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American Civil Liberties Union

Testimony before the
House Committee on the Judiciary,
Subcommittee on Crime, Terrorism and Homeland Security

on
Civil Liberties and the Recommendations of the 9/11 Commission

Submitted by

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Associate Director and Chief Legislative Counsel

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Chairman Coble, Ranking Member Scott and Members of the Subcommittee:

I am pleased to appear before you today on behalf of the American Civil Liberties Union and its more than 400,000 members, dedicated to preserving the principles of the Constitution and Bill of Rights, to explain the ACLU's views on the recommendations in the Final Report of the National Commission on Terrorist Attacks Upon the United States ("9/11 Commission report").

The 9/11 Commission report exhaustively details significant failures of the intelligence agencies, including the Federal Bureau of Investigation (FBI) and the Central Intelligence Agency (CIA), and proposes major structural changes to address those failures. The report contains helpful suggestions on privacy and civil liberties, proposing a Civil Liberties Protection Board and a framework for judging anti-terrorism powers including the USA PATRIOT Act. The report also endorses more effective oversight of the intelligence community, and real reform of excessive secrecy.

The report also contains detailed discussion of border and transportation security issues, including airline screening, the "no fly" list that has stranded many innocent travelers, and passenger profiling. By endorsing an expansion of intrusive border screening to domestic travel, the report's recommendations could – if implemented without change – result in a "checkpoint society" in which a federally-standardized drivers license serves as a "national ID" and internal passport.

As the 9/11 Commission itself acknowledges, "many of our recommendations call for the government to increase its presence in our lives . . ." (p. 395). In fact, as outlined, a number of specific proposals could have serious unintended consequences that would be highly detrimental for basic civil liberties. Legislation must include significant changes to some recommendations to protect civil liberties. The Commission's proposals to advance civil liberties – including increased oversight, reduced secrecy and a Civil Liberties Protection Board – must be implemented to ensure that, as the government centralizes some powers, it provides stronger checks and balances.

No one doubts the necessity of reorienting an intelligence community built to fight the Cold War to focus on the national security threats of the 21st Century. The ACLU strongly favors reforming the intelligence community in a way that enhances national security, encourages openness, and protects civil liberties.

This testimony outlines specific recommendations for how to implement the reforms proposed by the Commission without eroding basic freedoms.

The National Intelligence Director and National Counter-Terrorism Center

Recommendation #1: The National Intelligence Director (NID) should not be a Cabinet or White House official and the National Counter-Terrorism Center (NCTC) should not be placed in the Executive Office of the President, nor should stronger community-wide powers be given to an official who continues to head the CIA. A new head of the intelligence community, if one is created, should instead head an independent Office of the Director of National Intelligence.

In a democratic society, domestic surveillance must serve the goals of preventing terrorism, espionage and other serious crime, not the political goals of the party in power. As we have learned from past mistakes, the temptation to use the intelligence community to further a political agenda is ever-present.

Misuse of both foreign and domestic intelligence powers for political ends can occur under any Administration. Direct White House control of intelligence powers and access to sensitive intelligence files have been responsible for serious mistakes that undermine civil liberties and accountability, and have lessened the confidence of Americans in their government. For example, the worst spying abuses of the Nixon Administration were directed by White House staff with intelligence backgrounds and included warrantless secret searches to obtain medical records, covert wiretaps of journalists, and the Watergate break-in itself. Under President Reagan, a covert operation conducted by National Security Council staff member Lt. Col. Oliver North led to the most serious crisis of Reagan's presidency when it was revealed that the operation involved trading arms for hostages and using the proceeds to provide assistance to Nicaraguan rebels. Under President Clinton, White House political staff obtained hundreds of confidential FBI files on prominent Republicans that had been created from extensive background checks designed to protect national security.

In spite of these lessons, the 9/11 Commission's recommendations place effective control over the intelligence community – including parts of the FBI, Department of Homeland Security, and other agencies that exercise domestic surveillance powers – in the Executive Office of the President (the White House) and fail to include any mechanism (such as a fixed term) to ensure the National Intelligence Director's autonomy. The proposal seriously increases the risk of spying for political ends.

The proposed structure centralizes too much power over both foreign and domestic intelligence in the White House, and risks a re-run of the mistakes that led to Watergate, *Iran-contra*, "Filegate," and other significant abuses of Presidential power.

The placement of the National Intelligence Director in the White House could also frustrate Congressional oversight. White House officials have long received, on separation of powers grounds, far less scrutiny from Congress than agency heads and

other Executive Branch officials. White House officials are not usually subject to Senate confirmation and do not usually testify before Congress on matters of policy. Executive privilege may be claimed as a shield for conversations between the President and his advisors from both Congressional and judicial inquiries.

President Bush announced on Monday, August 2, a proposal for a national intelligence director that is not a White House or Cabinet official, but instead heads an independent office. Likewise, bills proposed by leading Democratic members of the House and Senate intelligence committees do not make that person a White House official.

Rep. Jane Harman, the ranking member of the House Permanent Select Committee on Intelligence, has introduced legislation to create a “Director of National Intelligence.” Like President Bush’s proposal, H.R. 4140, the “Intelligence Transformation Act,” places the new intelligence director in an independent office, not the White House. The leading Senate legislation takes the same approach. Senate bills include S. 190, the “Intelligence Community Leadership Act of 2003,” sponsored by Senator Feinstein (D-CA) and S. 1520, the “9-11 Memorial Intelligence Reform Act,” sponsored by Senators Graham (D-FL), Feinstein (D-CA) and Rockefeller (D-WV).

The ACLU supports placing a new intelligence director in an independent office. The National Intelligence Director and the National Counter-Terrorism Center, if they are established, should be accountable to the President, but they should not be servants of the President’s political or ideological agenda.

Pitfalls of greater power for head of the CIA. Rep. Porter Goss (R-FL), President Bush’s nominee for Director of Central Intelligence (DCI), has introduced a different intelligence reorganization bill, H.R. 4584, the “Directing Community Integration Act.” The Goss bill rejects a new intelligence director and instead enhances the powers of the DCI over community-wide responsibilities, including domestic collection of intelligence, while leaving the DCI as the head of the CIA.

The Goss bill is, in some respects, even worse than the Commission’s proposal for a White House NID, because it contemplates much greater involvement of the DCI – the head of a foreign intelligence agency – in domestic intelligence matters. The Goss bill would even go so far as to render toothless the current prohibition on CIA involvement in domestic activities by amending it to bar “police, subpoena, or law enforcement powers within the United States, *except as otherwise permitted by law or as directed by the President.*”¹

The proposed amendment would erase a fundamental limitation on CIA authority that prevents the use of CIA-style covert operations and intelligence techniques – including warrantless surveillance, break-ins, and infiltration and manipulation of political groups – from being used in the United States against Americans.

¹ H.R. 4584 § 102(a) (amending 50 U.S.C. § 401-1(c) and repealing § 403-3(d) (emphasis added)).

Recommendation #2: The National Intelligence Director must be subject to Senate confirmation and Congressional oversight, and should, like the Director of the CIA, have a fixed term that does not coincide with that of the President.

Congress must ensure that the National Intelligence Director is appointed by and with the advise and consent of the Senate, and that the NID will regularly testify before Congress. The Office of the NID and the NCTC must also be answerable to Congress. Congress must make clear that key officials will be asked to testify and that the NID and the NCTC are expected to provide answers to questions, relevant documents, and cooperate with Congressional inquiries.

The Commission recommends that the Director of the CIA should serve a fixed term, like the Director of the FBI, that does not coincide with the President's term. Insulating the CIA further from political pressure is a welcome step.

Ensuring the intelligence community works well together is an extremely important responsibility that must remain above partisan politics or the appearance of serving an ideological agenda. The President should, of course, appoint the National Intelligence Director, with Senate approval, and should retain the power to fire the director for poor performance. As with the head of the FBI or the Chairman of the Federal Reserve Board, however, the director should serve a fixed term that does not coincide with the President's term.

Recommendation #3: To ensure the FBI retains control of domestic surveillance operations, the head of the FBI's intelligence operations must report to the FBI Director and the Attorney General, not to the National Intelligence Director or another intelligence official.

The United States has – historically and to the present day – entrusted the domestic collection of information about spies, terrorists, and other national security threats to federal and state law enforcement, with the FBI playing the most important role. The reason is simple: Americans do not believe the government should investigate you if you are not involved in a crime – if your activities, however unpopular, are not illegal.

For this reason, the CIA – a pure spy agency with no law enforcement functions – has been barred from domestic surveillance ever since it was created by the National Security Act in 1947. President Truman – a strong opponent of Communism and a hawk on security – shared the concerns of many Americans about the CIA's establishment as a peacetime agency. Truman believed that a permanent secret spy agency could, if allowed to operate on American soil, use espionage techniques – including blackmail, extortion and disinformation – against American citizens who were critical of government policy or the incumbent administration, but had broken no law. With Truman's support, the National Security Act, sometimes described as the CIA's "charter," contains a prohibition – which stands today – on the CIA's exercising any "police, subpoena, or law enforcement powers or internal security functions."²

² 50 U.S.C. § 403-3(d)(1).

Truman's concerns were not just with bureaucratic turf – whether the FBI or the CIA was the lead agency in collecting information about national security threats within the United States. Truman believed that the domestic collection of information about national security threats should generally be handled as a law enforcement matter. Indeed, Truman often clashed with FBI Director Hoover over whether the FBI had any business using break-ins, illegal wiretaps, and other spy techniques, at one point saying Hoover's advocacy of such methods risked transforming the FBI into the equivalent of the Gestapo.³ Truman did not just want to prevent the CIA itself from operating on American soil – he wanted to ensure that a CIA-style agency did not become dominant in domestic collection of intelligence about national security threats.

The 9/11 Commission proposes that the NID hires both the FBI's Director of Intelligence and the intelligence chief of the Department of Homeland Security, either of whom may serve as the deputy NID for homeland intelligence. This proposal is very problematic. The Commission proposal puts the FBI's intelligence capabilities in the hands of a super-spy who could involve in domestic spying officials of the CIA and other agencies that use the methods of agencies that operate overseas – such as break-ins, warrantless surveillance, or covert operations.

While a NID could play a role in coordinating the activities of the Intelligence Community, the NID should not be given, as the Commission's proposal currently contemplates, what amounts to control over targets of intelligence collection within the United States. That should remain the responsibility of the FBI Director, under the supervision of the Attorney General.

Recommendation #4: The FBI Director and the Attorney General should have the responsibility to ensure that the guidelines and rules that govern domestic surveillance in both criminal and national security investigations are followed. The guidelines must be strengthened. While they may continue to allow “enterprise investigations” of criminal organizations including foreign and domestic terrorist organizations, they should clearly prohibit domestic spying on First Amendment-protected activity.

The FBI's own mistakes and missteps show the dangers of a powerful government agency that uses its investigating authority without regard to whether the subjects of its investigations are involved in criminal activities. To a large degree, these abuses were the result of the FBI's unique lack of accountability to the courts, Congress and even the Attorney General under the direction of FBI Director J. Edgar Hoover.

Today, as a result of the Church Committee reforms, the FBI operates under both internal and external controls that constrain its criminal and national security investigations. These controls are designed to ensure that its intrusive intelligence-gathering and criminal surveillance powers are directed at organizations involved in criminal activities and at the investigation of foreign agents and not at lawful political, religious and other

³ See Curt Gentry, *J. Edgar Hoover: The Man and the Secrets* (2001).

First Amendment activities. Controls that protect civil liberties include guidelines for FBI investigations, constitutional limits enforced by the exclusionary rule, and the “case-oriented” focus of the FBI. Putting a spy chief in charge of parts of the FBI could seriously erode each of these controls.

Domestic terrorism guidelines. For criminal investigations of organized crime or domestic terrorism, Attorney General guidelines restrict the use of most surveillance techniques – such as tracking mail, following suspects, and interviewing witnesses – to situations where there is at least some indication of criminal activity. These guidelines were weakened, following September 11, to allow FBI agents to visit, on a clandestine basis, political and religious meetings that are “open to the public” without any such indication. The ACLU and many members of the House and Senate judiciary committees opposed this change. Most other investigative techniques still do require at least some indication of crime.

International Terrorism Guidelines. National security investigations of international terrorist groups are governed by separate guidelines, important parts of which are secret. The guidelines do not require probable cause of crime but are, in theory, designed to restrict national security investigations to circumstances in which there is some indication of hostile activity by an agent of a foreign power. The most intrusive national security investigations – those that involve physical searches or electronic eavesdropping – must also at least “involve” some possible criminal activity when the subject of the investigation is a United States citizen or permanent resident, although this falls far short of the constitutional standard of criminal probable cause.

Investigative guidelines are vitally important to preserving civil liberties. The government argues that a number of highly intrusive intelligence gathering techniques – including collecting files on individuals and groups, physical surveillance in public places, and tracking the sender and recipient of mail, telephone and Internet communications – are not constitutional “searches” subject to the Fourth Amendment’s probable cause standards. As a result, for investigations using such techniques, it is only the guidelines and case-oriented structure of the investigating agency that protects against widespread spying on lawful political and religious activities.

The Constitution and the exclusionary rule. For those intrusive techniques that the government concedes are searches – including electronic eavesdropping of the content of communications and searches of a person’s home or office – the Fourth Amendment and federal statutes plainly require court approval based on probable cause. However, the Fourth Amendment’s principal remedy, the exclusionary rule that provides illegally-obtained evidence may not be used in court, does nothing to hinder illegal searches and wiretaps if the government does not plan to use the information in a prosecution.

The danger is certainly exacerbated by putting the FBI’s intelligence operations in the hands of the government’s “top spy” instead of its “top cop.” The FBI Director could, of course, direct abuses on the theory that the information is to be used for intelligence purposes rather than criminal prosecution and so need not be gathered legally. The

danger would be far greater, however, if the FBI's national security operations are under the effective control of intelligence officials who are used to operating entirely outside the constraints of the exclusionary rule.

The FBI's case-oriented approach. The FBI's focus on both criminal and intelligence "cases" helps prevent highly intrusive and sensitive investigations that may involve religious and political activities that are protected by the First Amendment from losing all focus on crime and terrorism. This focus is vitally important to civil liberties, and could be lost if a spy chief is placed in charge of parts of the FBI.

Critics of placing the FBI in charge of domestic national security surveillance argue that the case-oriented mindset of a law enforcement agency cannot be reconciled with quality intelligence analysis. While the FBI concerns itself with gathering information of relevance to particular cases, they argue, intelligence analysts must be looking more broadly to see how specific data fits into the "big picture" of a national security threat.

This critique sweeps too broadly because it fails to recognize the difference between two very different kinds of cases. The FBI not only investigates particular crimes – generally, crimes that have already occurred and must be "solved" – it also opens "enterprise" investigations of organized crime and terrorism. For example, in investigating a domestic funding network for Al Qaeda as a possible criminal enterprise, the FBI is not limited to investigating whether the organization was involved in funding specific terrorist bombings or other attacks, such as the 1998 embassy bombings in Africa, the 1999 bombing of the U.S.S. Cole, or the September 11 attacks. Rather, the FBI has authority to investigate the organization as an enterprise, and to fit together bits of information that help prevent future terrorist attacks, not just gather information about past crimes. The FBI's failures in analyzing information about Al Qaeda's domestic activities are not a result of flaws in the basic concept of an enterprise investigation; rather, they appear to be the result of a combination of other failures that must be addressed on their own terms.

Recommendation #5: The powers of the NID and the National Counter-Terrorism Center should be specified by a statutory charter that prohibits powers not authorized and requires the NID to observe guidelines to protect against domestic spying on First Amendment activity. Explicit, enforceable statutory language should make clear that the NID does not have what amounts to operational control of targets of domestic surveillance, whether directly or through the NCTC.

The Commission proposes a powerful new National Counter-Terrorism Center under the authority of the NID. The Center, while not itself a domestic collection agency, would go beyond the analysis of intelligence collected in the United States and abroad that is the function of the existing Terrorism Threat Integration Center (TTIC). If the Center's powers are not specified, and if it is not barred from monitoring First Amendment activities within the United States, the Center could task domestic collection efforts that seriously erode the limits the collection agencies themselves are bound to respect.

The Center would be structured like the CIA. The Center would have separate divisions for “intelligence” and “operations.” It would have the authority to “task collection requirements” and to “assign operational responsibilities” for all intelligence agencies – including the FBI – and to follow-up to ensure its mandates are implemented.

The Center’s power over both intelligence collection and operations throughout the intelligence community could pose grave risks of encouraging espionage and covert operations techniques on American soil. The Center’s tasking and strategic planning functions would extend not only to the FBI’s national security investigations, but also to other domestic agencies, including the Department of Homeland Security, with immigration, border control and transportation security functions.

Likewise, some of the powers of the NID and the Center over the intelligence agencies of the Department of Defense – the largest agencies, consuming the large majority of the intelligence community’s budget – could have domestic implications. The Department of Defense, after September 11, established a powerful regional Northern Command (NORTHCOM), led by a four-star general, with responsibility for the domestic United States (together with Mexico and Canada).

NORTHCOM already has a military intelligence unit, which raises serious questions under the Posse Comitatus Act – the law that limits military involvement in domestic affairs. Under the proposed structure, the NID and the Center could have what amounts to control of the domestic intelligence operations of civilian federal law enforcement and of the NORTHCOM intelligence unit, creating a real risk of blurring the military and civilian functions.

Recommendation #6: The National Intelligence Director and the National Counter-Terrorism Center should not be permitted to direct or plan intelligence “operations” that include “dirty tricks” or other extra-legal methods within the United States. Domestic use of intelligence information must remain bound by the legal system.

Perhaps the most far reaching power of the National Counter-Terrorism Center is its authority to plan and direct intelligence “operations” throughout the intelligence community. If the NID and the NCTC are created, it must be made clear that information derived from domestic surveillance is only to be used within the bounds of the legal system, and cannot be used for domestic “operations” outside that system.

The FBI’s COINTELPRO operations – “counterintelligence” programs under FBI Director J. Edgar Hoover that both gathered intelligence and used that intelligence to disrupt perceived national security threats – led to extremely serious abuses of power. These abuses included the illegal wiretapping of Martin Luther King, Jr. and the infiltration of scores of social, political and religious groups that opposed government policy, as well as “dirty tricks” campaigns to exploit damaging information without exposing the FBI’s sources and methods in a criminal prosecution.

The COINTELPRO programs were initially rationalized as attempts to counter what Hoover perceived as the influence, or possible influence, of the Soviet Union on the civil rights and anti-war movements. However, a lack of internal or external controls led to the continuation of these highly intrusive operations without any real evidence of involvement of a genuine agent of a foreign government or organization and without an indication of criminal activity. In other words, the FBI's most serious abuses of civil liberties occurred precisely when its top leadership forgot it was a law enforcement agency operating to enforce and uphold the law – not a freestanding security or spy agency designed to counter those individuals and groups whose views seemed, to the government officials, to be dangerous or un-American.

If the powers of the National Counter-Terrorism Center are not properly limited, the result could be the establishment of what amounts to just such a freestanding spy agency in all but name. For civil liberties reasons, the 9/11 Commission soundly rejected the idea of moving the FBI's counter-intelligence and intelligence gathering functions to a separate agency patterned on the UK's Security Service or MI-5. The FBI, because of its mission and culture, can serve the intelligence gathering mission that the CIA serves overseas, but the FBI must operate under the U.S. Constitution and "quite different laws and rules." The Commission was also sensitive to the dangers of negative public reaction to civil liberties abuses that would result from creating an agency unconstrained by those rules. A "backlash," it says, could "impair the collection of needed intelligence."

It also objects to the MI-5 idea for these reasons:

- The creation of a new agency, and the appearance of another big kid on the intelligence block, would distract the officials most involved in counter-terrorism at a time when the threat of attack remains high.
- The new agency would need to acquire, train and deploy a vast amount of new assets and personnel, which the FBI already has at its disposal.
- Counter-terrorism very easily ropes in matters involving criminal investigation. With the removal of the pre-9/11 "wall," it makes logical sense, the commission says, to have one agency utilize the entire range of intelligence and criminal investigative tools against terrorist targets.
- In the field, the cooperation between counter-terrorism investigators and the criminal side of the FBI has many benefits.

The Commission was right to reject the model of a domestic intelligence agency. For much the same reason, however, its proposals for intelligence reform must be modified and clarified.

Reducing Excessive Secrecy and Strengthening Oversight of the Intelligence Community

As the 9/11 Commission observes, structural reform of the intelligence community will not by itself solve basic intelligence deficiencies that contributed to recent intelligence failures. Substantive reforms – including strong internal watchdogs and a civil liberties board, a reduction in excessive secrecy, an increase in real public and Congressional oversight, and stronger efforts to incorporate dissenting views into analysis – must be adopted to prevent future intelligence breakdowns.

Recommendation # 7: The Commission recognized its recommendations could increase government intrusion on civil liberties and urged strong oversight. Congress should not act to reorganize the intelligence community without also implementing the Commission’s proposals for strong internal watchdogs and an effective civil liberties protection board.

Strong internal watchdogs. Proposals to reform the intelligence community have included the creation of an Inspector General for the intelligence community. The Inspector General would have significant investigative powers, including subpoena power, that would aid internal investigations. An Inspector General for the intelligence community would report directly to the National Intelligence Director and, as a result, could be a more powerful, and more independent, watchdog than the inspectors general that currently have jurisdiction over each of the fifteen intelligence agencies.

Civil liberties protection board. The 9/11 Commission should be commended for recognizing the need to protect civil liberties and endorsing an independent watchdog board to strengthen oversight throughout the government. While various entities and offices within the Executive Branch, such as inspectors general, officers for civil rights and privacy, and oversight boards, are charged with policing certain departments, agencies or programs, no one board has the responsibility for ensuring that civil liberties are not compromised by the need for enhanced security.

The need for such an independent, nonpartisan voice is clear. The Commission recommends putting the burden of proof on the government to show the need for new security powers, such as those enacted by the USA PATRIOT Act, but there is no reliable, independent agency that performs this function. The Commission did not, however, set forth any specific proposals with respect to what a civil liberties board could do.

The 9/11 Commission observed:

“[D]uring the course of our inquiry, we were told that there is no office within the government whose job it is to look across the government at the actions we are taking to protect ourselves to ensure that liberty concerns are appropriately considered. If, as we recommend, there is substantial change in the way we collect

and share intelligence, there should be a voice within the executive branch for those concerns.”

The Commission proposes a board that would “oversee adherence to the guidelines we recommend and the commitment the government makes to defend our civil liberties.”

The recommendation implicitly recognizes that there is a need for two functions, one proactive and one retrospective. First, a board should be a proactive voice for civil liberties during the development of counter-terrorism policies. For example, during the development of the government’s “no fly” list, the board should be asked to study and address civil liberties concerns. How are persons who are mistakenly put on such a list to get off the list? How will the government ensure that innocent travelers who have the same or similar name to a person on the “no fly” list are not harassed?

Second, a board must be able to look retrospectively at patterns of civil liberties abuse, or at significant new programs or laws that intrude on civil liberties. The board could, for example, examine the treatment of terrorism suspects detained on immigration violations or as “material witnesses,” but not charged with terrorism. The board could also look at the effectiveness, and impact on civil liberties, of new powers, such as the USA PATRIOT Act, and issue a report prior to the expiration of such powers.

This investigative function should build on the work of others, including the inspectors general of the agencies involved. Because those offices do not have government-wide authority, a board must be able to have the discretion to review and assess the work of inspectors general and other existing investigators, and to go further where necessary.

To complete its objectives, the board must have substantial clout, authority, and powers. It should be bipartisan. Ideally, appointments should be shared between the President and Congressional leaders, if such an appointment process can be reconciled with separation-of-powers concerns. Board members should have independence and should serve a fixed term, and they should be prominent citizens with experience in civil liberties, government investigations, and security. The board should hire a full-time executive director and a staff that permits it to carry out its functions.

The board should have the power to hold public hearings and issue both annual reports assessing the state of civil liberties and special reports that detail the results of investigations. Agencies should be required to respond to their recommendations, and the board should also make recommendations, where appropriate, for legislation. The board should have the power to subpoena documents and witnesses, and should enjoy the cooperation of all departments. Members and staff should have high-level security clearances to enable the examination of even the most sensitive national security secrets.

Recommendation #8: A presumption against classification without good reason was contained in Executive Order 12958 but has been rescinded. As a first step in reforming an outmoded system of secrecy designed for the Cold War, the presumption should be reinstated.

As the 9/11 Commission report recognized, excessive classification – not civil liberties protections – almost certainly represents the greatest barrier to effective information sharing. As the report states, too often the attitude has been that “[n]o one has to pay the long-term costs of over-classifying information, though these costs . . . are substantial.” The report laments an outdated, Cold War-era “need to know” paradigm that presumes it is possible to know, in advance, who requires access to critical information. Instead, it recommends a “‘need-to-share’ culture of integration.”

“Groupthink” led to some in the government discounting the possibility that Al Qaeda terrorism was directed at the United States, rather than overseas. According to the Senate Select Committee on Intelligence, groupthink was also the major culprit behind the intelligence failures regarding Iraq’s WMD programs. Groupthink cannot be challenged in secret. Public pressure – including the media and public interest groups – can challenge government agencies to reassess their assumptions.

Unfortunately, the Bush Administration has moved in the opposite direction – towards greater secrecy. President Bush’s executive order on classification, issued after September 11, not only extended a deadline for automatic declassification of old documents, it actually reversed a presumption against classification without good reason that was put into place by President Clinton in 1995 as a signal to agencies that their classification decisions should have stronger justification.⁴

Recommendation #9: The Freedom of Information Act should be amended to require courts to balance the public’s need to have access to information that is critical for oversight of government – such as serious security flaws, or civil liberties abuses such as the mistreatment of detainees – against government claims that the information is exempt from disclosure.

“Need-to-share” cannot be limited to agencies within the government or defense and homeland security contractors, but also must include, to the greatest extent possible, sharing relevant information with the public. Congress and the Administration have created, through the Homeland Security Act, an entirely new category of information that is withheld from public view – sensitive but unclassified (SBU) information. While the 9/11 Commission criticizes excessive secrecy, it also endorses establishing a “trusted information network” for sharing of unclassified, but still nonpublic, homeland security information.

The Commission’s calls for greater openness and sharing of information will not be effective if it succeeds only in adding another set of complex secrecy rules designed to limit public access to “homeland security information” on top of the existing classification regime. New categories of secret information – including “sensitive but unclassified,” homeland security information, or information in a new “trusted information network” – may succeed only in replacing one unwieldy secrecy regime with

⁴ Further Amendment to E.O. 12958 (March 25, 2003); See Adam Clymer, *U.S. Ready to Rescind Clinton Order on Government Secrets*, N.Y. Times, March 21, 2003.

another. The need for government and industry to keep critical infrastructure information from the public must be balanced against the public interest in access to critical oversight information. The Freedom of Information Act should be amended to require this.

Recommendation #10: Congress should enact H.R. 2429, the Surveillance Oversight and Disclosure Act, sponsored by Rep. Hoeffel (D-PA), or its Senate counterpart, S. 436, the Domestic Surveillance Oversight Act, as a first step towards making more information about the use of FISA available to the public.

The Commission calls for a debate on the USA PATRIOT Act, putting the burden on the government to show why a given power is needed. However, the government still takes the position that its use of surveillance authorities under the Foreign Intelligence Surveillance Act (FISA) is classified, and that the public's right to know only extends to the total number of surveillance applications made and the total number of orders granted. There can be no meaningful debate on the government's use of the USA PATRIOT Act, which expanded FISA surveillance powers, without any publicly-available objective data on such basic matters as how many surveillance orders are directed at United States persons, how many orders are for electronic surveillance, how many are for secret searches of personal records, and so on.

Rep. Hoeffel has introduced legislation (H.R. 2429) that would provide more public information about the use of FISA, and Senators Leahy, Specter and Grassley have introduced a similar measure (S.436).

Recommendation #11: Congress should enact H.R. 4855, sponsored by Rep. Bud Cramer (D-AL), which establishes a bipartisan classification review board, or its Senate counterpart, S. 2672, the Lott-Wyden bill. Congress should consider enhancing the board's power to release improperly classified documents. The Senate Select Committee on Intelligence should also make clear it will wield its existing power under the Senate rules as an effective check against intransigence by the President in releasing classified information that the board recommends to be released.

The Congress should enact H.R. 4855, sponsored by Rep. Bud Cramer, the "Independent National Security Classification Board Act of 2004." An identical bill, S. 2672, has been introduced in the Senate by Senators Trent Lott (R-MS) and Ron Wyden (D-WA).

The bill would create a bipartisan board, appointed by the President and members of Congress, to review and reform classification rules. The board should consider whether a complex system of government secrets that has grown to include layers upon layers of bureaucratic rules is the best way to safeguard the national security, and recommend real reforms.

Recommendation #12: The intelligence committees should hold far more open hearings. The annual hearings on legislation authorizing the intelligence community – as well as other legislative hearings – should be open to the public.

The 9/11 Commission called for Congressional oversight to be greatly improved, calling the current structure “dysfunctional.” As the Commission made clear, the establishment of a Senate and House committee devoted to intelligence matters does not provide effective oversight when hearings – even hearings on legislative matters – are almost always closed to the public

Recommendation #13: The intelligence budget should be made public as the Commission recommends.

Perhaps the most inexplicable example of excessive secrecy that frustrates real accountability is the continued insistence by the intelligence community on keeping basic information – even information that is widely known or guessed – classified. Even the overall amount of money budgeted for intelligence activities, which is widely reported as being approximately \$40 billion, is classified as is the amount of money budgeted for components of the intelligence community. At least these numbers, and other information that would help the public know how its dollars are being spent, should be made available.

Recommendation #14: While Congress should consider ways to consolidate and strengthen oversight of the intelligence community, the intelligence community should not be shielded from the oversight of relevant committees. Most importantly, the House and Senate judiciary committees must retain jurisdiction that is concurrent with the intelligence and homeland security committees over domestic surveillance, access to the courts and other government actions that affect legal and constitutional rights.

The Commission’s other recommendations include investing the intelligence committees, or a joint committee of both Houses of Congress, with authorizing and appropriations powers over the intelligence communities. This proposal should be approached with caution. Limiting the number of committees with jurisdiction over the intelligence community may frustrate oversight instead of enhancing it. If the single committee with jurisdiction over intelligence does not ask probing questions concerning a given program or policy, there will no longer be the potential for another committee to fill the void.

Most importantly, the judiciary committees of the House and Senate must retain concurrent jurisdiction over intelligence matters affecting legal and constitutional rights. A more powerful intelligence committee should *not* have the exclusive or final say on amendments to the Foreign Intelligence Surveillance Act or other sensitive surveillance statutes, for example. The same need for some concurrent jurisdiction in the judiciary committees arises if Congress adopts the Commission’s proposal for permanent committees to oversee the Department of Homeland Security.

Recommendation #15: Congress should enact H.R. 3281, the Platts bill, or its Senate counterpart, S. 2628, the Akaka-Grassley bill, providing special protections for national security whistleblowers.

Finally, a thorough and comprehensive review of the treatment of national security whistleblowers must be part of any reform of the intelligence community. The role of whistleblowers in assisting our understanding of pre 9/11 intelligence failures has been essential.

National security whistleblowers face unique obstacles. Many intelligence and national security jobs are exempt from the civil service protections, including whistleblower protections, enjoyed by most government employees. National security whistleblowers also face additional hurdles, such as the loss of a security clearance or possible criminal charges for allegedly disclosing classified information, that are not faced by most government whistleblowers.

The 9/11 Commission's calls for reform of the intelligence community that would challenge conventional wisdom should include specific procedures that would encourage whistleblowers. Additional safeguards, consistent with national security, must be enacted to encourage employees who see distorted and sloppy analysis or other serious shortcomings to come forward without fear of losing their jobs, security clearances, or going to prison.

The USA Patriot Act

Recommendation #16: Congress should adopt the 9/11 Commission's framework for determining whether to extend controversial provisions of the USA PATRIOT Act when they expire next year, which puts the burden on the government to show why powers are needed *before* examining the impact on civil liberties. In particular, Congress should wait until next year to decide whether to re-authorize the sections of the law that sunset so as to preserve an adequate opportunity for the debate for which the Commission called.

During the rush to enact the USA PATRIOT Act after September 11, the White House and Attorney General implied that if changes to the law did not pass quickly, and there was another terrorist attack, the blame would rest on Congress. Not surprisingly, the law passed by wide margins: 96 to 1 in the Senate, 357 to 66 in the House. Since then, however, numerous lawmakers have expressed reservations, and many, including members of the Subcommittee, are actively seeking to refine the law to better protect civil liberties.

Congress wisely included a series of "sunset" provisions in the law, which would require Congress to reauthorize certain provisions or let them expire by December 31, 2005. The Administration has asked Congress to act this year to remove the sunset provisions, which would make the entire law permanent.

The 9/11 Commission report unequivocally said that the government has the responsibility for defending the expansions of government power that are the hallmark of the USA PATRIOT Act. The Commission could have, but did not, endorse the

PATRIOT Act and call for its renewal. Instead, the Commission called for a “full and fair debate” over the need for these new powers, with the burden of proof resting on the government to show why a power is needed. In our view, the Department of Justice has not to date met this burden – particularly with respect to the most controversial parts of the USA PATRIOT Act. These sections relate to secret searches and access to library and other records, either under a minimal level of judicial review under Section 215, or with no review at all in the case of National Security Letters in Section 505.

The 9/11 Commission also recommended that expansions of government power must come only with adequate supervision of the executive’s use of the powers to ensure protection of civil liberties. This is a very important recommendation. We believe that enacting the Security and Freedom Ensured Act (“SAFE” Act), H.R. 3352 (and S. 1709 in the Senate) is an important step that Congress could take to increase judicial, Congressional and public supervision.

A National ID Card

Recommendation #17: Congress should reject any proposal to (1) make state-issued driver’s licenses into a common license that is federally-designed, but issued by the states, (2) require licenses to contain an embedded computer chip bearing the holder’s biometric identification information (i.e. a fingerprint or retina scan and digital picture), or (3) link the ability to obtain a drivers license to immigration status.

While the 9/11 Commission did not endorse a national identification card *per se*, its recommendations for federal standards for drivers licenses would almost certainly amount to a back-door way of accomplishing the same objective. Rep. Cannon (R-Utah) pointed this out at a hearing on August 20.

Even during periods of national threat, most notably the Cold War and World War II, the country has never thought it necessary to require citizens to carry “papers” with them at all times. If Congress did so now, it would endanger both security and civil liberties.

Once federalized, drivers licenses would be demanded for all manner of personal transactions that do not now require one. Moreover, federalized licenses would be the key that accesses personal information about the holder that would be inevitably linked to the license. Today, that information would include obvious identifiers such as Social Security Number and address. But tomorrow, it would include less obvious identifiers, and not just fingerprints and retina scans. Many businesses – from landlords to retailers – would themselves, or through the government, seek to tie personal information to the federalized drivers license, and they would not allow routine transactions unless a person produced their federalized drivers license.

Some states have decided that drivers licenses should be issued to those who can prove that they can drive, as opposed to those who can also prove that they are in the country lawfully. They have decided that it serves their public safety needs to ensure that all

drivers are licensed regardless of immigration status. Congress should not step in to upset this determination.

Moreover, the same people who produce fraudulent state identification documents today would produce fraudulent federalized identification documents tomorrow. The fraudulent federalized documents would be used not only by those seeking to commit fraud, but by those intending to do much more serious harm.

Finally, Congress has considered, and ultimately rejected, this proposal before. This proposal is very similar to Section 656(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The regulation the Department of Transportation proposed to implement Section 656(b) was roundly criticized as a system of national identification, and was never implemented. The regulation that the DOT proposed drew literally thousands of negative comments from members of the public. Congress wisely repealed the provision in a subsequent transportation appropriations bill.

A much better approach would be for Congress to fund state efforts to make drivers licenses more secure.

Airline Passenger Profiling and “No Fly” Lists

Recommendation #18: Before the TSA begins administering no-fly lists, Congress should ensure that there is some independent review, subject to appropriate security measures, of how someone gets on the no-fly list. For travelers who find themselves wrongfully included in the no-fly list, there must be some process for them to clear their names, and the TSA should be required to track the number and cost (both to effectiveness and civil liberties) of “false positives.”

The 9/11 Commission took no position on whether the passenger profiling system known as CAPPS II should go forward. Moreover, its factual findings suggest that the approach taken by the proposed CAPPS II – to subject every commercial air passenger to an invasive background check against business and intelligence databases -- is not necessary to ensure airport security.

However, the Commission did endorse broad expansions of “no-fly” and “automatic selectee” lists, and that screening against these lists should be performed by the Transportation Security Administration, instead of by the airlines, as is now the case.

The ACLU has long-standing concerns about the use of federal watchlists. While it does not oppose the concept of a watchlist per se, the practical use of such tools is fraught with peril for civil liberties. As currently administered, the no-fly list has spawned stigmatization, interrogation, delay, enhanced searches, detention and/or other travel impediments for innocent passengers. These innocent passengers can include prominent Americans such as Senator Ted Kennedy, who recently revealed that he was on the “no-fly” list for weeks, and people with the same name as terrorist suspects, such as the four innocent “David Nelsons” who were repeatedly stopped in the airport because their name

was on such a list. ACLU has filed a lawsuit seeking to vindicate the due process rights of people on the list. (www.aclu.org/nofly).

Expansion of the “no-fly” and “automatic selectee” lists, as proposed by the 9/11 Commission, should not go forward unless the TSA establishes adequate policies and procedures to ensure that the right people are on the list, people who are wrongly identified as terrorist suspects have a way of getting off of the list, and there is an independent review of the criteria used to put a person on one of the lists. The ombudsman process that the TSA has established has not to date proven adequate to accomplish these ends.

There is also some ambiguity in the report, which could result in parts of CAPPS II making their way into a reformed passenger screening system. Most notably, the commission’s recommendations that the air carriers turn over all necessary information about their passengers to implement any new screening system could open the door to the same kinds of problems with the CAPPS II proposal. The TSA must not use this as an opening to engage in the dragnet screening of every air traveler. Suspicion must still be individualized, and based on reliable indicators of threat, not whimsy, bias or unproven profiling schemes.

Border Security and Immigration

Recommendation #19: While improved border security is important for national security, the report’s “integrated approach” recommendation should not be implemented in a manner that creates what amounts to an “checkpoint society” or internal passport system. Discriminatory profiling should be rejected.

The 9/11 Commission recommended that the U.S. border security system be integrated into a larger network of screening points that includes our transportation system and access to vital facilities, such as nuclear reactors. While border security screening needs to be improved, it should not be converted into a system of internal checkpoints at all major transportation systems.

Major transportation systems include trains, light rail, inter-city bus systems, intra-city bus systems, and subway systems such as the Metro system here in Washington, D.C. The process for boarding a Metro train should not be integrated into the system designed for those crossing the border. To do so would not only bring internal transportation to a crawl, but would fundamentally change the character of American society by creating a system of internal checkpoints. One should not have to scan a passport – or a federalized drivers license – to board a bus or hop on a subway train.

We do not believe that the 9/11 Commission meant to call for such a system, and we encourage members of the Commission to clarify this recommendation.

Rejection of discriminatory profiling and the “special registration” for visitors from Arab and Muslim countries. The 9/11 Commission essentially rejected any border security

scheme that singles visitors out based on national origin or other categorical criteria. None of its recommendations should be construed as supportive of any such system. The report says: “We advocate a system for screening, not categorical profiling. A screening system looks for particular, identifiable suspects or indicators of risk. It does not involve guesswork about who might be dangerous.” (pg. 387).

We are hopeful that the Administration will interpret this recommendation in a way that ensures that the US VISIT program does not follow the path of its predecessor, the National Security Entry-Exit Registration System, or NSEERS. NSEERS singled young men visiting the United States from certain Muslim and Arab countries out for heightened scrutiny and forced them to register with the government; Congress should ensure that US VISIT does not go down this road.

Conclusion

Increased threats of terrorism after September 11, 2001, lightning-fast technological innovation, and the erosion of key privacy protections under the law threaten to alter the American way of life in fundamental ways. Terrorism threatens – and is calculated to threaten – not only our sense of safety, but also our freedom and way of life. Terrorists intend to frighten us into changing our basic laws and values and to take actions that are not in our long-term interests.

Proposals for fundamental reforms of the intelligence community are particularly sensitive because of the fundamental tension between intelligence gathering and civil liberties. Where government is focused on gathering intelligence information not connected to specific criminal activity, there is a substantial risk of chilling lawful dissent. Such inquiries plainly have a chilling effect on constitutional rights.

The answer is not to reject all intelligence and other reforms. The answer, instead, to ensure that specific safeguards for domestic collection of intelligence information that preserve the role of the FBI while ensuring against the use of spy tactics against Americans through strengthened guidelines and other checks to bar political spying. Greater openness, real accountability to both Congress and the public, and protection of whistleblowers is vitally necessary to challenge old assumptions and ensure better analysis and performance. If watch lists are used that have real consequences to those errantly on the list, then there must be a way to ensure that innocent people are not mistaken for dangerous ones, and to ensure that they can get off the list.

The 9/11 Commission should be applauded for avoiding the easy – and wrong – scapegoating of civil liberties and human rights protections for intelligence failures. The commissioners clearly understood that in order for America to remain strong and free, any reform of our intelligence or law enforcement communities must reflect the values and the ideals of our Constitution.

While we take exception to some of the 9/11 Commission's recommendations, such as the federalization of drivers licenses, we take heart from others, such as the call on government to justify broad expansions of power.

The challenge to our intelligence community is the same as the challenge to Congress, and for the nation as a whole. Securing the nation's freedom depends not on making a choice between security and liberty, but in designing and implementing policies that allow the American people to be both safe and free.

APPENDIX

9/11 Commission Recommendations Summary of Civil Liberties Safeguards

National Intelligence Director, Counter-Terrorism Center must be accountable, not political

1. Intelligence director should not be White House official, but should be independent office, counter-terrorism center should not be in White House, and head of CIA should not be given more powers over domestic surveillance.
2. Intelligence director should be subject to Senate confirmation and should have a fixed term, like FBI Director and new Director of the CIA; President can fire for cause.

Make sure a “top cop,” not a “top spy” remains in charge of domestic surveillance

3. Head of FBI intelligence operations must report to FBI Director and Attorney General, not intelligence chief;
4. FBI Director and Attorney General should be required to make and enforce guidelines prohibiting spying on First Amendment protected activity;
5. Powers of intelligence director and counter-terrorism center should be specified by statute, and other activities barred. Explicit, enforceable language should make clear intelligence director does not have effective control of domestic surveillance, whether directly or through counter terrorism-center.
6. No “covert operations” on American soil – use of domestic intelligence must be bound by legal system;

Reduce excessive secrecy, improve accountability

7. Create strong Inspector General and other internal watchdogs for intelligence community; create Civil Liberties Protection Board with real power to investigate abuses and prompt corrective action;
8. Restore presumption against classification for no good reason in prior Executive Order;
9. Amend Freedom of Information Act to provide that exemptions for new categories of unclassified, but nonpublic, information must be balanced against public interest in disclosure;

10. Enact legislation (e.g., S. 436/H.R. 2429) increasing public reporting on use of Foreign Intelligence Surveillance Act (FISA) that governs FBI national security wiretaps, secret searches, and records demands within United States;
11. Enact Lott-Wyden bill (S. 2672/H.R. 4855) establishing bipartisan classification review board, and make clear Senate is prepared to release information on board's recommendation if President is intransigent;
12. Intelligence committees must hold more open hearings, and open all legislative hearings;
13. Make intelligence budget public;
14. New and stronger committees to oversee intelligence community and Department of Homeland Security must allow for oversight by other relevant committees. Judiciary committees must have concurrent jurisdiction over domestic spying and other actions affecting constitutional rights.
15. Enact legislation (e.g., S. 2628/H.R. 3281) to provide specific protections for national security whistleblowers.

The USA Patriot Act

16. Congress should adopt the 9/11 Commission's framework for evaluating the USA PATRIOT Act, which puts the burden on the government to show a power is needed.

Border and Transportation Security

17. Congress should reject proposals to federalize drivers licenses and thereby turn them into a national ID that links databases and mandates immigration restrictions.
18. Standards for "no fly" and other watchlists must be enhanced to ensure there is clarity about how a person gets on a list, how the "same name" problem can be addressed, and how a person gets off.
19. Tracking "terrorist travel" should not be accomplished by a system of internal "checkpoints" that requires Americans to carry what amounts to an internal passport. Discriminatory profiling should be rejected.