Civil Liberties and the 9/11 Commission

An ACLU White Paper on Notable Findings and Recommendations in the Final Report of the National Commission on Terrorist Attacks Upon the United States

Much of the response to the recently released 9/11 Commission report has focused on the structural and organizational changes that the commission recommended for government. However, lawmakers, the news media and Americans everywhere should be aware of the report's significant findings and recommendations linked to the struggle to protect civil liberties in the post-9/11 environment.

Much like the USA Patriot Act, some of what it recommends is neutral for civil liberties; some is beneficial. However, certain recommendations, like the creation of a spymaster in the White House, run counter to basic ideas about the American way of life.

The country will not be well served by a politically charged bidding war over the commission's recommendations in an election year. Congress and the president need to take a deep breath before rushing to implement any of the commission's recommendations. While no one can argue that reform is not needed to protect our national security, the precise form that that reform should take requires calm and resolute deliberation. The 9/11 Commission's report should be a jumping off point for this deliberation, not the final word.

The ACLU believes that intelligence reform must enhance security, openness and civil liberties. Some of what the commission recommends reflects this need; some does not.

For instance, in rejecting calls for the creation of a domestic intelligence agency separate from the FBI, the commission cites both the added difficulty of effective legal oversight, and the inherent danger that any abuses by the new agency will provoke a public outcry that will impair needed intelligence collection. (§13.5; 423-424) However, its recommended consolidation of intelligence authority in the hands of one official in the White House is deeply troubling for civil liberties.

The following analysis attempts to list and analyze those parts of the 9/11 Commission report most relevant for the contemporary debate over civil liberties. Where applicable, ACLU recommendations follow in each section.

The specific issues discussed include:

- The "Wall": pgs. 15-17
- Conclusion: pgs. 17-18

The National Intelligence Director

(§13.2, 407-416)

Along with broadened Congressional oversight, discussed below, the commission's most sweeping recommendation is a sea-change reorganization of the U.S. intelligence community's management structure.

- "Recommendation: The current position of Director of Central Intelligence should be replaced by a National Intelligence Director with two main areas of responsibility: (1) to oversee national intelligence centers on specific subjects of interest across the U.S. government and (2) to manage the national intelligence program and oversee the agencies that contribute to it." (pg. 411)

The new NID would have sweeping powers, including:

- The power to submit a unified budget for national intelligence that reflects the priorities chosen by the National Security Council and an appropriate balance between different types of intelligence (i.e. imagery, human, electronic, etc.) S/he would apportion funds in-line with this budget, but would have the authority to change funding levels based on newly emergent priorities.

- The power to approve and submit nominations to the president for the chiefs of all the composite intelligence agencies, including the FBI's Intelligence Office and the head of the Defense Intelligence Agency.

- The power to set personnel policies to establish standards for education and training. S/he would also set information sharing and information technology policies in the interests of both maximizing data sharing, and ensuring data secrecy.

- The role of both intelligence community manager and primary servicer of intelligence consumers. The NID would be both the boss of the gigantic intelligence infrastructure, and would be the go-to person for the president and others on all things intelligence, including military, strategic, diplomatic, political and economic information.

At the time of writing, it remains unclear just where the new NID would be housed. The commission strongly recommended that the NID be located in the Executive Office of the President. However, members of Congress have been skeptical of that proposal and President Bush's position is that the NID should not be in the White House.

The commission also recommended that the NID be nominated by the president and confirmed by the Senate. S/he would have a relatively small staff of several hundred, and would not lead his or her own agency.

The NID's authority would break down along two streams. On one side, s/he would be responsible for overseeing a number of national intelligence centers, housed in disparate agencies, which are each assigned to track one national security concern like counter-proliferation, narco-trafficking or China. Such an arrangement, the commission argues will help foster "all-source" integration (e.g. help put both signals intercepts and human asset reporting in front of the same person).

The other branch would be directly over the different agencies that make up the intelligence community. The NID would hire and supervise the newly created director of the CIA (as distinct from the director of central intelligence, who would be replaced by the NID), the undersecretary of defense for intelligence and either the FBI's intelligence chief, or the head of the Department of Homeland Security's infrastructure and intelligence office. Accordingly, the NID would have managerial control over foreign intelligence, military intelligence and domestic intelligence, respectively.

Finally, the report recommends that the NID take the reins of a powerful new National Counter-Terrorism Center (NCTC), which would incorporate the Terrorism Threat Integration Center (currently run by a CIA official).

In recommending the new position, the 9/11 Commission rejected calls to create a separate domestic intelligence agency that would take over the FBI's counter-intelligence mission. It did so in part because of civil liberties concerns: the FBI, it said, "is accustomed to carrying out sensitive intelligence collection operations in compliance with the law." (pg. 423)

The ACLU has long argued, and the commission agreed, that a complete separation of domestic intelligence gathering from the FBI's culture of case-oriented law enforcement invites a re-run of past abuses. Before the reforms of the 1970s, domestic intelligence was authorized under the sole authority of executive branch officials and was not subject to judicial review. The result was the rampant abuse of domestic intelligence activities, most notably against anti-war and civil rights activists in the 1960s and early 1970s.

Unfortunately, the proposal in the 9/11 Commission's report could too easily devolve into the same types of problems the commission identified as reasons for rejecting a domestic intelligence agency.

Problems with the proposal include:

- The NID would be hired and fired by the president, putting him or her squarely in the "hip pocket" of the president. The position's should have a fixed term like that of the FBI director of chair of the Federal Reserve. President Bush's stated desire to "hire and fire" the NID, expressed during his announcement in early August that he would act to create the position, must be qualified to give the Director enhanced independence. The President would "hire" the NID subject to Senate confirmation, and the President should be able to "fire" the NID only for cause, including bad performance – not because the intelligence the NID supplies does not fit the President's political agenda.

- The NID's portfolio would combine authority over both domestic and foreign intelligence operations. When the CIA was created in 1947, both President Truman and the visionary behind the agency, William "Wild Bill" Donovan, were opposed to it having any domestic role. They realized that the tradecraft of espionage, as honed by Donovan during World War II, should have no place on American soil. Espionage's reliance, they said, on things like blackmail, illegal wiretaps and propaganda would be entirely inconsistent with American freedoms. Accordingly, authority for counter-espionage was given to the FBI and the CIA was barred from any "internal security" function. The creation of the NID would effectively negate any such line in the sand.

- The FBI is further side-lined in domestic counter-espionage and counter-terrorism operations by the creation of the powerful NCTC under the auspices of the NID's office. While not a separate direct collector of intelligence, the NCTC would nonetheless have both an analysis and an "operations" wing, and would be responsible for setting "operational" responsibilities for other agencies, including the FBI.

- Finally, by putting the NID at the helm of the military's intelligence agencies (which eat up 80 percent of the annual intelligence budget) the commission's proposal threatens to further blur the lines between domestic, foreign and military intelligence. Already the military joint command in charge of countering security threats to American soil, known as Northern Command or NORTHCOM, has its own intelligence unit. On its own, the NORTHCOM's intelligence function raises problems under a law, more than a century old now, that bars military involvement in domestic law enforcement. The commission's model for an NID would consolidate military intelligence on U.S. soil with domestic counter-intelligence and counter-terrorism power.

That said, it is not necessary to abandon the proposal for an intelligence director, or reject the need for intelligence reform, to protect against what amounts to CIA-style domestic spying tactics. An intelligence director could be created without undue threat to civil liberties. Strong checks would have to be installed on such a person's authority, especially over his or her ability to control domestic intelligence operations.

- First, the NID must not be given what amounts to direct operational control over the FBI or other domestic collectors of intelligence.

- Second, the centralizing of control over intelligence in the NID must not be so strong that it creates what amounts to a "Department of Intelligence."

- Third, civil liberties limits on domestic collection of intelligence information must be preserved, not only by retaining or strengthening guidelines, but by preserving the powers of agency heads to enforce them.
- Fourth, the NID must not be given control of the agency that is charged with integrating domestic and foreign intelligence analysis about terrorism.

- Finally, the NID must not be insulated from requests under the Freedom of Information Act and protection must be provided for potential whistleblowers.

The 9/11 Commission also proposes opening details about the overall amount of money spent on intelligence to public scrutiny. It does so explicitly to combat the "secrecy and complexity" that it criticizes in the community. Under the commission's proposal, the specifics of intelligence appropriations would remain classified to protect sources and methods. However, the top-line expenditures would be declassified, which would allow the public to discern just how its tax dollars are being disbursed among the foreign, military, technical and domestic intelligence agencies. (pg. 416)

The ACLU has released a detailed analysis of the potential problems with the intelligence reform proposed by the 9/11 Commission, and includes specific recommendations for changes that will help ensure intelligence reform reflects the special sensitivity of domestic surveillance.

Specific ACLU Recommendations

- The NID should not be a White House, nor a cabinet, position.

- The NID should be confirmed by the Senate and subject to Congressional oversight.

- The chiefs of the FBI's intelligence divisions should report still to the FBI director and attorney general, not the NID.

- The FBI director and attorney general should create and enforce guidelines prohibiting investigations based on First Amendment-protected activity.

- Any measure creating the NID should include explicit, enforceable language proscribing any operational control over domestic surveillance, whether directly or indirectly through the NCTC.

- Any measure creating the NID should also include an explicit, enforceable prohibition on covert activities on American soil. The rule of law should rule domestic intelligence gathering.

- TTIC or any successor unit or agency should not be under CIA control, but should not move to the White House.

- Congress should create an inspector general for privacy, civil liberties and civil rights within the intelligence community, possibly housed with the NID.

Steps should be taken to ensure that diverse experts challenge intelligence analysis to keep it from either understating *or overstating* threats to national security.

The USA Patriot Act

(See §12.4; 394-395; Notes to Chapter 5, #124, and Notes to Chapter 8, #83)

The Uniting and Strengthening America By Providing Appropriate Tools Required to Interdict and Obstruct Terrorism Act, or USA Patriot Act, was signed into law barely six weeks after the terrorist attacks of 9/11. During its negotiation, the White House and attorney general continued to imply that if it did not pass quickly, and there was another terrorist attack, the blame would rest on Congress.

Accordingly, 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 some are actively seeking to refine the law.

When it passed, concerned legislators also 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. Currently, the White House and its surrogates are campaigning vigorously 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 its position on the Patriot Act. The Commission could have, but did not, endorse the Patriot Act and call for its renewal. Instead, the Commission called for a debate over the need for these new powers, with the burden of proof resting on the government to show why a power is needed.

The ACLU said that the government has to date not met this burden with the expansions of surveillance and investigative powers in the Patriot Act and that the law should be narrowed.

Most notably, the report recognizes that many changes to government policy after 9/11 involve a greater role for government in our lives, that the current conflict against Al Qaeda and radical Islamic terrorism is open-ended and undefined, and that such a state of affairs requires additional checks and balances against abuse.

- "In wartime, government calls for greater powers, and then the need for those powers recedes after the war ends. This struggle will go on. Therefore, while protecting our homeland, Americans should be mindful of threats to vital personal and civil liberties. This balancing is no easy task, but we must constantly strive to get it right." (pg. 394)

It then links this call for greater oversight, accountability and transparency in calling for a debate on the Patriot Act – not a premature renewal.

- "Because of concerns regarding the shifting balance of power to the government, we think that a full and informed debate on the Patriot Act would be healthy." (pg. 394)

Based on this rationale, it proffers a specific recommendation concerning the Patriot Act and other expansions of government power.

- "Recommendation: The burden of proof for retaining a particular governmental power should be on the executive, to explain (a) that the power actually materially enhances security and (b) that there is adequate supervision of the executive's use of the powers to

ensure protection of civil liberties. If the power is granted, there must be adequate guidelines and oversight to properly confine its use." (pg. 395)

Crucially, nowhere in the 9/11 Commission report is there any suggestion that the sunset provisions should be abandoned, as requested by the Bush administration. Nor does the 9/11 Commission find that the government has met its burden with respect to any particular Patriot Act or related power.

The report also includes some discussion of the much ballyhooed "wall" between intelligence gathering and law enforcement, discussed further in a separate section. Crucially, the report agrees with the ACLU in describing the use of the term "wall" as highly misleading.

The Creation of a Civil Liberties Watchdog in the Executive Branch

Given the proposed increase in federal intelligence and law enforcement power in the report, the commissioners recommend also the creation of a super-watchdog in the executive branch, tasked with ensuring that "liberty concerns are appropriately considered."

"Recommendation: At this time of increased and consolidated government authority, there should be a board within the executive branch to oversee adherence to the guidelines we recommend and the commitment the government makes to defend our civil liberties." (pg. 395)

Specific ACLU Recommendations

- If Congress or the president goes ahead and creates a dedicated civil liberties watchdog with government-wide jurisdiction, the office must have appropriate power to enforce its findings, and must have appropriate independence from both Congress and the executive branch. If we do not give an internal civil liberties police officer independence and power, *we run the risk of creating something worse than useless*. Not only will it not protect civil liberties, but its findings will create the illusion of civil liberties oversight.

A National ID Card?

(See §12.4, 390; Notes on Chapter 12, #41)

While somewhat ambiguous, one of the report's recommendations regarding "terrorist travel" could, but should not, be construed as an endorsement of a national identification card.

- "Recommendation: Secure identification should begin in the United States. The federal government should set standards for the issuance of birth certificates and sources of identification, such as driver's licenses. Fraud in identification documents is no longer just a problem of theft. At many entry points to vulnerable facilities, including gates for boarding aircraft, sources of identification are the last opportunity to ensure that people are who they say they are and to check whether they are terrorists." (pg. 390)

Disturbingly, the footnote to the recommendation cites approvingly the findings of the Markle Foundation, which call for state driver's licenses and identification cards to "meet minimum uniform standards concerning their data content and the verifiability of the credential." (pg. 78; report is on-line at: http://www.markle.org/downloadable_assets/nstf_report2_full_report.pdf.)

The commission needs to clarify its recommendation. When it does so, the ACLU hopes that any system that it endorses not establish a national identification card, which would be highly unreliable, problematic for personal privacy and new avenue for racial profiling.

If the 9/11 Commission does come out in support of a national identification card, or of a federally standardized driver's license, *both Congress and the president must reject it outright*. 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 we do so now, we will be endangering both security and civil liberties.

Specific ACLU Recommendations

Congress and the president must reject any identification proposal that would:

- Make state issued driver's licenses "interoperable" among the states. Such a system would create a common license that is federally designed but issued by the states.

- 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).

- Link the ability to obtain a drivers license to immigration status.

Airline Passenger Profiling and "No Fly" Lists

(§12.4, 392-393)

In a significant victory for civil liberties, the 9/11 Commission takes no position on whether the passenger profiling system known as CAPPS II should go forward or remain stalled. 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 highly secretive intelligence and law enforcement databases – is not necessary to ensure airport security.

The hijackers were able to foil the system not because of it was not invasive enough, but because it only required the airlines to hold a suspect's bags off the plane until he or she boarded. The problem was a lack of foresight and imagination, not overly constrictive civil liberties safeguards. More invasive profiling would not solve the problem.

What is troubling, however, is that the report does strongly recommend broad expansions of "no-fly" and "automatic selectee" lists.

- "Recommendation: Improved use of 'no-fly' and 'automatic selectee' lists should not be delayed while the argument about a successor to CAPPS continues. This screening function should be performed by the TSA, and it should utilize the larger set of watchlists maintained by the federal government. Air carriers should be required to supply the information needed to test and implement this new system." (pg. 393)

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 a long list of, in the words of the ACLU's lawsuit against the no-fly system, "stigmatization, interrogation, delay, enhanced searches, detention and/or other travel impediments for innocent passengers." (Brief is on-line at www.aclu.org/nofly).

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.

Specific ACLU Recommendations

- 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.

- The TSA should be required to track the number and cost (both to effectiveness and civil liberties) of "false positives."

The report's other airport security recommendations are innocuous. They include screening people for explosives (not just luggage) and using private sector management techniques to understand and fix TSA screener performance problems. (pg. 393) Notably, the ACLU has long pointed to luggage matching, improved screener training and trace-explosive scanning of both persons and luggage as far more fruitful security measures than CAPPS-style profiling.

Border Security

(§12.4, 383-390)

The report's discussion of border security is complicated and multi-faceted. Selected findings, relevant (albeit obliquely) to civil liberties, are listed below under sub-head.

NSEERS

The commission essentially rejected any border security scheme that singles visitors out based on national origin or other categorical criteria. Crucially, none of its other 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)

Most importantly, the 9/11 Commission report should be taken as a warning to the administrators of the current entry-exit program known as US VISIT that they not let it follow the path of its predecessor, the National Security Entry-Exit Registration System, or NSEERS. NSEERS actually singled visitors from certain Muslim and Arab countries out for heightened scrutiny and forced them to register with the government.

Terrorist Travel Generally

- "[B]order security – encompassing travel, entry and immigration – was not seen as a national security matter. … In national security circles, … only smuggling of weapons of mass destruction carried weight, not the entry of terrorists who might use such weapons or the presence of associated foreign-born terrorists." (pg. 384)

- "For terrorists, travel documents are as important as weapons." (pg. 384)

- "We found that as many as 15 of the 19 hijackers were potentially vulnerable to interception by border authorities." (pg. 384)

- "The small terrorist travel intelligence collection and analysis program currently in place [at the Homeland Security Department] has produced disproportionately useful results. It should be expanded." (pg. 385)

A Biometric Screening System

The 9/11 Commission calls for any screening system to be holistic. That is, each individual inspection station, ticket counter, terminal gate, passport or visa application or any other step required in international travel should be a "portal" in one giant process. In this process, inherent mechanisms (biometric and other) should make sure that each station becomes a "chance to

establish that people are who they say they are and are seeking access for their stated purpose, to intercept identifiable suspects, and to take effective action." (pg. 385)

Accordingly, the commission suggests that the entire border security system be reexamined within a clearly laid-out conceptual framework.

- "Throughout government, and indeed in private enterprise, agencies and firms at these portals confront recurring judgments that balance security, efficiency, and civil liberties. These problems should be addressed systematically, not in an ad hoc, fragmented way." (pg. 386)

In this discussion, the commission's report highlights the importance of trusting subjective judgment in this system, citing the fact that an alert customs inspector actually thwarted one of the hijackers from entering the country. The report's phrasing clearly repudiates any sort of racial, ethnic, religious or national origin profiling.

- "The inspector relied on intuitive experience to ask questions more than he relied on any objective factor that could be detected by 'scores' on a machine. Good people who have worked in such jobs for a long time understand this phenomenon well. … This is not an invitation to arbitrary exclusions." (pg. 387)

The report's recommendation reflects this:

- "Recommendation: The U.S. border security system should be integrated into a larger network of screening points that includes our transportation system and access to vital facilities, such as nuclear reactors. The President should direct the Department of Homeland Security to lead the effort to design a comprehensive screening system, addressing common problems and setting common standards with system-wide goals in mind." (pg. 387)

Specific ACLU Recommendations

- While improved border security is important for national security, we should not let the report's "integrated approach" recommendation lead to the creation of an internal passport system.

U.S. Visit and Border Screening

It is worth noting that part of the commission's recommendations for improving U.S. Visit involves the integration of a system for "speeding qualified travelers." The commissioners are referring to a proposal to scrap the current system that allows citizens and some non-citizens traveling to the United States from Canada, Mexico and the Caribbean to enter without a passport. (pg. 388)

Were their recommendations to be adopted, people entering from these countries would be required to show a biometric passport (or otherwise have their identities securely verified), but

could be accelerated through a system for "known travelers," which would likely incorporate radio frequency identifier technology.

The report extends broadly opened arms to all manner of friendly visitors, including students, scholars, businesspeople and tourists, which it says fuel our economy, add to our cultural vitality and augment our political reach. It notes recent evidence that the current dysfunctions in our immigration system have resulted in dramatic drops in visa applications, especially from the Middle East. (pg. 389)

Secrecy, Accountability and Congressional Oversight

One of the commission's most significant critiques of the current intelligence system concerns the ongoing problems consequent to the community's pervasive secrecy, over-classification and compartmentalization, and the "dysfunctional" state of Congressional oversight.

"Secrecy stifles oversight, accountability and information sharing," the report says. "Unfortunately, all the current organizational incentives encourage over-classification. This balance should change; and as a start, open information should be provided about the overall size of agency intelligence budgets."

Regarding Congress' role, the intelligence oversight function in Congress today is split among several different committees and lawmakers. The select intelligence committees in the House and Senate exercise limited oversight power, as do the armed services committees in both chambers over the huge chunk of the intelligence budget spent by the Defense Department. The final spending bill for each fiscal year must also be approved by the appropriations committees.

The commission recommends consolidating these committees into an entirely new creature. It recommends the old Joint Committee on Atomic Energy as a possible model, or alternatively endorses a single committee in each chamber with both authorizing and appropriating powers.[1]

The final goal, the commission says, is a "structure – codified by resolution with powers expressly granted and carefully limited – allowing a relatively small group of members of Congress, given time and reason to master the subject and the agencies, to conduct oversight of the intelligence establishment and be clearly accountable for their work." Committee staff would be non-partisan and would work for the entire committee and not for individual members.

The commission's report also calls on any new committee to have a subcommittee specifically dedicated to operational oversight, freed from the demands of worrying about budgetary matters. The report recommends subpoena authority for the committee, and says that majority representation should never exceed minority members by more than one. Finally, four of the members appointed to the committee or committees should also be members of each of the following committees: armed services, judiciary, foreign affairs and defense appropriations. Members should not be term-limited. (pgs. 420-421)

[1] The Joint Committee on Atomic Energy was in existence from 1946 to 1977. Unlike the other joint committees of the modern Congress, it was given the explicit authority to report bills, and in fact the legislation creating the committee ordered that all legislation related to the "development, use or control of atomic energy" be referred to it.

The ACLU believes that such an oversight structure might have benefits for civil liberties, but that it also contains significant peril as well. Creation of a more powerful intelligence committee or committees should not exclude oversight by other relevant committees. The intelligence community could escape oversight altogether for programs or policies that do not interest the members of the intelligence committees.

We also recommend strongly that the judiciary committees retain concurrent jurisdiction over intelligence matters that deal with constitutional and legal rights and that the intelligence committee or committees not have the final say over changes to the FISA statute or other sensitive domestic surveillance laws.

The report also recommends the creation of a "single, principle point of oversight" for the Department of Homeland Security and contains suggestions on how to minimize disruptions at the senior levels of the intelligence community caused by transitions between executive administrations. Again, the recommendation may be useful, but the concurrent jurisdiction of the judiciary committees over constitutional liberties, access to the courts, and due process must also be preserved.

Regarding the excessive secrecy that still obtains within the intelligence community, the commission is *highly* critical. "No one," the report says, "has to pay the long-term costs of over-classifying information, though these costs – even in literal financial terms – are substantial." It lays the blame for the failure within the American intelligence community to really develop an all-source analytical capability squarely at the feet of the "human or systemic" resistance to sharing information. It decries the current "need to know" culture of compartmentalization and information protection and urges the creation of a "need to share" worldview. (pg. 417)

In line with the commission's recommendations, the ACLU believes Congress should act immediately to pass the Independent National Security Classification Board Act of 2004. Introduced by Senators Ron Wyden (D-OR) and Trent Lott (R-MI), the bill would establish a bipartisan board appointed by the president and Congress that would review classification rules and would have the power to recommend the declassification of information on its own initiative or when requested to do so. (pg. 418-419)

Finally, as will be discussed below, the commission's findings confirm much of what the ACLU has long said about the significance (or lack thereof) of Section 218 of the USA Patriot Act in fostering cooperation between the FBI's national security and criminal investigators, and between the FBI and the other members of the intelligence community (most notably the CIA and NSA).

The culture of compartmentalization, coupled with an overly restrictive reading of the "primary purpose" test in FISA, caused most of the intelligence breakdowns that are now mistakenly pointed to as evidence of the so-called legal "wall" between spies and cops.

Specific ACLU Recommendations

- Based on the 9/11 Commission's findings, Congress should enact the Lott-Wyden bill establishing a bipartisan classification review board.

- The presumption against classification that was overturned by President Bush's executive order should be restored.

- As recommended by the commission, the top-line budgets of the intelligence community's agencies should be made public.

- Clearer guidelines should be created controlling the "sensitive but unclassified" category of homeland security information.

- A "public interest balancing test" should be imposed on Freedom of Information Act requests. That is, agencies should be required to weigh the public interest in releasing information versus the threat to national security. If public interest wins, the information should be released.

- Intelligence committees should hold more open hearings.

- As stated, the judiciary committees should maintain concurrent jurisdiction over intelligence issues implicating constitutional rights and civil liberties.

The Rejection of a Domestic Intelligence Agency

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 British Secret Service.

The commission couched its objections to a domestic intelligence agency largely in terms of civil liberties concerns. 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 is 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 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 "Wall"

(See esp. §3.2, 78-80 and pg. 539)

The 9/11 Commission is quite clear that the internal and inter-agency obstacles to information sharing, as they developed during the 1980s and 1990s, were, as the ACLU has argued, almost exclusively the result of a misunderstanding and misapplication of both FISA and internal procedures designed to keep criminal prosecutors from exploiting the lower standards for intelligence surveillance – and not a result of FISA itself.

Pages 78 through 80 tell this story.

Prior to 1978, the attorney general claimed authority to allow foreign intelligence surveillance without any court review, although this authority was hotly contested. In response to the broad misuse of this power to investigate political dissenters, a reformist Congress passed the Foreign Intelligence Surveillance Act of 1978, which established a secret court to oversee the investigation and surveillance of foreign powers and foreign agents.

FISA was then interpreted by the courts to require that an intelligence order have as its "primary purpose" the acquisition of foreign intelligence information. According to sources examined by the commission, the Justice Department interpreted the primary purpose test to mean that federal prosecutors could be briefed on FISA information but could not direct or control its collection.

From 1978 to the mid-1990s, federal prosecutors had "informal" arrangements for accessing information gleaned from FISA tools, under the understanding that they would not exploit this material for their criminal cases.

However, after the Aldrich Ames case in 1994, anxiety rose significantly within the Justice Department that the current system could result in the courts excluding evidence obtained through FISA orders. Consequently, the Office of Intelligence Policy and Review in the Justice Department, which presents all FISA applications to the FISA court, decided to regulate the flow of FISA information to prosecutors.

In July 1995, OIPR complaints finally resulted in a working group led by the Justice Department's Executive Office of National Security, in consultation with FBI, OIPR and the criminal division. The U.S. Attorney's office for the Southern District of New York was permitted to comment on the working group's product. The procedures developed by the working group, led by Deputy Attorney General Jamie Gorelick, *mandated* the disclosure of

information obtained under FISA authority, but regulated the manner in which it was to be shared.

The procedures were, in the words of the commission, "immediately misunderstood and misapplied." After some time, they became known as what is often referred to as the "wall." "The term 'the wall' is misleading, however," the report says, "because several factors led to a series of barriers to information sharing that developed." (pg. 79)

The OIPR then became the sole gatekeeper for passing FISA information to the criminal division, arguing that if it were not permitted to play this role, it would no longer present FISA applications to the court.

This bottleneck was then compounded by an institutional aversion to information sharing among agents themselves. The FISA primary purpose proviso was intended to leash criminal prosecutors, not necessarily investigative agents themselves. However, pressure from the OIPR, FBI leadership and the FISA court itself began to build barriers between FBI agents working on criminal matters and those working on intelligence investigations. At one point, the report relates, FBI Deputy Director Robert "Bear" Bryant informed agents that too much sharing could be a "career stopper."

This overly cautious view leeched into the mindset of agents in the field. As a result, intelligence investigators began to stop sharing *any* intelligence information, even if it had not been gathered using FISA at all. Reports from the CIA and NSA failed to make their way across the growing divide to criminal investigators. Limited restrictions on the transfer of information disclosed during grand jury proceedings turned into a blanket interpretation barring the sharing of "much of the information" unearthed during investigations. And so on.

The practical consequences of this broad confusion were serious. As related in chapter eight (pgs. 269-276), an intelligence FBI agent assigned to the U.S.S. Cole bombing, confused about the complex rules governing information sharing, mistakenly told a criminal FBI agent assigned to the criminal Cole investigation that the rules barred him from participating in the search for Khalid al Midhar, one of the hijackers who the FBI had discovered was in the U.S.

"As a result of this confusion," the report says, "the criminal agents who were knowledgeable about al Qaeda and experienced with criminal investigative techniques, including finding suspects and possible criminal charges, were thus excluded from the search."

Furthermore, the report finds that if additional resources had been applied and a significantly different approach taken (presumably one where the limitations of the so-called "wall" were properly interpreted by investigators), Midhar and another hijacker, Nawaf al Hazmi, could have been located, as they had used their real names in the U.S. Authorities also knew that Midhar had met with another terrorist facilitator, known as Khallad, in Kuala Lumpur.

In short, the findings of the 9/11 Commission report highlight the fallacy in the argument, ubiquitous among supporters of the Patriot Act, that the 2001 law was instrumental in breaking down the "wall" between intelligence and law enforcement. The "wall," the report's findings

make clear, was not a result of FISA, but a result of confusion about FISA. That said, the report contradicts itself, on two occasions, by suggesting that the Patriot Act had the effect of breaking down the wall. On page 328, the report says:

- "The government's ability to collect intelligence in the United States, and the sharing of such information between the intelligence and law enforcement communities, was not a priority before 9/11. Guidelines on this subject issued in August 2001 by Deputy Attorney General Larry Thompson essentially recapitulated prior guidance. However, the attacks of 9/11 changed everything. Less than one week after September 11, an early version of what was to become the Patriot Act (officially, the USA PATRIOT Act) began to take shape. A central provision of the proposal was the removal of 'the wall' on information sharing between the intelligence and law enforcement communities."

On page 539, the report says, more vaguely:

- "Nor did [Attorneys General Reno and Ashcroft] challenge the strict interpretation of the FISA statute set forth by the FISA Court and OIPR. Indeed, this strict interpretation remained in effect until the USA PATRIOT Act was passed after 9/11."

These two statements are at odds, strictly speaking, with the narrative of the wall's construction, as related in chapter three of the report and summarized above. All the Patriot Act did was to redefine the foreign intelligence role of a FISA application from "primary purpose" to "significant purpose." While this might have given the FBI a psychological green light to relax their internal constraints on information sharing, it was not *necessary* to do so. If the amendment to FISA contained in the USA PATRIOT Act had never passed, there is little doubt that the procedures described by the report – procedures that the report says were not required by FISA – would have been altered in any event. This conclusion is borne out by the report's insistence that *confusion* over the law, not the law itself, was responsible for the wall (such as it was).

Moreover, Section 218 of the Patriot Act, which makes this change, could now be used to justify the direction of FISA applications by criminal prosecutors. As the report points out, this core FISA concern did not impede information flow; rather, it was confusion and misunderstanding about bureaucratic procedures to implement the rules that did. Allowing criminal prosecutors to *direct* intelligence cases (instead of simply receiving briefings about them) is highly perilous as prosecutors could use FISA to sidestep traditional Fourth Amendment protections against undue searches, seizures and surveillance. Section 218 should be reconsidered by Congress in light of the 9/11 Commission's findings.

Conclusion: The War on Terrorism and Civil Liberties

There are two crucial lessons to be learned from the 9/11 Commission's final report.

- First, in a post-Cold War world, terrorism is a new and immediate threat to America's national security. It must be met with resolve.

- Second, this reality should make us all *more* mindful of our civil liberties, not less. The terror in terrorism is meant to make us do things that are not in our own self-interest. Our challenge is to ensure that we not take the bait.

Accordingly, caution must be the order of the day when considering many of the sweeping recommendations in the commission's report. This is especially important given the broad expansions of government power proposed in its findings. If Congress or the president follows these recommendations without appropriate deliberation, it is extremely unlikely that we will be able to roll back the clock if they turn out to be unwise.

If there is one thing that is certain, it is that power, especially when granted to the government, is intensely difficult to take away.

Were Congress to create, for instance, a national intelligence czar with the power to control both domestic and foreign intelligence operations, that person's power could easily be misused by the President for political investigations. In another example, if the president were to order the creation of a de facto national identification card by standardizing driver's licenses, the move would be permanent, and the system would expand much like the use of social security cards.

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.

The entire point of terrorism, especially the kind of terrorism that we face today from enemies like Al Qaeda, is to create fear and to make people behave irrationally. Fear, however, is the great enemy of democracy. Our nation and our way of life have survived for so long because, in America, we have checks and balances – like the separation of powers, judicial supremacy or the writ of habeas corpus – that ensure the protection of our civil liberties.