT NAT’L SEC. DIV., FED. BUREAU OF INVESTIGATION, TERRORISM IN THE UNITED STATES 1997, at 15 (1997); see also RICHARD A. CLARKE, AGAINST ALL ENEMIES: INSIDE AMERICA’S WAR ON TERROR 143 (2004) (“Snatches, or more properly ‘extraordinary renditions,’ were operations to apprehend terrorists abroad, usually without the knowledge of and almost always without public acknowledgment of the host government.”). One well-known example involves the apprehension of Fawaz Yunis, a Lebanese citizen brought to the U.S. to stand trial for air piracy, conspiracy, and hostage taking. According to the Court of Appeals for the District of Columbia, “[i]mmediately after the hijacking, several United States agencies, led by the Federal Bureau of Investigation, sought to identify, locate and capture the hijackers.” U.S. v. Yunis, 867 F.2d 617, 618 (D.C. Cir. 1989). Close cooperation between the CIA and FBI also occurred in the multi-year search for Mir Aimal Kasi, who was apprehended in Pakistan, brought to the U.S., and convicted of capital murder and related offenses in connection with the shooting of CIA employees. Kasi v.
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the 1980s and the dividing line was essentially determined to be CIA officers would not be directly involved in the physical apprehension of the suspect or transport of the suspect to the United States.\textsuperscript{165} However, according to Richard Clarke, former National Coordinator for Security, Infrastructure Protection, and Counterterrorism, "[s]ometimes FBI arrest teams, sometimes CIA personnel, had been regularly dragging terrorists back to stand trial in the United States or flying them to incarceration in other countries."\textsuperscript{166} The division of labor in such operations could raise hackles in the face of the murky law enforcement proviso. In a similar vein, CIA participation in interdictions on the high seas can also be problematic.\textsuperscript{167}

2. \textit{State Secrets and Due Process}

The ever-closer relationship between intelligence and law enforcement poses problems in protecting sources and methods of intelligence information. Specifically, close cooperation between intelligence and law enforcement agencies can expose intelligence information to \textit{Brady} requests in criminal trials.\textsuperscript{168} According to Baker, "[t]here will be surprising consequences in sources and methods and attacks on legality of intelligence agency conduct and efforts to use \textit{Brady} to get inquiries into intelligence operations on behalf of terrorist suspects. Those are not solved yet."\textsuperscript{169} The boundaries of what governmental information may or may not be considered exculpatory are complicated by the unique nature of intelligence products. Baker explains:

The future relations [between law enforcement and intelligence agencies] could be jeopardized by the way criminal defense lawyers treat analytical reports in the hopes that alternative theories for who committed the terrorist act could be identified and, since analytical reports are often a bit speculative or include stray bits of information that are later decided to not be part of the story, it would not be

\begin{footnotesize}
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\item[165.] Interview with Frederick P. Hitz, former Inspector General, Central Intelligence Agency, in Princeton, N.J. (Apr. 7, 2004).
\item[166.] CLARKE, supra note 164, at 143.
\item[167.] The CIA "has cooperated in interdictions on the high seas—that is a law enforcement function." Interview with Frederick P. Hitz, supra note 165.
\item[168.] The Supreme Court has held that prosecutors cannot withhold from a criminal defendant information that is favorable to the defendant and is material to guilt or punishment. Brady v. Maryland, 373 U.S. 83 (1963). The "Jencks Act" and the Federal Rules of Criminal Procedure provide additional means of discovery. \textit{See} 18 U.S.C. § 3500 (2000); \textit{FED. R. CRIM. P.} 16.
\item[169.] Telephone Interview with Stewart A. Baker, supra note 143. \textit{See also} Mark D. Villaverde, \textit{Note}, \textit{Structuring the Prosecutor's Duty to Search the Intelligence Community for Brady Material}, 88 \textit{CORNELL L. REV.} 1471, 1475 (2003) ("Despite its necessity, greater cooperation between law enforcement and the intelligence community may undermine the government's ability to pursue prosecution referrals of international terrorists because of the threat that such prosecutions pose to the disclosure of classified information."). \textit{See generally} Fredman, supra note 9, (discussing issues of discovery and \textit{Brady} material in the time period prior to the legislative changes made in the wake of September 11).
\end{enumerate}
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hard to find exculpatory information in the reports.170

No statute addresses the degree to which intelligence community files may be subject to a defendant’s right to discovery or a prosecutor’s duty to search.171

The government “can argue that it is not required to search all intelligence agency files for any trace of such information unless the agency has ‘aligned’ itself with the Department of Justice during the criminal investigation.”172 In practice, however, alignment is often accepted as “a cost of doing business.”173

According to Jonathan Fredman, Associate General Counsel at the Central Intelligence Agency, the importance of the counterterrorism mission leads the CIA to share its information with law enforcement and simply to “deal with discovery requests as they come about.”174 Fredman cautions, though, that as reflected in the United States Attorneys’ Manual, the conduct of discovery searches is not “cost-free.”175 The opportunity cost of discovery requests means resources are diverted from ongoing operations in order to locate and review documents for possible production. Many times, because of their specific expertise the only persons who can conduct those searches are the very same persons who otherwise would be conducting substantive intelligence operations.176 “Where warranted by Brady, the Jencks Act, or Rule 16, of course, these costs of compliance are legitimate; but the conduct of unnecessary searches in response to a litigant’s ‘fishing expedition’ diverts time and effort from oft-times critical national security operations.”177

Herein lies the critical need to ensure due process while also respecting the resource constraints of the intelligence community.

Use of intelligence information in judicial proceedings “may compromise the security of the information itself . . . as well as the sources and methods by

170. Telephone Interview with Stewart A. Baker, supra note 143. For additional background on the differences in standards and content of information between the intelligence and law enforcement communities, see Treverton, supra note 114, at 63.

171. Fredman, supra note 9, at 338-39.

172. Ronald J. Sievert, War on Terrorism or Global Law Enforcement Operation? 78 NOTRE DAME L. REV. 307, 339 (2003). See also, Fredman, supra note 9, at 347, 354-55, 367-68; Richard, supra note 23, at 12-13 (“This loss of control presents a tremendous threat to the CIA and makes CIA officials leery about supporting a tasking policy that encourages greater cooperation with the Department of Justice and exposes them to being ‘aligned’ with the prosecution.”).

173. Telephone Interview with Jonathan M. Fredman, Associate General Counsel, Central Intelligence Agency (Nov. 30, 2004).

174. Id. Fredman predicts “[w]e may start to see this same congruence in the issue of proliferation” as well. Id.

175. E-mail from Jonathan M. Fredman, Associate General Counsel, Central Intelligence Agency (Feb. 23, 2005, 17:03:21 EST) (on file with author). See generally UNITED STATES DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL, TITLE 9 CRIMINAL DIV., ch. 90.210 (1998), available at http://www.usdoj.gov/usaio/eousa/foia_reading_room/usam/title9/90merm.html#9-90.210 (describing Department of Justice policy as to contacts with the intelligence community pertaining to criminal investigations or prosecutions).

176. E-mail from Jonathan M. Fredman, supra note 175.

177. Id.
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which it was collected."\textsuperscript{178} Disclosure of sources and methods can cause the loss of secret intelligence sources and endanger national security.\textsuperscript{179} The Classified Information Procedures Act (CIPA)\textsuperscript{180} seeks to protect such information from public disclosure, but the use of CIPA "is not foolproof."\textsuperscript{181}

It is also possible that, absent sufficient protections for classified information, the prospect of future \textit{Brady} requests could change the manner in which intelligence products are presented and thereby reduce their utility for policymakers. This could occur if CIA analysts began to present information with an eye to preventing the disclosure of sources and methods in response to possible \textit{Brady} requests rather than with the goal of providing policymakers all of the relevant known information. At the same time, withholding relevant information during criminal proceedings could violate due process and result in lost criminal convictions of suspected terrorists.

The interrogation of detainees has also highlighted the importance of further examining cooperation between intelligence and law enforcement. The primary goal of military and CIA interrogators is to extract useful intelligence information. In contrast, FBI agents participating in interrogations abroad seek evidence that is admissible in U.S. courts, which raises questions as to the application of the Fifth Amendment and \textit{Miranda} rights.\textsuperscript{182} According to press reports, senior FBI officials directed the Bureau's agents to "stay out of many of the interviews of the high-level detainees" in Iraq for fear that "the interrogation techniques, which would be prohibited in criminal cases, could compromise their agents in future criminal cases..."\textsuperscript{183} This tension also

\textsuperscript{178} DYCUS ET AL., supra note 38, at 870. The security of information and sources and methods can be compromised "when information about a defendant or her conduct was obtained from classified sources or methods, where the charged conduct or a related activity is itself secret, or where contextual evidence involving the defendant's state of mind (and, sometimes, relationship to our intelligence agencies) is classified." \textit{Id.} See also Heymann, supra note 121, at 11-12 (discussing the sensitivities of "extensive access of judges and short-term prosecutors to highly sensitive national security information").

\textsuperscript{179} See Heymann, supra note 121, at 10 ("Gathering information for law enforcement by using expensive intelligence capacities that have been built for other purposes has a very small \textit{marginal} cost in dollars or political fallout. Its real cost is in risk to the secrecy about the sources and methods on which we rely for protection against dangerous surprises by hostile nations.").


\textsuperscript{181} Sievert, supra note 172, at 340.

\textsuperscript{182} See Sievert, supra note 172, at 317-20, 327 (explaining that "application of the Fifth Amendment to extraterritorial interrogation of terrorist suspects is highly problematic for those interested in combating terrorism in the courts" because "it is far from certain" that government arguments justifying statements by non-Mirandized suspects will be accepted in court").

arose in the capture and interrogation of American Taliban soldier John Walker Lindh and high-ranking al Qaeda member Abu Zubaydah. Furthermore, the CIA has an institutional interest in preventing its agents from interrogating suspects to obtain evidence for use in court because such activity could destroy the "cover" of CIA agents called to testify as witnesses.

The murky line between intelligence and law enforcement may bring harmful consequences if left unresolved. Criminal convictions could be lost if a court disliked the involvement of the CIA in the apprehension of the suspect. An alternative scenario, though by no means any more desirable, is that the current climate of the consensus on fighting terrorism could cause a court to creatively work around legal restrictions pertaining to the evidence or methods in question in order to prevent having to release an accused terrorist. In that case, the result may be "bad law" in which strained interpretations of the law enforcement prohibition open the door to future abuses. Yet another possible risk would be an increased reliance on plea bargains or selective prosecution due to concerns regarding CIA involvement in the case (in the apprehension of the suspect or the gathering of evidence) or because of fears of disclosure of sources and methods of intelligence information. Clarification of the CIA mandate and the "handoff" with law enforcement, as well as a greater focus on the protection of sources and methods of intelligence, would help mitigate these risks.

B. The War on Terror

The exigencies of the fight against terrorism clearly demonstrate two sides of the need for a clearer CIA mandate: (1) to prevent violations of civil liberties such as those that occurred in the Cold War and (2) to maximize the efficiency of cooperation between law enforcement and intelligence. History indicates that abuses can arise when ambiguously defined mandates are reinterpreted during times of extreme national security crisis. Aside from the potential for abuse, the war on terrorism and the U.S. national security strategy demand that the intelligence and law enforcement communities work hand-in-glove. An unclear CIA mandate is not conducive to this.

A handful of commissions and thousands of pages of reports and recommendations made clear that zealous pursuit of a national security mission must be constrained by an adequate statutory infrastructure and equally rigorous oversight. The history of the Cold War illustrates that lax oversight and domestic fear can create a culture of tolerance for intelligence abuses. The fight to defeat communism was seen as a zero-sum struggle paramount to all other concerns, including the abuse of civil liberties or the "niceties" of

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184. See Sievert, supra note 172, at 317.
185. Telephone Interview with James W. Zirkle, supra note 38.
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statutory limitations, and the CIA was encouraged in this direction by leaders at the highest levels of political authority.  

Terrorism is a national security threat that has united the nation and could create the same climate of tolerance of abuse that prevailed during the Cold War. The U.S. government is now singularly focused on domestic security and the present day fight against terrorism is portrayed as and perceived by policymakers to be an all-out, multi-front struggle that “knows no borders.” This struggle is, as the title of this Note suggests, commonly thought of and described as a “war.” In today’s fight against terror, ambiguous prohibitions on CIA activity could facilitate future civil liberties abuses. In terms of the limits on CIA authority, the legal restraints are the same as before September 11, but they “may have been reinterpreted.”

On the other extreme, ambiguity in the boundaries of the law enforcement prohibition could hamper the U.S. response to terrorism and other transboundary national security threats by deterring cooperation between law enforcement and intelligence. According to the IC21 Commission, one of the results of the intelligence scandals of the 1970s “was that the two communities tended to further distance themselves from one another over concern about further inadvertent missteps.” Likewise, the Aspin-Brown Commission concluded that “some clarification of existing law would be helpful” in fostering improved cooperation between intelligence and law enforcement agencies because the “[l]ack of clear legal authorities has resulted in confusion—inside individual intelligence agencies, between different intelligence agencies, and within the law enforcement community—regarding what activities intelligence agencies can conduct to support law enforcement.” These concerns are all the more pressing when viewed in light of jurisdictional questions and definitional problems caused by the nature of

186. See supra Section II.D.

187. In discussing such disturbing hypotheticals, Judge Prettyman’s remarks in the context of the Fourth Amendment appear particularly apposite: “[W]e are dealing with doctrines and not with presumable taste and sense of individual officials. Maybe none of these examples would ever occur. But the question before us is not whether they would happen but whether they legally could.” District of Columbia v. Little, 178 F.2d 13, 18-19 (D.C. Cir. 1949), aff’d on other grounds, 339 U.S. 1 (1950).

188. The Church Committee noted this natural tendency of domestic intelligence collection: “In time of crisis, the Government will exercise its power to conduct domestic intelligence activities to the fullest extent. The distinction between legal dissent and criminal conduct is easily forgotten.” 2 CHURCH COMMITTEE, supra note 51, at 289. As an illustration of the dangers of ambiguous statutory language, recall the Church Committee’s finding that the CIA “interpreted the internal security prohibition narrowly to exclude investigations of domestic activities of American groups for the purpose of determining foreign associations.” 1 CHURCH COMMITTEE, supra note 40, at 138. See supra note 66 and accompanying text. Similar issues can present themselves in investigating and ascertaining intelligence on domestic groups suspected of foreign terrorist connections. Indeed, an important facet of the struggle against terrorism is ferreting out front organizations for terrorist groups (such as certain ostensibly charitable organizations) operating in the United States.

189. Telephone Interview with Stewart A. Baker, supra note 143.

190. IC21 STAFF STUDY, supra note 150, at 272.

191. ASPIN-BROWN COMMISSION, supra note 135, at 41.
terrorism and other international threats.\textsuperscript{192}

Hence, preventing abuse and lost convictions is only half the story; clarifying the CIA mandate with respect to domestic and law enforcement type activities can capture advantages such as improved coordination with law enforcement agencies (particularly in avoiding an overly cautious or "conservative" approach on the part of the CIA to activities that approach law enforcement), and greater efficiency in the fight against terrorism and other transnational threats. Additionally, clarification of the CIA mandate could bolster public confidence in the mission and activities of the Agency and might help allay concerns on the part of civil libertarians about post-September 11 intelligence reforms.\textsuperscript{193} According to Paul Pillar of the National Intelligence Council, "among the most effective weapons the United States has in fighting terrorism is the long-term strength of its intelligence agencies, based in part on their integrity and the trust they have with the American people."\textsuperscript{194} Finally, the sensitivities inherent in intelligence collection in a democracy argue in favor of clear and transparent governing authorities for their own sake.

\textbf{C. Alternatives to and Disadvantages of Statutory Amendment}

A review of the alternatives to statutory clarification of the CIA mandate reveals that, despite its possible disadvantages, formal amendment of the CIA charter represents the best policy solution to the dilemmas discussed in this Note. This Section discusses the primary alternatives to legislative action: reliance on the courts, congressional oversight, and use of presidential guidance documents. This Section then examines the possible drawbacks to formal amendment of the CIA mandate.

1. \textit{Courts}

Courts are not the most effective means by which to prevent abuses from the intelligence community. Case law demonstrates a strong reluctance by courts to define the terms of the CIA mandate or otherwise delineate the boundaries of the Agency's authority.\textsuperscript{195} More disturbing is the reluctance of

\textsuperscript{192} See supra Part III.
\textsuperscript{193} See ROCKEFELLER COMMISSION, supra note 27, at 12 ("Greater public awareness of the limits of the CIA's domestic authority would do much to reassure the American people."). This argument takes on additional weight when the CIA is viewed in the context of the unique U.S. political culture with respect to intelligence. See JEFFREYS-JONES, supra note 8, at 249 ("American antipathy to state espionage, secrecy, and intrusiveness had historical roots and continues to the present day."). The CIA has a special prominence within that culture because, although it is only one of many components of the intelligence community, "for most Americans, the CIA is U.S. intelligence." ASPIN-BROWN COMMISSION, supra note 135, at 61.
\textsuperscript{195} See supra notes 30-39 and accompanying text.
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courts to enter the fray even in the wake of widespread revelations of intelligence abuses. Courts handed down the bulk of case law addressing CIA authority in the late 1970s, a time in which the pendulum had swung far in the direction of outrage and disgust with the intelligence community as a whole. Yet courts declined the opportunity to severely castigate the CIA—let alone clarify the Agency’s mandate—even in the face of painstakingly documented illegal and questionable activity by the Agency. In Birnbaum, the Second Circuit upheld the district court’s award of $1,000 in compensatory damages to each plaintiff whose mail the CIA had unlawfully read but stated that it could not “share entirely the [m]oral concern of the District Court over these activities, for the security of the nation was said to be involved. We assume that the CIA officials meant well by their country.”

There is little reason to believe that courts, after refusing to clarify the CIA mandate in a time of widespread opprobrium of intelligence activities, would now take up the task of charting the limits of CIA authority. If anything, judicial deference to the executive branch on this subject would likely be higher now than in the atmosphere of the 1970s given the relatively stronger support for the Agency and its mission in the war on terrorism. Even assuming judicial will to address the CIA mandate, the nature of judicial action provides substantial impediments to doing so. Constitutional and prudential roadblocks to judicial relief are exacerbated by the absence of widely available public information of intelligence abuses such as that generated by the investigatory commissions of the 1970s. Oftentimes the secret nature of intelligence collection can prevent abuses from becoming known to potential plaintiffs who might then be able to challenge certain intelligence collection techniques or activities in court. Furthermore, cases would likely come in a time of crisis, and a decision may strike the wrong balance or be limited to specific factual circumstances. A reasoned public and legislative discussion could take a broader view,
would not be limited by specific sets of facts, and could better balance the competing priorities involved in the CIA mandate (e.g., cooperation between government agencies, the rights of criminal defendants, protection of civil liberties, etc.). If anything, a clearer charter would, at least to some degree, better facilitate the ability of the courts to serve as a check on intelligence activities. Finally, reliance on courts to define the CIA mandate maintains the ambiguity of the status quo in the interim and therefore prevents greater efficiency in interagency cooperation in the fight against terrorism.

2. **Congressional Oversight**

The 9/11 Commission minced no words in expressing its opinion: “So long as oversight is governed by current congressional rules and resolutions, we believe the American people will not get the security they want and need.”

The 9/11 Commission was highly critical of the current congressional oversight structure and made reform of that structure a central recommendation in its report. Yet that recommendation fell upon deaf ears, and the Intelligence Reform and Terrorism Prevention Act of 2004 did not overhaul the structure of congressional oversight of the intelligence community. Though the notable absence of oversight reform has been roundly criticized, the 9/11 Commission recommendations appear to have little traction in the current Congress.

Dramatic improvement of the congressional oversight structure, though clearly in order, would still be incomplete without statutory clarification of the CIA mandate because both are necessary to prevent abuses effectively. Even the most vigilant and well-intentioned oversight cannot effectively navigate the rocky shoals of ambiguity of mandate. At the same time, a lack of meaningful oversight of CIA activity could negate many benefits of even the most crystalline limits of CIA authority. In sum, strong oversight is not a

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201. 9/11 COMMISSION REPORT, supra note 15, at 419.

202. See id. at 419-21. The 9/11 Commission called the current oversight structure “dysfunctional” and recommended, among other suggestions, that the intelligence committees be granted appropriations powers or be merged into a joint House-Senate committee. Id.

203. See, e.g., Editorial, Intelligence and Civil Rights, N.Y. TIMES, Dec. 11, 2004, at A18 (“[T]he public cannot expect much protection from a Congress that passed intelligence reform but glaringly failed to overhaul its own morass of oversight committees.”); Editorial, Energizer Bunnies, N.Y. TIMES, Dec. 31, 2004, at A26 (quoting Senator John McCain as saying congressional leaders resisted oversight reform because “[t]he old bulls are more interested in protecting turf than protecting national security”); Philip Shenon & Eric Lipton, 9/11 Panel Members to Lobby for a Restructured Congress, N.Y. TIMES, Dec. 21, 2004, at A20 (“There is no shortage of voices calling for powerful and unified Congressional oversight.”). The members of the 9/11 Commission have formed a lobbying group to continue to press for oversight reform. Id.

204. See Shenon & Lipton, supra note 203, at A20 (citing opposition to the 9/11 Commission’s proposals for oversight reform by House Speaker J. Dennis Hastert and quoting Representative Jane Harman, the ranking Democrat on the House Intelligence Committee, as calling some of the proposals “nonstarters”).
replaced for statutory clarification (nor vice versa) and would also not capture all of the benefits of formal amendment of the CIA mandate, such as improved cooperation with law enforcement.

3. *Presidential Directives and Internal Checks*

Reliance on presidential directives to shed light on the CIA mandate and the "handoff" between law enforcement and intelligence represents a continuation of the status quo. Executive Order 12,333, though not a paragon of clarity, provides important directional guidance to the intelligence community. Yet its utility is limited by the simple and fundamental fact that an executive order lacks the power to alter the CIA's statutory mandate. Indeed, Executive Order 12,333 directly states it is constrained by the National Security Act of 1947 and other laws and was promulgated for purposes of guidance. Such guidance as found in an executive order could not legally authorize any activity deemed to fall outside the bounds of the prohibitions in the National Security Act. Thus, the utility of an executive order is severely diminished because it still operates within—but cannot resolve—the unclear statutory limits on CIA authority. Seen in this light, guidance in the face of categorical, but ill-defined, statutory prohibitions is a distant "second best" to clarifying the prohibitions themselves.

The guidance provided by executive orders as to CIA authority is also less predictable and meaningful because executive orders can be rescinded by the President at anytime. Though a statute could also be rescinded or amended, it would require more consensus and deliberation than merely the changed opinion of the President and would likely prompt greater public scrutiny and debate. More to the point, the political pressure to misuse the Agency during...

205. The analysis of this Section often refers to Executive Order 12,333 but would apply with equal force to any unilateral presidential directive.

206. Executive Order 12,333 is not based on specific statutory or delegated legislative authority. Moreover, an executive order could not trump a statute. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-89 (1952); *see also* Marks v. CIA, 590 F.2d 997, 1003 (D.C. Cir. 1978) (discussing Executive Order 12,036, the predecessor to Executive Order 12,333, and clearly stating, "[o]f course, an executive order cannot supersede a statute"); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 144-45 (2004) ([A] unilateral executive order can never supersede a prior inconsistent statute because a unilateral executive order that conflicts with a valid federal statute is per se invalid.").

207. Exec. Order No. 12,333, *supra* note 12, at 59,954. The relevant text reads in full: "This Order is intended to control and provide direction and guidance to the Intelligence Community. Nothing contained herein or in any procedures promulgated hereunder is intended to confer any substantive or procedural right or privilege on any person or organization." *Id.*

208. *See* DYCUS ET AL., *supra* note 38, at 706 (posing the question: "How may the CIA 'conduct counterintelligence activities within the United States in coordination with the FBI' [under Executive Order 12,333] without performing any 'internal security functions'? "). Critics of Executive Order 12,333 suggest it is "illegal" to the extent it contains provisions inconsistent with the CIA's statutory mandate. *See*, e.g., Sherri J. Conrad, Note, *Executive Order 12,333: "Unleashing" the CIA Violates the Leash Law*, 70 CORNELL L. REV. 968, 976, 989 (1985) ("Executive Order 12,333 illegally defines the contours of intelligence community activity.").
the Cold War came primarily from the highest levels of the executive branch, thus providing a strong argument against leaving guidance and clarification of the CIA’s mandate to the president’s sole discretion.\textsuperscript{209} If history serves as any guide, dirty marching orders are more likely to come from the President than Congress given the CIA’s institutional location within the executive branch and the Agency’s relationship with the President. Statutory amendment cannot guarantee the law will not be disregarded, but it would provide a better check than an executive order and would supply clearer guideposts for congressional oversight and executive branch officials such as inspectors general.\textsuperscript{210}

A statute would also be more effective than an executive order because it would better entrench the guidance and clarified boundaries of authority within everyday CIA activity. Statutory amendment would most clearly and forcefully state the limits of CIA authority, thereby assisting the decisions of CIA officials and lawyers. This clear statement of norms of behavior (in this case clarification of prohibited activity) could also further the internalization of these norms among CIA officials.\textsuperscript{211}

For reasons similar to those discussed above, reliance on advisory boards, inspectors general, and other internal checks within the executive branch is less effective than statutory clarification would be in preventing abuse.\textsuperscript{212} If anything, a clearer CIA charter would bolster the abilities of oversight officials by providing better guideposts to monitor CIA activity. In any case, it must be recalled that these officials and boards can, at best, assist in issues of oversight. Unlike statutory clarification, checks internal to the executive branch are incapable of alleviating the coordination challenges between intelligence and law enforcement agencies.

4. Potential Disadvantages

Legislative reconsideration of the CIA mandate is not without risk. There may be benefits to retaining a certain level of ambiguity (more often cast as “flexibility” by supporters of this argument) in the language of the National

\textsuperscript{209} See supra notes 68-69 and accompanying text. See also Lawrence P. Gottesman, Note, The Intelligence Identities Protection Act of 1982: An Assessment of the Constitutionality of Section 601(c), 49 BROOK. L. REV. 479, 501 n.117 (arguing that the “substantive and procedural limitations” on CIA activity do not “constitute a significant check on illegal intelligence activities,” partly because “the concept of illegality is inherently fluid since Executive Orders may be revoked as expediency requires”).

\textsuperscript{210} See supra Section IV.C.2.


\textsuperscript{212} For additional background on such internal checks, see, for example, IRTPA § 1071 (to be codified at 50 U.S.C. § 403q) (defining the responsibilities and role of the Inspector General of the CIA); and IRTPA § 1061 (establishing a Privacy and Civil Liberties Oversight Board within the Executive Office of the President to review executive branch policies and procedures regarding terrorism).
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Security Act. According to the IC21 Commission: “There is no need to further clarify the National Security Act of 1947, as amended, or the subsequent Executive Orders” because “[t]here is a flexibility in these laws that permits a reasonable, but well-bounded, range of interpretation that will allow for improved cooperation and coordination between law enforcement and intelligence without blurring important demarcations between the missions and authorities of the two communities.” Yet this IC21 recommendation predated September 11 by five years, and the fight against terrorism (as well as other post-Cold War national security priorities) is making such “important demarcations” increasingly difficult to discern.

Furthermore, the IC21 Commission conceded that one of the outcomes of the intelligence scandals of the 1970s was a sometimes overly conservative approach toward cooperation between the law enforcement and intelligence communities. Additionally, this “range of interpretation” in the CIA mandate led to interpretations of convenience in the Cold War and leaves us more vulnerable to abuse.

Clarification of the CIA mandate could be “overlawyered” and therefore reduce the effectiveness of cooperation between intelligence and law enforcement. A similar result occurred in the aftermath of two banking scandals in the 1980s involving Bank of Credit and Commerce International (BCCI) and Banca Nazionale del Lavoro (BNL). The BCCI and BNL scandals resulted largely from problems in the sharing and management of information between the CIA and law enforcement officials. In the early 1990s, a high-level interagency task force produced recommendations to improve communication between intelligence and law enforcement and created several interagency working groups, including the Joint Task Force on Intelligence and Law Enforcement (JICLE), to further develop those recommendations. JICLE produced memoranda of understanding in the wake of the banking scandals but, according to Jeffrey Smith, General Counsel of the CIA at the time, the JICLE process had “overlawyered it” and “the product was going to ‘gum up the works’ and make cooperation [between intelligence and law enforcement] more difficult.”

Statutory revision could similarly open the door to overregulation

213. IC21 STAFF STUDY, supra note 150, at 272, 288. It should be noted, however, that the next paragraph of the IC21 report undercut this conclusion to some extent by citing a need for the establishment of “procedures by which the [intelligence and law enforcement] communities can interface effectively.” Id. at 273.

214. See supra Part III.

215. IC21 STAFF STUDY, supra note 150, at 272; see also supra note 190 and accompanying text.

216. See supra Section II.C.

217. For background on the BCCI and BNL scandals, see IC21 STAFF STUDY supra note 150, at 277-78.

218. Telephone Interview with Jeffrey H. Smith, supra note 24. The “overlawyering” component of JICLE eventually became a verb and was referred to as “JICLED to death.” Telephone Interview with Robert O. Davis, supra note 157. Ultimately, the regulations produced in the JICLE process were replaced in practice by joint FBI-CIA teams that would focus on specific targets, but the creation of “the wall” in the mid-1990s ended these activities (until the post-September 11 legislative changes).
or hamper cooperation between law enforcement and intelligence if not done correctly.

Overall, the advantages of clarifying the CIA mandate outweigh the reduced "flexibility" and the risks of excessive or imperfect regulation. The best approach is to be cognizant of, but undeterred by, the dangers of statutory amendment. Revision of the CIA mandate in the context of the ongoing national dialogue with respect to the fight against terrorism and reform of the intelligence community offers the best opportunity for a thoughtful and reasoned approach to the issues. The alternatives are much less palatable. Continuation of the ambiguity of mandate risks abuse and prevents efficiencies. At the same time, reactive or haphazard adjustment of CIA authorities risks undercutting civil liberties and due process with insufficient forethought and public debate. A case in point was a May 2003 attempt by the Bush Administration and select legislators to give the CIA and the Pentagon the authority to issue administrative subpoenas (known as "national security letters") to obtain personal and financial records of people within the United States. The proposal was slipped into a broader intelligence authorization bill (with little discussion) but was eventually defeated. Such alterations to the powers of the CIA and Pentagon can impact due process and civil liberties and should therefore be openly debated on their merits.

D. Proposed Statutory Revision

This Note's primary purpose is to place reexamination of the limits of CIA authority on the national agenda as part of ongoing policy decisions regarding intelligence reform and cooperation between intelligence and law enforcement agencies. To that end, this Note proposes draft statutory amendments intended to clarify and improve cooperation between intelligence and law enforcement and provide additional safeguards for the protection of civil liberties.

Five key principles should be considered when clarifying the CIA charter. First, statutory clarification should advance and balance both goals described in

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219. A national security letter requires no court approval and can be used to request personal information and specified records (e.g., records from financial institutions, information from consumer reporting agencies, etc.) in national security investigations. For criticism of the use of national security letters, see, e.g., JAMES BOVARD, TERRORISM AND TYRANNY 146 (2003) (arguing that national security letters "turn the Fourth Amendment on its head by creating a presumption that the government is entitled to personal or confidential information unless the citizen or business can prove to a federal judge that the National Security Letter should not be enforced against them," which is especially disturbing because "few Americans can afford the cost of litigating against the Justice Department to preserve their privacy").


221. These draft statutory amendments are meant to serve as a starting point for discussion.
this Note: clarifying boundaries to reduce potential abuse and improving efficiency in countering transnational threats. Second, statutory revision should balance clarity with flexibility. Overly rigid statutory language could backfire and reduce the effectiveness of the CIA by unduly limiting CIA activities or increasing transactions costs for CIA activities that were not originally of concern (e.g., by creating a bulky approval process for a method of collection that poses few risks of running afoul of civil liberties). Third, any legislation should respect inherent executive authorities in the fields of foreign affairs and national security. Fourth, although the current national security environment is the driving force for statutory clarification, revision should not, to the extent possible, focus solely on current national security threats. There will be different types of national security threats in the future, so statutory revision should seek to resolve the problems at hand while minimizing the degree to which we lock ourselves into procedures that only work against current threats (at the expense of creating a slow response to future threats). Fifth, statutory clarification should be designed as a “shield” and not just a “sword.” Statutory clarification should strengthen the shield effect and improve the CIA’s ability to resist pressure to reinterpret its mandate should there be a repeat of the improper high-level political pressure placed on the Agency during the Cold War.

Much of the groundwork for statutory revision of the CIA mandate was laid in the detailed commission reports released in the 1970s and the resultant executive orders. The best approach is to selectively include, combine, and modify the relevant language of the failed Charter Legislation, the recommendations made by previous commissions that studied the CIA and intelligence reform, and topical executive orders. In that vein, this Note suggests five areas of statutory change that would clarify the limits of the CIA mandate better than the current language as codified in 50 U.S.C. § 403-4a(d).

First, the permissible domestic activities of the CIA should be directly addressed through creation of a new section of the U.S. Code: 50 U.S.C. § 403-9. Central Intelligence Agency activity within the United States

223. See supra note 71 and accompanying text.
224. Some of the statutory proposals suggested by this Note are directed at all agencies within the intelligence community rather than specifically focused on the CIA so as to provide a more comprehensive approach. In general, the language of the proposed amendments is intended to be consistent with the language used elsewhere in the U.S. Code and, where applicable, Executive Order 12,333.
225. This proposed section combines and modifies provisions in Executive Order 12,333 and the failed Charter Legislation in an effort to delineate the means and limits of permissible domestic activity by the CIA. See Exec. Order 12,333 §§ 1.8 and 2.4; National Intelligence Reorganization and Reform Act of 1978, S. 2525, 95th Cong. § 413(h)(1)-(2) (1978). This proposed section seeks to serve three main functions: (1) to ensure all domestic CIA intelligence activity is lawful and coordinated with the
(a) Subject to subsections (b) and (c) of this section, the Central Intelligence Agency may:

(1) Collect foreign intelligence or counterintelligence within the United States, as permitted by law, if such intelligence is integrally related to its foreign intelligence or counterintelligence activities outside the United States;

(2) Protect the security of its installations, activities, information, property, and employees by appropriate means, including such investigations of applicants, employees, contractors, and other persons with similar associations with the Agency as are necessary;

(3) Carry out or contract for research, development and procurement of technical systems and devices relating to authorized functions; and

(4) Conduct such administrative and technical support activities within and outside the United States as are necessary to perform the functions of the Agency, including procurement and essential cover and proprietary arrangements.

(b) All Agency activities involving the collection of foreign intelligence or counterintelligence within the United States and all Agency counterintelligence and counterterrorism activities within the United States shall be conducted in coordination with the Federal Bureau of Investigation and in accordance with procedures agreed upon by the Attorney General and the Director of National Intelligence. Such procedures shall protect constitutional and other legal rights and limit the use of information collected in the activities described in this paragraph to lawful governmental purposes.

(c) The Agency shall use the least intrusive collection techniques feasible when collecting information within the United States.

(d) The Director of National Intelligence and the Attorney General shall conduct a review, at least annually, of all Agency activities within the United States for the purpose of ensuring that such activities do not violate any right protected by the Constitution or laws of the United States, determining the necessity for continuing such activities, and making such recommendations in this regard as they deem appropriate to the President, the National Security Council, and the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

(e) Definition. For the purposes of this section, the term “United States” has the meaning given such term in 50 U.S.C. § 18010.

Second, the authority of the intelligence community to collect information related to United States persons should be addressed through creation of a new section of the U.S. Code, with the proposed text reading:


FBI; (2) to provide a means for regular review of CIA domestic activity; and (3) to provide clearer guidance as to the CIA’s ability to protect its information and investigate persons associated with the agency (a point which was litigated in Weissman and Marks, supra note 33). The phrase “as permitted by law” in paragraph (1) is designed to preserve legal constraints on intelligence collection within the United States and to prevent any portion of that paragraph from interfering with the domestic intelligence collection regime established by the Foreign Intelligence Surveillance Act.

226. This proposed section codifies the provisions of § 2.3 of Executive Order 12,333 with only slight modification (such as adding the caveat “as permitted by law” to the domestic authorities of agencies other than the FBI in paragraph (a)(2), and requiring that procedures established in subsection (a) also be approved by the Director of National Intelligence). This proposed language also adds the
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(a) Agencies within the Intelligence Community are authorized to collect, retain, and/or disseminate information concerning United States persons only in accordance with procedures established by the head of the agency concerned and approved by the Director of National Intelligence and the Attorney General. Those procedures shall permit collection, retention and dissemination of the following types of information:

(1) Information that is publicly available or collected with the consent of the person concerned;

(2) Information constituting foreign intelligence or counterintelligence, including such information concerning corporations or other commercial organizations. Collection within the United States of foreign intelligence not otherwise obtainable shall be undertaken by the FBI or, when significant foreign intelligence is sought, by other authorized agencies of the Intelligence Community, as permitted by law, provided that no foreign intelligence collection by such agencies may be undertaken for the purpose of acquiring information concerning the domestic activities of United States persons;

(3) Information obtained in the course of a lawful foreign intelligence, counterintelligence, international narcotics or international terrorism investigation;

(4) Information needed to protect the safety of any persons or organizations, including those who are targets, victims or hostages of international terrorist organizations;

(5) Information needed to protect foreign intelligence or counterintelligence sources or methods from unauthorized disclosure. Collection within the United States shall be undertaken by the FBI except that other agencies of the Intelligence Community may also collect such information concerning present or former employees, present or former intelligence agency contractors or their present or former employees, or applicants for any such employment or contracting;

(6) Information concerning persons who are reasonably believed to be potential sources or contacts for the purpose of determining their suitability or credibility;

(7) Information arising out of a lawful personnel, physical or communications security investigation;

(8) Information acquired by overhead reconnaissance not directed at specific United States persons;

(9) Incidentally obtained information that may indicate involvement in activities that may violate federal, state, local or foreign laws; and

(10) Information necessary for administrative purposes.

(b) Agencies within the Intelligence Community shall use the least intrusive collection techniques feasible when directed at United States persons.

(c) Nothing in this section shall be construed to modify, repeal, supersede, or otherwise affect the Foreign Intelligence Surveillance Act of 1978 [50 U.S.C. § 1801 et seq.].

(d) Agencies within the Intelligence Community may disseminate information,

express statement that nothing in this section would invade or alter the domestic FISA regime. The purpose of this section is to clearly state the bounds of permissible information collection regarding United States persons in order to: (1) provide clear statutory operating guidelines as to the treatment of United States persons both domestically and abroad; and (2) bolster and otherwise prevent loopholes in the proposed section on the domestic powers of the CIA.
other than information derived from signals intelligence, to each appropriate agency within the Intelligence Community for purposes of allowing the recipient agency to determine whether the information is relevant to its responsibilities and can be retained by it.

(e) Definitions. For the purposes of this section:

(1) The term "United States" carries the same meaning as defined in 50 U.S.C. § 1801(j).

(2) The term "United States person" carries the same meaning as defined in 50 U.S.C. § 403-5a(c)(2).

Third, coordination between intelligence and law enforcement agencies should be clarified by amending and expanding 50 U.S.C. § 403-5a(a) to read as follows:

50 U.S.C. § 403-5a. Assistance to United States law enforcement agencies

(a) Authority to provide assistance

(1) Subject to subsection (b), elements of the Intelligence Community are authorized to:

(A) Upon the request of a United States law enforcement agency, collect information outside the United States about individuals who are not United States persons. Such elements may collect such information notwithstanding that the law enforcement agency intends to use the information collected for purposes of a law enforcement investigation or counterintelligence investigation;

(B) Cooperate with appropriate law enforcement agencies for the purpose of protecting the employees, information, property and facilities of any agency within the Intelligence Community;

(C) Unless otherwise precluded by law, participate in law enforcement activities to investigate or prevent clandestine intelligence activities by foreign powers or their agents, or international terrorist or narcotics activities;

(D) Provide specialized equipment, technical knowledge, or assistance of expert personnel for use by any department or agency, or, when lives are endangered, to support local law enforcement agencies. Provision of assistance by expert personnel shall be approved in each case by the General Counsel of the providing agency; and

(E) Render any other assistance and cooperation to law enforcement authorities not precluded by applicable law.

Fourth, the potential negative impacts from close cooperation between intelligence and law enforcement should be formally assessed and minimized to the extent possible. A new subsection of the U.S. Code should be created to read as follows:

50 U.S.C. § 403-5b(d). As soon as possible, but in no event later than 180

227. This proposed subsection builds on 50 U.S.C. § 403-5a(a) by adding relevant provisions from Executive Order 12,333 with only slight modification (addition of "or their agents" in subparagraph (C) to extend the reach of that provision). See Exec. Order No. 12,333 § 2.6. The goal of this expanded subsection is to statutorily allow for closer cooperation between intelligence and law enforcement.

228. Subsection (b) is only relevant to intelligence agencies within the military and would be unchanged by this proposed amendment. See 50 U.S.C. § 403-5a(b) (West Supp. 2004).

229. This proposed subsection is modeled after other subsections in 50 U.S.C. § 403-5b that address, inter alia, the sharing of foreign intelligence uncovered in criminal investigations with the DNI.
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days after the date of the enactment of this Act, the Director of National Intelligence
and the Attorney General shall jointly issue guidelines and procedures to protect the
security and sources and methods of foreign intelligence or counterintelligence
disclosed by elements of the Intelligence Community and used by the Attorney
General, or any other department or agency of the Federal Government with law
enforcement responsibilities, in the course of a criminal investigation or judicial
proceeding.

Additionally, the protection of intelligence should be added to the stated
attributes of and required guidelines for the Information Sharing
Environment. Specifically, 6 U.S.C. § 485(b)(2)(H), which states the
attributes of the ISE, should be amended to add the following italicized
language and to read in relevant part: “incorporates protections for individuals’
privacy and civil liberties and the security and sources and methods of
intelligence.” The protection of intelligence should also be added to
requirements on the production of guidelines by the President for the ISE. A
new paragraph, 6 U.S.C. § 485(d)(4), should be created, the text of which
would read: “issue guidelines that protect the security and sources and methods
of intelligence in the development and use of the ISE.”

Fifth, 50 U.S.C. § 403-4a(d)(1) should be amended to read: “The Agency
shall have no police or subpoena powers, and no law enforcement or internal
security functions except as otherwise permitted by law.” This text would
recognize the Agency’s authority to cooperate with law enforcement agencies
and its limited domestic functions.

The statutory revisions proposed in this Note would strengthen intelligence
reform while avoiding the problems and issues that led to the downfall of the
Charter Legislation, as they are limited in focus and do not include contentious

This proposal is meant to focus deliberate and sustained attention on the impacts on due process and the
protection of intelligence caused by cooperation between law enforcement and intelligence agencies.
The issuance of guidelines and procedures would centralize, build upon, and be superior to, the ad hoc
efforts to address the issue to date. Moreover, requiring production of reports and guidelines is a
standard modus operandi in treating such subjects in the field of intelligence law. See, e.g., IRTPA, §§
1011, 1016, 1018. Finally, increased attention and guidelines as to this issue may provide the basis for
future statutory additions (if deemed desirable) that would address issues such as a defendant’s right of
discovery and a prosecutor’s duty to search in the context of intelligence community files. See supra
Section IV.A.2. In this vein, former Deputy Attorney General Philip Heymann argues the federal
government should “propose a statute in an effort to use the weight of legislation to settle open
questions, as the CIPA statute did” because “[e]ven when the issue involves constitutional requirements
of disclosure, as in Brady, the Supreme Court is likely to give great deference to the views of the
executive and legislative branches on an issue that has such significant national security dimensions.”
Heymann, supra note 121, at 12.

230. The ISE as codified does not explicitly address protection of intelligence either as a goal or as
a subject of guidelines that must be produced by the President in operationalizing the ISE. See 6 IRTPA

231. This construction of the prohibitions of CIA activity makes an important grammatical change
to the language of the National Security Act. As amended, the prohibitions against police and subpoena
powers would remain categorical and only the prohibitions of law enforcement and internal security
functions would be modified by the caveat “except as otherwise permitted by law.” The prohibitions of
police and subpoena powers need not be changed to capture the advantages of statutory clarification
described in this Note; there are no strong policy arguments to amend them.
issues such as covert action. Proponents of statutory clarification would be wise to stress the benefits of improving cooperation between law enforcement and intelligence in addition to the harms (the prospect of lost criminal convictions or abuse of civil liberties) inherent in the status quo. Proponents should also emphasize the protective nature of a clearer mandate, such as in shielding the Agency and its employees from improper directives; this argument may help gain the backing of the Agency and its traditional supporters.

V. CONCLUSION

The march of intelligence reform should not halt prematurely. Although much progress has been made, much remains to be done. It would be unfortunate for the Executive and Congress to rest on their laurels after the Intelligence Reform and Terrorism Prevention Act rather than carry through other needed reforms such as clarification of the CIA charter. The limits of CIA authority are simply too important to be left to historical accident or ambiguity, and there is too much at stake to confront revision of the CIA mandate in a reactive or haphazard manner. The superior approach is to consider these issues in an open and deliberate manner and to do so sooner rather than later. Any risks inherent in inspection and a frank reevaluation of the CIA mandate are clearly outweighed by the risks of inaction, be they intelligence abuses, disclosed sources and methods, or foregone criminal convictions. Therefore, statutory revision of the CIA charter based on a forthright realization of the new national security environment is the best course ahead to prevent abuse and maximize the effectiveness of our national security resources.

232. See supra notes 80-83 and accompanying text.
233. See supra notes 71-73 and accompanying text.