

**COUNTERING THE CHANGING THREAT OF
INTERNATIONAL TERRORISM**

HEARING

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY, TERRORISM,
AND GOVERNMENT INFORMATION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

ON

THE NATIONAL COMMISSION ON TERRORISM'S REPORT ON ISSUES RE-
LATING TO EFFORTS BEING MADE BY THE INTELLIGENCE AND LAW
ENFORCEMENT COMMUNITIES TO COUNTER, AND U.S. POLICIES RE-
GARDING, THE CHANGING THREAT OF INTERNATIONAL TERRORISM
TO THE UNITED STATES

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COUNTERING THE CHANGING THREAT OF INTERNATIONAL TERRORISM

WEDNESDAY, JUNE 28, 2000

U.S. SENATE,
SUBCOMMITTEE ON TECHNOLOGY, TERRORISM,
AND GOVERNMENT INFORMATION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:11 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Jon Kyl (chairman of the subcommittee) presiding.

Also present: Senators Grassley and Feinstein.

OPENING STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. The subcommittee will please come to order. Let me first welcome everyone to this hearing of the Subcommittee on Technology, Terrorism, and Government Information. Today, we are going to be discussing the report entitled "Countering the Changing Threat of International Terrorism," recently published by the congressionally-mandated National Commission on Terrorism.

America is entering a new national security era. During the cold war, we faced the threat of a massive nuclear attack and massive conventional attack across Europe from the Soviet Union. Since the end of the cold war, however, the threats facing the United States have become much more complex. Perhaps the most problematic is the threat of terrorist attack against our homeland and our citizens abroad.

And the face of terrorism itself has changed significantly over the last quarter of a century. The Soviet bloc, which once supported terrorist groups, no longer exists. While some states like Iran continue to support terrorist groups, other groups like the terrorists financed and led by Saudi millionaire Osama bin Laden are not state-sponsored. These groups have varying motives and are more difficult to track and deter.

These new terrorist groups have demonstrated the desire and capability to reach large portions of the globe. Bin Laden was responsible for the bombing of two U.S. embassies in Africa, and according to press reports, U.S. intelligence agencies discovered and thwarted his plans to attack other U.S. embassies and a military base in Saudi Arabia.

Furthermore, a growing share of terrorist attacks are intended to kill as many people as possible. As the Commission pointed out in its report, the World Trade Center bombing killed 6 and injured

about 1,000 people. But the terrorists' goal was to topple the twin towers, killing tens of thousands of people.

More recently, terrorists have expressed growing interest in more lethal means, including chemical, biological, and nuclear weapons. For example, the Japanese cult Aum Shinrikyo, which carried out a sarin nerve gas attack in the Tokyo subway, could have killed thousands.

Also, according to another congressionally-mandated advisory panel on weapons of mass destruction terrorism, chaired by Virginia Governor Gilmore, the cult also attempted, and failed on at least nine occasions, to disseminate biological agents such as anthrax.

So the threat is real. In the fact of this threat, Congress mandated this National Commission on Terrorism to address America's capacity to prevent and respond to the threat. To their credit, the bipartisan Commission was not shy about delving into the thorny issues surrounding counterterrorism efforts.

For example, should our intelligence agencies recruit unsavory people to gather information on terrorists in order to thwart their attacks? Should information currently collected on foreign students in the United States be consolidated into a national data bank? Should we revise the guidelines for monitoring Americans under statutes like the Foreign Intelligence Surveillance Act? Should we include allies like Greece on a list of nations seen as not fully cooperating with counterterrorism efforts? And should we empower the Defense Department to lead response efforts to extraordinary terrorist incidents, like a biological weapons attack in the United States?

We have 5 of the 10 members of the Commission here today to present the group's findings, expound on their discussions, clarify any misunderstandings, and recommend legislative action to increase our ability to protect the American people from terrorist attack.

We are pleased to be joined by the chairman of the Commission, Ambassador Paul Bremer, who served 23 years in the diplomatic service, including 3 years as Ambassador at Large for counterterrorism. The vice chairman of the Commission was Maurice Sonnenberg, a member of the President's Foreign Intelligence Advisory Board. He was invited to testify here today, but was unable to attend.

In addition to the chair, we are joined today by four other distinguished Commission members: former Congresswoman Jane Harman, who served on the House Intelligence and Armed Services Committees; John Lewis, former Assistant Director of the National Security Division of the FBI; James Woolsey, former Director of the Central Intelligence Agency; and Juliette Kayyem, who previously served as a legal adviser to the U.S. Attorney General at the Department of Justice.

Before we hear from our witnesses, I would like to turn to Senator Feinstein for her opening remarks.

**STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR
FROM THE STATE OF CALIFORNIA**

Senator FEINSTEIN. Thanks very much, Mr. Chairman. I don't want to be redundant. I thought your opening statement was excellent and has really outlined much of the concern.

I would like to congratulate the people that worked on this report. I think the report rightly emphasizes that terrorists today are a different breed than they were 20 or 30 years ago. In the 1970's and 1980's, they wanted attention. Today, they simply want to kill as many people as possible. In the 1970's and 1980's, terrorists often had concrete political goals. Today, they operate out of religious belief or apocalyptic vision, out of hate for certain groups, the United States or the West. They are often without fear of losing their own life.

In the 1970's and 1980's, much terrorism was state-sponsored. Today, terrorists are often transnationalist, and even self-funded. You mentioned Osama bin Laden. He has moved between several adopted countries, and has a fortune estimated in the hundreds of millions of dollars. Aum Shinrikyo, the Japanese group you mentioned, Mr. Chairman, has spent tens of millions of dollars preparing chemical and biological attacks. In addition, terrorists disperse themselves even further, hiding in cells in multiple jurisdictions, stockpiling their supplies and waiting to strike. We know that we have many such cells in our own country.

The film "The Battle of Algiers" nicely encapsulates just how much things have changed. As that movie shows, the French were able to break the FLN terrorist network in Algiers in the 1950's because the paratroopers could literally diagram it on a blackboard. But, today, some countries, and Greece is one that comes to mind, cannot diagram their terrorist groups on a blackboard. Since 1975, only 1 of 146 terrorist attacks against Americans or American interests in Greece has been solved. And just this past weekend, we read about Jihad in the New York Times which really described how states-sponsored schools can begin the training that a youngster would need to become part of this kind of movement.

The result of all of this is that now more than ever we need to take what actions we can to combat terrorism. In fact, as the number of world states increase, ethnic, religious, political, and economic discord will heighten, and terrorism will only become more noteworthy.

We have taken a number of steps already. For example, the 1994 Crime bill increased sentences for international terrorism, extended the statute of limitations for terrorist offenses, extended criminal jurisdiction to attacks against citizens on foreign vessels, attacked foreign counterfeiting of U.S. currency, and prohibited the provision of material support to terrorists.

Nowadays, many terrorists penetrate nongovernmental organizations or companies to gain access to money, logistical networks, and cover. So we need to make better use of the Office of Foreign Assets Control at Treasury, the IRS, and Customs to track and analyze data regarding terrorist fundraising, and to stop funding and logistical support for terrorists. As we well know, many terrorist groups have a charitable arm and a terrorist arm, and they raise

money under the charitable arm and then they transfer that money into the terrorist arm.

The Antiterrorism and Effective Death Penalty Act of 1996 required the addition of chemical taggants to plastic explosives to make them more traceable, strengthened controls of and enforcement against biological agents and pathogens, facilitated the removal of alien terrorists, expanded the Government's ability to exclude from the U.S. aliens who were involved in terrorist activities, and denied asylum to alien terrorists and streamlined the deportation process for criminal aliens.

I authored legislation in 1996 that would prohibit military sales to countries that do not cooperate with U.S. antiterrorism efforts. Thus, I was quite interested in the Commission's recommendation that the President should make more use of his power to punish states that are not cooperating fully by embargoing defense sales to these countries or imposing other sanctions. A weaker version of my amendment was sponsored by Senator McCain and passed as part of the 1997 Foreign Operations Appropriations bill.

I think we have got a great deal left to do. I also think that this is very difficult because it is an atraditional battle. As some of the more controversial recommendations of the Commission suggest, you have got to counter atraditional actions with atraditional reactions, and that is where, for a democratic society, things become very dicey.

So I look forward to hearing from the Commission and then being able to ask questions about some of their recommendations.

Senator KYL. Thank you, Senator Feinstein.

Senator Grassley, we are delighted to have you join us. I know of your interest in this subject and appreciate your being here with us today.

Senator GRASSLEY. I don't have any opening statement. I was just wondering, would I be able to ask questions by 3 o'clock, or won't that be possible?

Senator KYL. I think the witnesses are going to try to be as quick as they can because I think Senator Harman has to leave roughly in that timeframe, too, and we would like to give her an opportunity to both speak and answer any questions.

Senator FEINSTEIN. You promoted her to the Senate.

Ms. HARMAN. Thank you very much for that.

Senator KYL. Did I say "Senator Harman?"

Senator FEINSTEIN. Both seats from her State are already filled.
[Laughter.]

Senator KYL. Well, I am really torn, Madam Vice Chairman, because what you say is certainly true, but I wouldn't want that to be considered as a Freudian slip. But I did serve with Representative Harman and we worked on a lot of things together, and I have one question in particular that relates to something we worked on. We will get that later.

Mr. Bremer.

STATEMENT OF L. PAUL BREMER III, CHAIRMAN, NATIONAL COMMISSION ON TERRORISM, NEW YORK, NY; ACCOMPANIED BY R. JAMES WOOLSEY, SHEA AND GARDNER, WASHINGTON, DC, AND MEMBER, NATIONAL COMMISSION ON TERRORISM; JANE HARMAN, HARMAN INTERNATIONAL, LOS ANGELES, CA, AND MEMBER, NATIONAL COMMISSION ON TERRORISM; JOHN F. LEWIS, JR., DIRECTOR, GLOBAL SECURITY, GOLDMAN, SACHS AND COMPANY, NEW YORK, NY, AND MEMBER, NATIONAL COMMISSION ON TERRORISM; AND JULIETTE N. KAYYEM, ASSOCIATE, BELFER CENTER FOR SCIENCE AND INTERNATIONAL AFFAIRS, JOHN F. KENNEDY SCHOOL OF GOVERNMENT, HARVARD UNIVERSITY, CAMBRIDGE, MA, AND MEMBER, NATIONAL COMMISSION ON TERRORISM

STATEMENT OF L. PAUL BREMER III

Mr. BREMER. Mr. Chairman, thank you for the opportunity to be with you today. If I may, I would like to ask that my full statement be entered for the record.

Senator KYL. All statements will be entered into the record, and might I also enter into the record, without objection, a statement by Alexander Philon, the Ambassador of Greece, who wished to have his country's policy with regard to terrorism recorded in the record of the hearing, and another statement which was submitted on June 27 by Juliette Kayyem, Commissioner of the National Commission on Terrorism, a copy of which I believe you also have, Senator Feinstein.

Senator FEINSTEIN. Thank you.

Senator KYL. Without objection, they will be entered in the record.

[The prepared statement of Mr. Philon and the letter of Ms. Kayyem are located in the appendix.]

Mr. BREMER. I will try to briefly summarize our findings, Mr. Chairman, in the interests of time. Both of you have rightly pointed out the key finding, which is that the threat of terrorism is changing. It really is the theme of our entire report. The threat is changing.

We have seen the World Trade Center attack. We saw the attacks on our embassies in East Africa. These are conventional attacks. The thing that concerned many of us on the Commission is what if terrorists escalate to nonconventional attacks using biological, chemical, or nuclear radiological weapons. And that could cause casualties not in the hundreds or the thousands, but even in the tens of thousands.

A lot of our concern, Mr. Chairman, flowed from the view that this was not unimaginable. Five of the seven states which the State Department designates as states sponsoring terrorism are, we know, already developing their own programs in those areas, and so this is a real concern.

The first major finding concerned the critical importance of intelligence to this fight. We have made a number of recommendations in that field. I will just briefly summarize a couple of them and, of course, we are prepared to answer questions.

We found that in many areas the Federal Government is stymied by bureaucratic and cultural obstacles to the quick and broad collection of important intelligence. In the area of the CIA, we felt that some guidelines that have been in place for the last 5 years, whatever their intention, have had the effect of making it less likely that we will get the right kind of people providing the right kind of information about terrorists.

What do I mean by that? Well, if you are going to prevent a terrorist attack, you have to know what their plans are, and to know what their plans are you essentially have to have somebody inside the group talking to you. In other words, you have to have a spy who is also a terrorist. And we believe that the CIA agents in the field ought to be able to use the same kind of discretion which municipal police departments and law enforcement departments all over this country do to use informants to get prosecutions, in effect, but in this case to get prevention of terrorist attacks.

We looked at the guidelines under which the FBI field agents operate in the United States, and there is a difference, Mr. Chairman. We thought the guidelines are adequate in their scope, but they are unclear in how they are written, and we recommended that they be made clearer. We have all looked at them. There are more than 40 pages worth of guidelines there, and I must say I was as confused reading them as some of the agents whose testimony we heard.

Another problem that you touched on briefly and directly is the overly cautious approach by the Office of Intelligence Policy and Review in the Department of Justice in considering applications for wiretaps against domestically-based international terrorists. The Commission came to the same conclusion that the Department of Justice's own internal investigation came to in the Wen Ho Lee case, which is that the Office of Intelligence Policy and Review takes a too-conservative approach, asking for more information than is, in fact, required by the statute, the Foreign Intelligence Surveillance Act.

Mr. Chairman, one question you raised in your opening statement leads me to make a clarification. We did not in our report anywhere call for changing the guidelines on the FISA applications. I just want to be sure that that is clear. There was an implication in one of the sentences you read as a question that some people might think that is something we recommended. That is not what we recommended. We recommended that the Attorney General instruct the OIPR office to ask for nothing more than the probable cause standard that is already in the existing statute. We do not recommend a change in the statute.

We believe there are important resource needs in the collection of intelligence. The FBI is trying to establish a technical support center, which we would encourage members of the subcommittee to give favorable consideration to. It is particularly important as terrorists now use advanced means of encryption and communication that we not be behind. We also recommended more resources for CIA and NSA.

As Senator Feinstein pointed out, as the decline of state support for terrorism occurs, terrorists are looking elsewhere for funding, and we made recommendations that the Government should take

a much broader approach to attacking terrorist fundraising, in particular using offices such as the one she mentioned, the Office of Foreign Asset Control at Treasury and the IRS, and take basically a broad view.

Finally, Mr. Chairman, we made some recommendations relating to the possibility of catastrophic terrorism. Some people have been critical of us for not defining catastrophic terrorism. I have said in testimony we are talking about not hundreds or thousands, but tens of thousands of casualties. In our view—and I would say this is an important conclusion based on our discussions—we have to worry about the possibility that this could happen in the United States.

Indeed, I was interested to read yesterday that the FBI has reported a dramatic increase in the number of threats of using such agents in the United States in the last 4 years. In 1996, there were 37 such threats. Last year, there were over 250. Fortunately, these were basically hoaxes, most of them about the use of anthrax. But the fact of the matter is we can't ignore the possibility.

We therefore thought it was important for several things to happen. First, the Government should be clear—and this is a responsibility of the executive branch—what authorities it has and what authorities it lacks in the event of dealing with a catastrophic terrorist attack, and we suggested the President should make such an inventory.

Second—and this is a point that has been much misunderstood—we believe that if you had a catastrophic attack, it is possible that under extraordinary circumstances that catastrophe could go beyond the capabilities of local, State, and Federal agencies, or it might even be part of an armed conflict, an ongoing armed conflict. And in such cases, the President of the United States might want to consider designating the Department of Defense as the lead agency for responding to such a catastrophe.

We are not recommending marshal law, we are not recommending that this happen automatically. What we are saying is, particularly if you are concerned about preserving civil liberties—and every one of the people sitting in front of you is—it is very important to think through that kind of catastrophe beforehand rather than trying to figure out what to do in the hysterical aftermath.

The example I give, Mr. Chairman, is what happened after Pearl Harbor, when two great American liberals, Franklin Delano Roosevelt and Earl Warren, locked up Japanese Americans in the hysteria following that catastrophic military attack. And we don't want that to happen again and we think the best way to avoid having civil liberties trampled on is to have thought through what would have to happen in the wake of a catastrophic terrorist attack.

We also recommended in this area, Mr. Chairman, that controls should be tightened on biological agents and equipment that would be needed to turn biological agents into real weapons. This is an area where Congress would have to take the lead because it would require some legislation. We have made specific recommendations in our report which I won't go into in detail.

Mr. Chairman, I think you have before you the report of 10 Americans from both parties, from different backgrounds. We think

it is a balanced report. We think that we have made prudent suggestions. We didn't mince words, as you pointed out. We let the facts drive us to our conclusions. We reached in all cases but one a complete consensus on these recommendations, and we think if these recommendations are followed by Congress and the executive branch, Americans will be safer, and that is the bottom line of what we were after.

Thank you.

Senator KYL. Well, thank you very much. I know the other Commission members have been willing to let the chairman speak initially on behalf of the entire Commission. Is there anything that any of you would like to add at this point, recognizing that since the initial release of the report and the flurry of testimony and news conferences—incidentally, your first news conference I thought was one of the best news conferences I have ever seen in explanation of something like this.

There has also been response from a variety of quarters, and I see this hearing today at least potentially as an opportunity for you all to reply to some of that response, as well. I would also note that I specifically sought out a couple of organizations that I knew had expressed some concerns—the ACLU, which I had also asked to testify before and they had declined to testify at our hearing before on privacy implications of the national plan for protection against cyber attack, but I invited them again in any event.

Also, the American Arab Anti-Discrimination Committee. I asked them if they would be willing to submit some questions which I would ask on their behalf. They did, and I will. I offer that same opportunity to others if they have specific concerns. But I see to some extent today's hearing as an opportunity for you all to clarify, and also to then help us understand where you think we go from here.

Because Senator Grassley has asked for the opportunity to be sure to be able to ask some questions, let me yield, Senator Grassley, to you at this point if you are ready.

Senator GRASSLEY. Do you want Congresswoman Harman—

Senator KYL. Well, I think any questions that we want to pose to her, we should do fairly early on, and I do intend to do that.

Senator GRASSLEY. I didn't have specific questions of her, but I do have—the first instance I want to bring up would be a request for some information to back up a position you have taken.

On page 8 of the report, you argue that the 1995 process for recruiting informants is too strict. And you say this: "Recruiting informants is not tantamount to condoning prior crimes, nor does it imply support for crimes they may yet commit." To me, this is getting a little bit into dangerous territory. Let me explain.

We have had too many cases where law enforcement not only condoned crimes of informants, but actually facilitated them. So this sounds a little bit like we are going back to the Whitey Bolger era of informants. I would like to see what concrete evidence your Commission has on which to base your statement that because of the stricter enforcement process, agent morale is down and a significant number of officers have retired or resigned. I hope you could provide that material to the committee. Could you, please?

Mr. BREMER. I can answer it right now. We took testimony from a large number of serving and retired field agents, both in Washington and in the field. I think it is fair to say I certainly never heard among all of those witnesses anything but the view that these guidelines had restricted and had reduced the recruitment of terrorist informants. I never heard a contrary view, and I don't think anybody else on the Commission did. I mean, the testimony was absolutely clear, convincing, and consistent.

Senator GRASSLEY. Well, these were taped and recorded interviews?

Mr. BREMER. No, they weren't.

Senator GRASSLEY. Notes taken?

Mr. BREMER. In some cases, notes were taken. In most cases, they were not.

Senator GRASSLEY. Then I guess I would want to see the notes.

Mr. BREMER. I would have to consider that question, Senator.

Senator GRASSLEY. OK.

Mr. BREMER. Most of the people who spoke to us, because of the sensitive nature of this issue, spoke to us on the understanding that they would not be cited.

Senator KYL. Might I just interpose, would it be possible perhaps to have a private conversation with the chairman to describe in more detail the type of individual, the number, and perhaps some further identification, just for the benefit of—

Senator GRASSLEY. Well, I want to follow up some way.

Mr. BREMER. I would be happy to do that. I would be happy to do that, Senator.

Senator KYL. It is a good question.

Mr. BREMER. We are in a very difficult situation in terms of the—you can appreciate, I think, Senator, with your long experience in this town that this is not an easy subject to talk to serving officers about, or for them to talk to us about. I should put it that way.

Mr. WOOLSEY. Senator Grassley, could I perhaps add one point on this?

Senator GRASSLEY. Yes, please do.

Mr. WOOLSEY. It doesn't appear in the report, but it is something that I have long felt and I think is important in this context.

Throughout the cold war, the United States recruited successfully a large number of what I would call good people working inside bad governments. A substantial share, for example, of the Soviet agents that the CIA was able to recruit over the years were genuine Russian democrats, anticommunists, people who, even though they were GRU colonels or KGB generals, hated their system and worked for us because they were decent people.

That happens with some frequency inside bad governments. It is one of the great strengths of American intelligence around the world that we are—we and the British and one or two other countries tend to be places where a good person trapped inside a bad government will go in order to try to help defeat communism or fascism or whatever his government's characteristics are.

And I think one can have a reasonable point of view that because of that phenomenon, when one is dealing with spying on governments, one may well want to consider balancing and not nec-

essarily recruiting or using readily, let's say, as an informant some of the types of individuals, for example, that in the Guatemalan military gave rise to the concerns which Senator, then Congressman, Torricelli articulated and which in turn gave rise to my successor, John Deutch, implementing these 1995 guidelines.

But when one is talking about spying on terrorist organizations, if you are inside Hizbollah, it is because you want to be a terrorist. You don't have for all practical purposes this phenomenon of good people inside bad organizations. If you want to get information about what a Hizbollah is doing, you have to recruit a terrorist, the same way that if the FBI wants to recruit someone inside the Mafia to inform on John Gotti, they are going to end up with someone like Sammy "the bull" Gravano, who killed 19 people and still was given his freedom in exchange for testifying against Gotti.

Working against terrorist organizations is much more like the FBI working against criminal organizations than it is like working against other governments. So this Commission's responsibility was solely in the area of terrorism, and I believe that in that area it is quite reasonable to suggest, as we did, that the Government not use these 1995 guidelines which require a balancing between the nature of the act that the individual may have committed before and the information he might provide, but rather go back to the CIA's traditional method of so-called vetting of agents and to require its officers, and in appropriate cases with scrutiny from Langley, an assessment of the likelihood that the individual is going to give real intelligence, real information.

Is he credible? Does he have access? Even if he is a bad person in some other ways, is he likely to be telling you the truth? That is the balancing that we thought ought to occur in the context of terrorist organizations. So this should not be read as a general rejection of the 1995 guidelines. Different ones of us have different views on those. But with respect to terrorism only, which is all the further our writ ran, we felt, all of us, that it required a recognition really up front that working against a terrorist organization routinely requires the recruitment of people who have done some very bad things as informants.

Ms. HARMAN. Senator, could I just add one more word to that? This was probably the most contentious among us of the recommendations in the report. We spent many, many hours, and there was a range of views in our own Commission. On the one hand, some wanted to rescind the guidelines. On the other hand, some wanted just to clarify the guidelines. We came out in the middle.

We do not rescind the guidelines, and we make very clear also on page 8 that the balancing test, as Jim Woolsey has just described it, will apply to the recruitment of any terrorist assets. We are not talking about eliminating a balance, and we are very, very well aware of how complicated it is to do this well. But we felt we had no alternative if the goal is to find out in advance about the activities of these very dangerous terrorist groups around the world.

Senator GRASSLEY. Before I ask Ms. Kayyem another question, I think I would accept the chairman's suggestion, particularly if the

chairman and/or Senator Feinstein would be interested in following up with me. I think I would like to have your interest as well.

But also my reaction to Mr. Woolsey is that it sounds a little Machiavellian, what you tell me is the goal. And maybe in this world it has to be, I don't know. I guess I don't know because I wouldn't draw the conclusion that you are right, but I accept your statement with sincerity, in a sense, that the end justifies the means in this instance.

But let's just assume that if you do have to hire bad people because you are involved with bad organizations, I don't know whether that goes so far as in the one instance I referred to that our Government would help, or at least know about their commission of crimes as well; that we would go that far and be that far involved with them.

Mr. WOOLSEY. Senator, if it is a crime under American law—and killing an American in an act of terrorism overseas is a violation of American law—there is a separate set of rules that also comes into play and which we did not address and made no recommendation on. That set of rules deals with something called crimes reporting.

What that says is that if someone who is to be recruited as a spy by the CIA overseas may have violated a U.S. Federal law, then prior to that individual being recruited, there has to be a notification of the Department of Justice and the Justice Department has to give a declination letter to decline to prosecute before that person may be recruited.

Now, there is criticism of this also among case officers overseas. This would mean, for example, if there is a Swiss businessman who knows a good deal about smuggling precursor chemicals to the Midwest that might be used in chemical weapons, and 20 years before there is some evidence that he may have been involved in insider trading when he was in the United States, before the CIA officer could recruit that businessman as a source regarding proliferation of chemical weapons, he would have to go to the Justice Department or have the CIA go to the Justice Department and get a declination letter saying we are not going to prosecute this fellow for insider trading 20 years ago.

So, that check which some people believe is excessive nonetheless exists, and that is an independent check on what case officers may do. What we are talking about in our recommendation is not crimes under American law, but rather acts by an individual in a foreign country that may violate that foreign country's law and may be a very bad thing, robbing someone, killing them. It is the acts of an individual that don't violate U.S. law that are the subject of this recommendation.

Senator GRASSLEY. I will go to Ms. Kayyem on another point, and this comes from my Subcommittee on Administrative Oversight and the Courts and the Wen Ho Lee investigation we have, and then Senator Specter proposing legislation to amend the Foreign Intelligence Surveillance Act. And if Senator Biden were here, I would be glad to compliment him on his authorship of that legislation in the first instance and the bipartisan support for the amendment that Senator Specter has proposed.

On page 10 of your report the Commission states, “The Department of Justice applies the statute governing electronic surveillance and physical searches of international terrorists in a cumbersome and overly cautious manner.” One of the recommendations of your panel stated, “The Attorney General should substantially expand the Office of Intelligence Policy and Review staff and direct it to cooperate with the FBI.”

I notice that you did not concur with the content of this section, and since this is a current issue before the Senate and we are considering this legislation regarding FISA, I would like to have you elaborate why you did not concur with the Commission’s recommendations.

Ms. KAYYEM. I submitted a letter to the committee, as well, that elaborates further. But let me first state where we do agree, where all the commissioners agree. Everyone agrees that at least the constitutional standard of reasonableness applies in FISA, and certainly the statutory probable cause standard applies. So we are not questioning that. I actually agree in the first recommendation that you quoted. If necessary, the OIPR attorneys—there may need to be more, and there should be greater cooperation between the FBI and OIPR.

My concern with the Commission’s recommendation had less to do with the specific language of the recommendation—certainly, no one wants Government to work in a cumbersome manner, especially regarding terrorism—but the suggestion in the write-up to the recommendations, and I lay this out in the letter, regarding what would constitute membership in a foreign terrorist organization.

As I lay out in the letter, membership is a very difficult thing with terrorist organizations. Most of them don’t keep membership lists. We all know that, and when we are talking about foreign intelligence surveillance, we are talking about one of the more invasive types of surveillance—secret wiretaps against Americans—but in the case the Commission was talking about, non-Americans as well.

It was my concern in the write-up leading to the recommendations that the standard regarding what would constitute membership or mere membership was, at least by the Commission—the suggestion that a mere showing by the FBI of membership, I thought, probably wouldn’t satisfy either the statutory or the constitutional standards.

The OIPR was created by Congress to ask the tough questions of the FBI. Do you have probable cause to go forward in this case? And it is going to have to ask tough questions about what does membership mean. Was someone at a meeting? Were they reading literature? Were they giving money? I think that those questions have to be made.

If the process is cumbersome, it may be cumbersome because we need more people in OIPR, but I don’t think it is cumbersome because OIPR is asking the wrong questions. I think the evidence in terms of the numbers before the FISA court and the great confidence that the FISA court has in the OIPR attorneys that they are bringing forward cases that are legitimate is proof that there is good cooperation. And if there is sort of a turf battle between the

FBI and OIPR, maybe the way to solve that is through more people.

Finally, on the Wen Ho Lee case and the Department of Justice recommendation, I have been reading letters, Senator Grassley, that you sent to Senator Specter. There are a lot of lessons to learn from the Wen Ho Lee case, as we know, and one of them was not only that possibly the OIPR were cautious, but also at the initial stages before things heated up, the FBI admitted to at least itself in internal documents that it probably didn't have the case. And until all the evidence comes out on Wen Ho Lee, I think that we should reserve judgment specifically on that case.

Senator GRASSLEY. Just quickly, I was going to read a long quote from your report, Ambassador Bremer. It is on page 12, but the bottom line of it is when it comes to offering to buy insurance for agents, why should the FBI and the CIA be singled out for this benefit when there are a lot of other men and women in Federal law enforcement putting their lives on the line everyday investigating not only terrorists but other criminals? And I am particularly concerned about the State Department Diplomatic Security Service not being recommended for the same thing.

Mr. BREMER. Well, I am sure we would all agree with you, Senator. I don't think there is any argument. We just happened to focus on the two which were brought to our attention because they are the two mostly on the front line. I think any public servant who puts his or her life on the line certainly in the fight against terrorism ought to have this benefit. I speak for myself, but I am sure I speak for the whole Commission.

Senator GRASSLEY. Thank you.

Senator KYL. Thank you very much, Senator Grassley, and we will pursue the other matters.

Senator GRASSLEY. I appreciate your letting me go first.

Senator KYL. You are very welcome, and I ordinarily would call on Senator Feinstein next, but she has kindly allowed me to ask one quick question of Jane Harman before you have to leave.

As you may know, Senator Mack and Senator Lautenberg have introduced the frozen terrorists asset bill, which I cosponsored. The bill would allow victims of terrorism to be compensated from assets of the state-sponsors of terrorism that are frozen in the United States that have won court cases against sponsors of terrorism.

For example, Steve Flato's 20-year-old daughter Alissa was killed when a Palestinian suicide bomber attacked a bus in the Gaza Strip in 1995. Mr. Flato won a court judgment against Iran, but the administration has not allowed him to receive the compensation.

Do you believe that this legislation would aid ultimately in our efforts to fight terrorism?

Ms. HARMAN. You bet, and our chairman just commented to me that a frozen terrorist is the best kind of terrorist. [Laughter.]

Senator KYL. One whose assets are frozen and can be obtained is certainly the right kind.

Ms. HARMAN. Mr. Chairman, could I just say a few things additionally?

Senator KYL. Absolutely.

Ms. HARMAN. First of all, I want to observe that over the many years I have known you, it has been an absolute pleasure to work with you, first, in the House and then between the House and the Senate—work with you and your staff on issues like this and on technology transfer. It is always impressive to see how thoroughly prepared you are and the way you work in a bipartisan fashion with people like my senior Senator, Senator Feinstein, who I think sets the gold standard for Senators. So I really want to say for the record, as somebody who has perhaps more knowledge than most of how this thing works, what a great asset you are.

Senator KYL. Thank you.

Ms. HARMAN. On the subject of frozen assets, not frozen terrorists, you and I worked together a great deal on ways to stop the flow of technology and people from places that may be questionable to places that are truly dangerous, where they work on or become part of the arms race against us and our allies or missiles targeted at our ally, Israel, or in this case part of the reach of some of these terrorist organizations. We have to use the tools available to us. We have to enforce legislation on the books, and there is good legislation. Obviously, we need to do more to make more happen.

But in this report—as I think you know, Senator, it was one of the things the chairman did not highlight today—we call for no further concessions to Iran. The reason we do that is that we believe that Iran continues to have a hardline foreign policy. Its domestic leadership may be improving, and that is wonderful for the Iranian people. But we saw no evidence, and I don't believe there is any evidence that its missile production, its harboring of terrorists, and its threat to us and our allies is decreasing. So for that reason, we continue to call for a hardline policy against Iran in the interest of protecting Americans.

A final point on bipartisanship. Another thing that is in our report at the end is a call for bipartisanship by Congress in dealing with this issue of terrorism. We call for additional staff on the appropriations committees—I know Senator Feinstein is a member of the Senate Appropriations Committee—so that we could review as a whole—you are, too, Senator Kyl—we could review as a whole the counterterrorism budget and make sure that things like better technology for our surveillance agencies are fully funded.

I thank you for giving me the opportunity to speak early, and I just want to tell you again what an honor it has been to serve with this excellent Commission under the chairmanship of Jerry Bremer. Thank you.

Senator KYL. Thank you very, very much. Clearly, this is a non-partisan issue. There is nobody who is better at it than my vice chairman, Senator Feinstein, as you noted, and we have worked very closely together.

I would also note before you leave that Senator Schumer and I are going to be sending a letter around which specifically recommends against granting any additional concessions, for example, on food sales or things of that sort to Iran until we see definite evidence of Iranian foreswearing of terrorism. Thank you very much.

If I could, before I call on Senator Feinstein, did the Commission make any specific recommendations for dealing with Iran? I know that the report notes that despite the election of Katami, on page

20 the report says there are indications of Iranian involvement in the 1996 Khobar Towers bombing in Saudi Arabia, et cetera. In October 1999, President Clinton officially requested cooperation from Iran in the investigation. Thus far, Iran has not responded. I just wondered if there were any recommendations specifically with respect to Iran.

Mr. BREMER. There are really two; a general one, which is that the U.S. Government should make no further concessions toward Iran until it actually does stop supporting terrorism, and then a rather specific one relating to Khobar.

We have a disagreement with a lot of our allies about how to approach Iran. They have different objectives than we do. They see the thing differently than we do, but we ought to be able to persuade them that on the question of criminal acts like the attack which killed 19 American soldiers in Khobar, everybody ought to be able to say to the guilty party—and there is some evidence that it is some people in Iran—you have to cooperate on a legal basis. Put aside the politics of it.

This doesn't affect the position the U.S. Government took on Pan Am 103 vis-à-vis Libya, where we had the same disagreements with our allies, but where we were able to persuade the allies, even if they didn't like the politics of it, that on a legal basis it was important to insist on Libyan cooperation with the investigation into Pan Am 103.

Our recommendation is the administration should take the same approach vis-à-vis the Khobar Towers. They should say to the allies, even though you may not agree with the politics of our approach toward Iran, you should be willing to say this is a criminal act and Iran should be forced to comply with the request to cooperate in the investigation.

We think the Administration took the first correct step, which was the President to write a letter directly confronting the Iranians. The Iranians have never answered the letter. We think the Administration should push further now both directly on the Iranians, but more importantly through our friendly countries to say this is a legal question. Those are the two recommendations on Iran, Mr. Chairman.

Senator KYL. Thank you.

Let me call on Senator Feinstein.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Jim Reynolds, the Chief of the Terrorism and Violent Crime Unit at the Department of Justice, recently testified on your DOD recommendation, which he thought was unnecessary. He noted that a number of statutes exist permitting the use of the military under extreme situations, including statutes that permit the military to be used for consequence management and technical assistance. In all cases, though, the military would be under the leadership of the FBI and FEMA.

Did the Commission examine these statutes before making your recommendation?

Mr. BREMER. Yes, we did, Senator. We started with the Posse Comitatus Act of 1874, went down through—I have got a whole list of them here—the Insurrection and Civil Disturbances Act, et cetera, et cetera.

Senator FEINSTEIN. Talk a little bit about how you came to that recommendation?

Mr. BREMER. Well, first of all, we are not, as I said in my opening statement, making any general recommendation as to what should happen. We are saying it is possible to conceive of—and certainly all of us could conceive of it, and if you can't conceive of it, it seems to me people are not using their imagination—an attack where you have tens of thousands of casualties which quickly go past the capability of State and local and Federal agencies to cope with—the FBI, FEMA, or whoever is trying to cope.

In circumstances like that, there will be enormous public pressure for the President to take action and to use what is at hand. And the tool which is at hand with the best communications, logistics, and command and control is the U.S. military. It could be under Federalized National Guard; there could be a lot of ways. The Federalized National Guard has been used for a lot of things in the last 40 years, including patrolling the borders. I mean, there are lots of uses of the military that, in fact, are not consistent with Posse Comitatus.

Posse Comitatus doesn't say it is not allowed. It simply says, "except in cases and under circumstances authorized by the Constitution or by Act of Congress." And a number of Acts of Congress have, in fact, allowed the military to be used. Even in law enforcement, there are a number of Acts of Congress. That wasn't what we were after.

What we were after was how do you protect civil liberties. How do you assure that in the aftermath of a biological attack at Chicago O'Hare Airport, where you have tens of thousands of people down, many of them dead, people getting on planes to go somewhere else, hysteria beginning, attention in the press, huge pressures on whoever is in the White House to do something now—how do you assure that what he or she does is consistent with civil liberties and also saves lives? So our starting point was to say this is the kind of thing which is not unimaginable and which ought to be thought through ahead of time.

I do not agree with Mr. Reynolds. I respect him greatly. He testified several times before our Commission. I just think he is wrong. I think he is not being very imaginative.

Ms. KAYYEM. Senator Feinstein, could I—

Senator FEINSTEIN. Please.

Ms. KAYYEM. Certainly, as a legal matter, at least the insurrection statutes as part of the Constitution—if the pressure is on the President to do something, I don't think there is any question as a legal matter that the Department of Defense could take the lead role.

Given that that is the case, my concern certainly is the last thing you want to do is to, for want of a better verb, unleash the Department of Defense and the military in civilian society and not have any idea what that is going to look like.

Even after the most recent Posse Comitatus exceptions in the late 1990's were put in place for nuclear and biological, the Department of Defense was told to plan and prepare for the possibility during a nuclear attack. From what we know, or at least testimony

that we heard, that still has not happened or it is stuck somewhere in the Department of Defense or the Department of Justice.

The last thing that anyone would want is to have the law applied and permit the Department of Defense to be utilized in a lead agency role—I mean, certainly there would still be civilian leadership; no one is talking about marshal law—and now know what that is going to look like. Let people see what that is going to look like.

My concern certainly is bad things that can happen. I will be honest with you. Imagine if the attack is a foreign terrorist attack and imagine that it came from a place with an ethnic identity. I think the pressures would be extremely strong to maybe possibly violate people's rights just based on where they are. We saw it happen after Pearl Harbor. If the event occurred from a terrorist from Latin America or the Middle East, I think the pressures would be exceptionally strong. I think we need to think about it now and know that actions like that are unlawful.

Senator FEINSTEIN. I think you have both raised a very good point. If you think of an attack on that broad scale, you wonder who else, besides the Department of Defense, would actually be equipped to handle it.

I would like to ask a question of Mr. Woolsey, if I might. I want to just talk for a minute about the 1995 Deutch guidelines. Apparently, the CIA responded to your report that the 1995 guidelines work fine and that CIA headquarters has never turned down a case officer who has ever wanted to recruit a terrorist.

Is that true?

Mr. WOOLSEY. I believe that is, in essence, what they said, yes, Senator Feinstein. Although I have a high regard for the current Director and for the organization that I used to head, I don't think the response was on point. We are quite willing to accept their statement that they haven't turned down any requests, but that is not the issue. The issue is how many requests get made.

What these guidelines do with respect to terrorist organizations is, as the chairman said, and the Commission was also told by a number of current and past intelligence officers—what they do is add a deterrent to submitting the request in the first place because of the time that is required and because one, in a sense, as a young case officer out in the field, has to be saying, "Well, I think this person that I am about to recruit or that I want to recruit"—the information outweighs this terrible thing they may have been involved in 10 years ago.

And so there is a deterrent that operates in such a way as to get people not wanting to seem to stand behind prior bad acts by their potential recruit or not to want to be criticized or not want to have to become an object of special attention by their bosses. All of those sort of subtle incentives in the bureaucracy can, and we heard that they do keep people from submitting requests.

So the issue is not, of the 5 or 10 or whatever it is requests that have been submitted, have all of them been approved. We are quite willing to recognize that that is the case, assuming that that is what the CIA's records indicate. The question is how many requests get made. Are we deterring case officers from making these requests?

And I think if the FBI had similar guidelines to these in terms of recruiting informants inside the Mafia, we would not have seen the very extraordinary progress that we have seen over the course of the last decade or two in undermining the power of many of the organized crime families in the United States.

I think you have to give your people out in the field some authority and responsibility, and this seemed to us to be too great a deterrent. It implicitly says that what we really want you folks to do out there is, as much as you can, when you are spying on terrorist groups, recruit nice people as spies. And if you recruit mainly nice people as spies in, say, Beirut, you will have a pretty good idea of what is going on in the churches and the chamber of commerce, and so forth. But you don't want to know that. You want to know what is going on inside Hizbollah.

Senator FEINSTEIN. If I can, let me just follow this up for a second. It is my understanding that Mr. Deutch adopted these guidelines in part because the House and Senate Intelligence Committees were never informed of the recruitment of individuals who had murdered Americans or engaged in torture before or after they were on the CIA payroll. So that raises the question, I think, of whether the United States should go back to that kind of situation.

Mr. WOOLSEY. Well, there are two separate issues here. One is if someone in many circumstances kills an American overseas—this is not true of all, but in the case such as the one that was described—that is also a violation of American law. And as I mentioned in response to Senator Grassley's question, if there is evidence of some violation of American law, that request to recruit that individual that may have so violated American law has to go to the Justice Department as a crimes report, quite apart from anything we talked about. We didn't deal with this issue. The Justice Department has to give a declination letter, a waiver, essentially, that it is all right to recruit that individual.

And as I also mentioned in response to Senator Grassley, I think a reasonable case can be made, and reasonable people can be on both sides of this argument, that one ought to be very cautious about recruiting people inside governments that have committed, let's say, human rights violations in the past, as was allegedly the case with the Guatemalan military officer involved, because one has other alternatives in getting information from governments.

You can recruit spies, as I mentioned, good people trapped inside bad governments, and you can have intelligence liaison relationships in which you exchange information and you learn things. It may not be necessary to recruit brutal people and pay them money inside foreign governments in order to obtain information.

The problem is that inside terrorist organizations, there isn't anybody there unless they want to be a terrorist. So if you are going to get inside information, it is going to virtually always have to be from somebody who has participated in or been involved in some type of terrorist activity in the past. And so in dealing with terrorist organizations, we felt that those guidelines should not be observed. And we took no position on the guidelines with respect to the types of recruitments that had given rise to the business about Colonel Alpirez and Jennifer Harberry and Bamako and all

of that back in 1995 which led to John Deutch issuing the guidelines.

Senator FEINSTEIN. Thank you.

Senator KYL. You have mentioned the *John Gotti* case, and I think Sammy “the bull” was out in Arizona. They spent a lot of money putting him up.

Mr. WOOLSEY. He went bad again.

Senator KYL. But other people wouldn’t have been put away.

Senator FEINSTEIN. That is right.

Senator KYL. And he allegedly killed people, so you have that kind of a situation. And I was going to ask Mr. Lewis to respond to that, but I have another question for him, too.

Let me ask some of the questions that were submitted by the American Arab Anti-Discrimination Committee because, again, I would like for this hearing to be, among other things, an opportunity to reply to some criticism. And I think there have been some good questions raised.

One of the questions that I was asked to ask, and I am happy to do so, has to do with recommendation on tracking of foreign students. The question is how would tracking foreign students according to a student’s field of study or change of major help the United States anticipate and thwart a potential terrorist attack? What is the significance of a student changing a major from, for example, English literature to nuclear physics, and how is a student’s area of academic interest relevant to efforts to combat international terrorism?

I might ask that, first of all, of Mr. Lewis, but anybody else who has expertise.

Mr. BREMER. Let me answer that first because I am probably the only person at the table who spent quite a bit of his life issuing student visas, so I have seen this from the front to the back.

Senator KYL. OK.

Mr. BREMER. Let me first of all say that any student who applies for a visa to the United States has for 3½ decades had to specify his or her major in the application form.

If you are a student applying for a visa from a state which is designated as a state-sponsor, of which there are currently seven, there are special visa waiver procedures which are in place called SAO’s, special advisory opinions, which must be sought by the consular officer before he can issue the visa.

In the case of some of those countries, if the major is a major on something which the INS calls a critical subjects list—and things on a critical subjects list are things like nuclear physics, biochemistry, and so forth, things like that—you may not issue the visa; that is to say, it is in the law as it stands now.

Since that is well known, a person coming from one of those states—and, incidentally, very often people coming from those states are sponsored by their government. The only case is Libya, where for many years by law the Libyan government has not been allowed to send money for students.

Somebody coming from those states could therefore apply for a visa using a different major, and when he or she switched majors after coming here, they would be in violation of their visa status. In fact, that is a violation of the law to change your major in some

cases. So the precise, specific answer is that it would be a violation of their visa status for some students to change their major.

So that is a very precise answer, but I am going to let Mr. Lewis give you a more general answer.

Senator KYL. And one of the recommendations was that this information be computerized so that it would be easier to track.

Mr. BREMER. Well, of all of the things this Commission has said, this has been the most comprehensively misreported and misunderstood recommendation of all. Let me first of all say it is, in our view, not a very important recommendation among our recommendations. It doesn't even deal in any important sense with the problem of border security.

Every single day, Mr. Chairman, 1.5 million people legally cross American borders—1.5 million people, many of them in the Senator's State, legally. So we are talking here about something on the order of 250,000 student visas issued every year. It is a very minor number compared to 1.5 million everyday, something like 500 million a year.

The Commission felt that we have a major border security problem in this country. It goes way beyond terrorism; it has a lot of other implications. It was such a big issue, with only 6 months for us to study terrorism, we basically said we can't solve this problem in 6 months. And we recommended Congress or another commission or somebody take a real look at this.

We did come across this one program that is in place, and has been in place since 1965. And it is in response to a law which you passed in 1996 that the INS has set up this pilot project to monitor students, and what they are monitoring is essentially the same things that have been monitored since 1965 when I started issuing student visas, nothing more, nothing less, except we are doing it on a computer now instead of in shoe boxes. But if I could ever get anybody to understand that, I would consider that I had achieved my goal.

Senator KYL. This hearing hopefully will help to do that.

Mr. BREMER. I hope so, Senator.

Senator KYL. I think that your answer helps to put it in perspective.

Mr. LEWIS. Well, quite frankly, the chairman has stated it very well. The only thing that I might add is from the FBI's standpoint, we cite as an example in the report the issue of the student that dropped out and was involved in the World Trade Center bombing.

What we are looking for is just some information of what is the status of particular students, and we are going back to this 1996 pilot program. That is all we are asking for. Again, this has been widely misunderstood.

Ms. KAYYEM. If I could follow up, right before this hearing I actually met with a group of Muslim leaders and I asked them, what is the problem here, why is it this one—and Ambassador Bremer is right—of all the recommendations, because certainly the law has been there for a long time. I think that there is a concern, and probably a legitimate concern, that it is not so much this law, but how it is going to be applied in practice.

Certainly, you have all heard from the Arab and Muslim community that objective laws can be applied in a discriminatory fashion.

Speeding laws can be applied in a discriminatory fashion if the only people pulled over are African-Americans. We know that. And I think that those concerns are legitimate. I think that they should be heard as the INS and this Senate vote on extending it nationwide. I think the INS has to be forever vigilant on that.

Terrorism has an identity in America and it tends to be Muslim or Middle Eastern, and I think it is important that we hear those concerns and complaints and that we respect that that is actually the concern at hand. It is not so much the law; it is the potential of this law. This is not a law that the INS is going to collect information and then give it to anyone who asks, so that every student—you know, we are going to know what they ate or if they are on a home study program. It is an immigration law, but I think that those concerns we need to respect and are valid if we learn that this law is being applied in a discriminatory fashion.

Senator KYL. Let me just ask this question. Does somebody then ostensibly monitor the information not only to determine whether the technical immigration law might have been violated when, let's say—and let's take a hypothetical country so that we are not stepping on any toes, but an individual sponsored by that country changes from dance and music to nuclear physics, maybe doesn't even report it, but information comes to the attention of Immigration which validates that change.

Now, somebody in INS may decide that that is a technical violation of the law and therefore we are going to revoke the student visa, if that is the appropriate remedy. But is it anticipated here that there would be an additional step because of the potential, at least the idea here being that that could be an activity involving espionage or terrorism of some kind, and that that information would be turned over to a law enforcement agency like the FBI?

Mr. Lewis.

Mr. LEWIS. No, to answer it shortly. It is INS' call on something like that, and if there is any indication on the part of the INS official involved that a possibility of some clandestine activity or something that goes beyond just the change of status, then, yes, very well it could be, or the FBI would be alerted. Now, that doesn't happen in all instances and that is a judgment call on the part of the INS.

Senator KYL. So there would have to be something in addition?

Mr. LEWIS. Something dire, something really different and noticeable, but this is not routinely done.

Senator KYL. OK.

Mr. LEWIS. We would like to have known about the World Trade Center. See, he changed his status. He was no longer a student, but just stayed here. Now, that should be reported.

Senator KYL. But even that fact would not ordinarily alert a law enforcement agency to a potential problem, would it?

Mr. LEWIS. No, not necessarily.

Senator KYL. It would be a violation. I mean, there are a lot of people who get here on a visa of one kind or another and then just end up staying illegally.

Mr. LEWIS. Right, yes, Senator.

Mr. BREMER. That is why we make no pretenses that this is a very important recommendation to deal with the much broader problem of border security.

Senator KYL. But it does deal in one way with security, and that is whether or not the individual may have some involvement in terrorism. At least there is a remedy for removal from the country for the technical violation of law.

Mr. BREMER. Right, that is right.

Senator KYL. Might I ask just one more of these questions and then I will turn back to you, Senator Feinstein?

I think this is a good one to clarify as well. On February 4, 1999, FBI Director Louis Freeh testified before the Senate Appropriations Subcommittee on Commerce, State and Justice, and told the subcommittee that since the World Trade Center bombing of 1993, "no single act of foreign-directed terrorism has occurred on American soil."

The Commission report states that, "Today, international terrorists attack us on our own soil," and cites the arrest of Ahmed Ressam at the Canadian border in December 1999 as evidence. The citation I have for that is page 1. I am not certain of that.

However, given that Director Freeh confirms that there have been no incidents of international terrorism in U.S. territory in many years, and that Mr. Ressam was arrested at the border, the question asks, isn't it reasonable to conclude that current security measures are proving effective in protecting Americans on American soil?

Mr. BREMER. What is left out of that, by necessity, is testimony from the Director of the number of attempts which have been thwarted, and we heard testimony that that number is in the several dozen just in the last 5 years alone, including some where there was the possibility of the use of weapons of mass destruction.

What is enough security? How do you find the balance between respect for civil liberties, which we all feel very strongly about, and providing security for Americans? You can always say, since it didn't happen, it won't happen, and therefore we don't have to do anything. I think the burden of our report is that the threat is changing enough that we need to take further prudential steps to meet it, including steps involving, for example, resources for the FBI. And I think all of us stand by that. We are not comforted by the fact that the FBI has been effective in the past in thwarting these attacks. We want them to continue to be effective.

Senator KYL. I might say that, before this subcommittee, the FBI Director, Louis Freeh, has said that each year for the last several years—he hasn't been specific—that about roughly a dozen terrorist attacks are thwarted.

Mr. BREMER. Right.

Senator KYL. And I think he may have even qualified that saying "major terrorist attacks." I don't remember.

Mr. BREMER. We certainly heard numbers in the several dozens. Senator KYL. OK.

Mr. BREMER. And it is the case that the Ressam arrest was largely luck and very good instincts on the part of a very smart border guard who spooked the guy.

Senator KYL. So the statement in the report—and I have not compared this question to the report itself, but the quotation is, “Today, international terrorists attack us on our own soil.” Do you remember writing that, and would you want to qualify that in any way?

Mr. BREMER. No; you could say “attempt to attack us,” but they did attack us. They attacked us at the World Trade Center.

Senator KYL. OK; well, he was saying since then.

Mr. BREMER. And they tried to attack us at the Millennium. That was thwarted.

Senator KYL. OK, great.

Senator Feinstein.

Senator FEINSTEIN. I don’t know whether it was Mr. Bremer or Mr. Woolsey, but the comments on probable cause for a wiretap under FISA—I didn’t quite understand what you were saying. You said that the Department demands evidence beyond what was required in the law. Could you be more explicit?

Mr. WOOLSEY. Just a couple of points, one that Ms. Kayyem spoke to. We noted that, for example, OIPR sometimes requires specific knowledge of a terrorist practice rather than merely being a member of a terrorist organization. And I think this is a legitimate argument which the Commission took one view on and Ms. Kayyem stated her view. I think that is a reasonable disagreement between reasonable people.

The one that stuck most in my mind was the fact that, typically, OIPR doesn’t generally consider past activities of a surveillance target in determining whether a FISA probable cause test is met. And it strikes me that in an area such as terrorism, past behavior is something that is quite reasonably considered. And, again, in none of these cases were we recommending that the FISA statute be changed, nor were we recommending that the judges exercise different standards than what they do.

What seems to have occurred from time to time is that OIPR has not let through requests that might well have been successful before the FISA court. The fact that in all of the FISA court’s existence it has only—and you can get two different views of this—it has either never turned down a request or perhaps has turned down one, suggests that the prior screening that is going on at the OIPR may be a bit too stringent.

My wife says that if you don’t miss an airplane once in a while, you are spending too much time in airports, and people differ on that, but the point is a reasonable one. It is that if you always show up 2 hours ahead of every flight, you are never going to miss a flight, but most people try to make judgments a bit more balanced than that.

In these cases, I think what one should read between the lines of this portion of the report is that most of the commissioners felt that OIPR was not permitting some requests to get to the court which would meet the statutory standards and would normally be approved by the court.

Senator FEINSTEIN. Are you saying, under present practice, let’s say if Osama bin Laden were in the United States, there would not be just *de facto* probable cause to wiretap him?

Mr. WOOLSEY. Well, he is sufficiently famous; he might get through most any screen.

Senator FEINSTEIN. He is a known terrorist. I just used that because it was extreme.

Mr. WOOLSEY. If one could not consider membership in an organization and if one could not consider past behavior, then at least I suppose theoretically he might not get through the OIPR screen. As a practical matter, I am sure OIPR would approve a request to wiretap Osama bin Laden.

Mr. BREMER. Commissioner Lewis has the most experience of any of us in this area.

Senator FEINSTEIN. Right.

Mr. LEWIS. Senator, obviously this is one of those issues that I feel very strongly about, and I have to state right up front that I strongly disagree with my esteemed colleague here on my right. The FISA statute clearly sets out the standard for probable cause. Membership alone is spelled out if you are a non-U.S. person.

What the OIPR attorneys do—and I have the utmost respect for them—they are always doing what they think is correct and I believe is wrong, is the simple fact that they always are looking for quantity. They are substituting their judgment for the judgment that the Congress has set out in the statute. That, in effect, is what happens. The statute requires A and B. OIPR wants A, B, C, and D.

Now, we say maybe one has been turned down. Well, the fact of the matter is most of them never get there. Much like the request to become an asset of the CIA abroad, you are not going to get the request because they are stymied down below, and that is what happens on a routine basis.

Senator FEINSTEIN. Thank you. That is helpful.

Mr. BREMER. I just want to underline one point, Senator. Commissioner Woolsey said it, but I want to say it again. We in no way are suggesting a change in the probable cause standard that is in the statute. That is not our recommendation.

Senator FEINSTEIN. You are just saying observe the statute.

Mr. BREMER. And Ms. Kayyem understands that.

Ms. KAYYEM. Yes.

Mr. BREMER. There is no disagreement. We are not doing that.

Ms. KAYYEM. And on the past acts issue, we didn't raise it as a Commission. I mean, we know that there is legislation that you all are addressing, and I actually think it would be relevant. I think if Osama bin Laden shows up, although we didn't address it as a Commission, I think that that would be in some instances very legitimate. This really just came down to a basic question, as Mr. Woolsey said, about membership in organizations that it is very hard to find out about membership.

Mr. WOOLSEY. I think that is a reasonable point.

Senator FEINSTEIN. That concludes my questions. Thank you, Mr. Chairman.

Senator KYL. We may have a whole series of votes here in a minute, and so as soon as that starts, we will probably have to conclude the hearing. There may be some other questions that occur to us that we would want to submit to you and I would like to have

the opportunity to do that, but we have just a couple more minutes, if I could take some additional time.

One of the things that I have become persuaded of since I have been active in the Federal Government here is that the United States generally, and our allies, place a lot of reliance on international agreements. And then after the press conferences and signing ceremonies and hoopla and reading the next morning's headlines, the international agreements are essentially forgotten because they are very difficult to enforce, usually.

Frequently, there are overriding concerns. Our allies have certainly made this clear with respect to some of these terrorist countries. They have got trade, for heaven's sake. Why would they want to enforce an agreement? We have got to make a buck.

Now, in view of that, one of your recommendations endorsed the International Convention for the Suppression of the Financing of Terrorism as a tool to internationally affect the fundraising of terrorist groups, certainly a laudable goal. The Convention calls for each signing party to enact domestic legislation to criminalize fundraising for terrorism and provide for the seizure and forfeiture of funds intended to support terrorism. I think it was Senator Feinstein a moment ago who noted the fact that a lot of organizations, under the guise of charitable purposes, raise a lot of money. And who knows where that money eventually goes?

Given the failure of the international community to enforce other multilateral agreements, why do you think that this would be such an effective tool in affecting the financing of terrorist organizations?

Mr. BREMER. Well, Senator, I don't think we think this is the greatest thing since smoked bacon in terms of fighting fundraising. I think, in the end, most of the fight against terrorism is not going to be multilateral; it is going to be unilateral and bilateral. Most of it is going to take place behind closed doors in liaison with law enforcement agencies, treasury departments in this case, people who have organizations like the Office of Foreign Asset Control.

We by no means, want to suggest that just putting this Convention into effect will be a silver bullet. It won't be. It may help gradually in the process that started in the early 1970's, in effect, of essentially saying it is not OK to be a terrorist. I think there are now 12 U.N. treaties that have been signed affecting terrorism, starting with the hijacking treaties in 1970 and coming all the way forward. You could say about each of them more or less what you have said about this one, that by itself, well, it is sort of marginal.

On the other hand, what it does do is it creates a political climate abroad in the world that says it is not OK anymore to be a terrorist. And I think one of the reasons you are seeing less overt state support for terrorism in the 1990's is that during the 1970's and 1980's, we did manage to criminalize terrorism in the eyes of a lot of people. We delegitimized it.

We should be very modest in our expectation of this Convention and the one on cyber terrorism, which I know you are particularly interested in, Mr. Chairman, which we also endorsed. They are modest steps. They are better than nothing, as long as they don't lead you to believe you have solved the problem.

Senator KYL. Right, and this is one that I find it hard to see what harm it could do.

Mr. BREMER. Exactly.

Senator KYL. There are others that can do harm, among other things, because of what you just pointed out. I just wondered if I was missing something there.

I think I asked this question at, was it the Intelligence Committee hearing that we had? And I believe I asked the panel how do you get at this problem of differentiating between legitimate fundraising and that which ends up supporting terrorism. I believe that the answer at the time was, really hard to do, but again you have got to try to work at it. Is there anything to add to that?

Mr. BREMER. I don't think we have gotten any smarter in the intervening 2 weeks, Senator.

Senator KYL. Well, could you characterize how big you think the problem is? That might be helpful for us.

Mr. BREMER. I am all for going after terrorist funding, but one of the problems is it is a pretty cheap crime. I mean, you don't need a lot of money really in the long run to be an effective terrorist.

Senator KYL. I remember this was another part of your answer before.

Mr. BREMER. You need an AK-47, a couple of clips, and, you know, arrive at an airport. On the other hand, when you have people like Osama bin Laden, who is reputed to have hundreds of millions of dollars stashed away in various places, and who is now sort of self-financing, my colleague Jim Woolsey points out that we don't have the problem of terrorists supporting states now. We have—what do you call it?

Mr. WOOLSEY. The other way around. We have terrorists supporting states.

Mr. BREMER. Terrorists supporting states, not states supporting terrorists, yes. It makes a lot of sense to see if you can figure out where his money is. And, of course, there has been a lot of progress in tracking funds in the narcotics field and now in the sort of money laundering field. There is a lot of knowledge out there in the world among bankers and governments. And we certainly ought to go at it, but we shouldn't think that it is going to be easy.

Senator KYL. Perhaps my last question. Going back to the subject that has come up—and it was the first question Senator Grassley asked and it has come up several times during our hearing here, and that has to do with the FISA approach. We understand you are not recommending a change in guidelines. We understand that there is at least one different point of view with respect to one element of that, and your letter, in addition to your testimony, will be a part of the record.

As I understand it, the Commission has said that the practice of the Justice Department is to require specific knowledge of wrongdoing or specific knowledge of the group's terrorist intentions, in addition to the person's membership in the terrorist organization, before forwarding an application for a FISA court for a search or surveillance. Is that correct so far?

Mr. BREMER. Correct.

Senator KYL. I gather that the distinction between a terrorist organization and the group's terrorist intentions is meant to apply to

the difference between the general and the specific. In other words, even though you know that Hizbollah, for example, is a terrorist organization, and Mr. Jones here is somebody that you want to surveil because of his membership in that organization, the effect of the Justice Department policy here is to say we need either knowledge of his wrongdoing or specific knowledge of the intentions of Hizbollah to engage in a particular kind of terrorist act, or an intention to engage in terrorism, beyond its general reputation.

Do I understand that correctly?

Mr. LEWIS. Yes, but when you talk about that, there is a difference between a U.S. person and a non-U.S. person. What you are looking for is any kind of clandestine activity, something that goes beyond the mere membership. That is what you need for a U.S. person to show that there is something more here. But going back to a non-U.S. person, membership alone is sufficient if it fits the statute.

Senator KYL. And the Commission's view, with one dissent, would apply the recommending in what way?

Mr. LEWIS. We are recommending as a Commission, with one dissension, that OIPR follow the statute, what the statute specifically says for FISA's, nothing more than that. There is no change in anything, just OIPR's interpretation. That is what we are recommending, again, going back to quantity over quality—A, B, C, D, et cetera.

Senator KYL. And the effect of that in this particular situation would be not to require specific knowledge of the group's terrorist intention. Is that correct?

Mr. WOOLSEY. If they are non-U.S. persons.

Senator KYL. If they are non-U.S. persons.

Ms. Kayyem.

Ms. KAYYEM. You read that recommendation alone and it seems quite unobjectionable, and I bet you the OIPR attorneys would agree with it, that they ask for nothing more. It is really a question of interpretation about both the statute, because I disagree with Mr. Lewis on the interpretation of the statute, but also the kinds of questions you want the lawyers to ask regarding when was this person a member, the nature of their involvement. I think that these are really hard questions.

I respect the Commission's viewpoint on this difficult issue of terrorism, but when it comes to both the statutory and, of course, the constitutional standards, I think OIPR has shown itself to be very successful in these cases.

Senator KYL. Let me ask this question to probably Mr. Lewis, but any of the rest of you might have some experience with it. In the matter of domestic terrorism, let's say a militia-type organization, where there is some reason to believe that this is a group that likes to talk pretty tough and may have some history of even having—it seemed like they were planning terrorist activities, but nothing current, and you would like to find out what is going on with this group and you would like to get somebody on the inside so you could find out if they are planning anything. What is the law?

Mr. LEWIS. Those fall into the domestic guidelines, and we didn't address that as a Commission, but that falls under the general

criminal domestic guidelines. We are not talking about FISA's. We are talking title III, and certainly we can put somebody in the group. This is going to get into preliminary inquiries, full investigations, and it gets very complicated.

But if it is a preliminary inquiry, which we probably would do to start off with, we could not go out and recruit somebody. We could use an existing informant that we know of and try to get them in there. That is in accordance with the Attorney General's guidelines. Once we make a determination that they are up to no good, then we can recruit informants, et cetera, and work from there.

Senator KYL. And that is one of the key distinctions between the foreign and the domestic situation?

Mr. LEWIS. Yes, Senator.

Senator KYL. I think it is important for the American citizenry to understand these. And I understand that these can be complicated issues and everyone has a pretty visceral reaction to any infringement on our freedom in this country. That is why I think it is also important that you had the opportunity to further expound on the situation that could potentially involve tens of thousands of people injured or killed in this country, the need for some kind of general government policy in dealing with the emergency, and the desire to know in advance what the general guidelines would be.

You can easily foresee, for example, the situation where an ethnic group would be singled out, and Ms. Kayyem made the point there that you can't allow that kind of thing to occur in the application of this kind of emergency power if it is going to be granted to the Government, such as the Defense Department.

Mr. WOOLSEY. Mr. Chairman, if I might, just one clarifying thing. John or any of the others can correct me if I am wrong. In the context of the distinction between title III and FISA and U.S. persons and non-U.S. persons that we are talking about, a permanent resident alien, a green card holder, is a U.S. person for this purpose. When we are talking about a non-U.S. person, we would be talking about someone who was, say, here on a student visa or something like that.

Ms. KAYYEM. There can be FISA surveillance against U.S. citizens if the U.S. citizen has a connection to foreign intelligence. So U.S. citizens would apply in the FISA and the title III. What John and Jim are getting at is in both statutes, there are different requirements, depending on if you are a U.S. citizen or not. And, of course, they are much stricter for U.S. citizens, as would be appropriate under the law.

Mr. WOOLSEY. U.S. persons.

Ms. KAYYEM. U.S. persons, right.

Senator KYL. Somewhere, someplace there probably should be a nice chart.

Mr. LEWIS. We have one.

Senator KYL. There probably is, OK, and for those of our fellow citizens who are interested in this kind of thing, I certainly invite questions. We may not be able to answer them, but we can certainly get them to the people that can.

I want the American people to feel good about the fact that we have very dedicated citizens of this country, very knowledgeable people who have served in the Government who are looking at these issues, who care enough to make recommendations about how to deal with terrorism, and who care very deeply about the necessary constitutional protection of American citizens in the process.

I urge them, if they have concerns, rather than venting concerns, as I have heard some do, to channel those concerns in a constructive way, such as those who submitted questions to us today to pose to you. I think that is the right way to go about doing this, and would urge any of those kinds of groups in good faith to do that. And I will certainly respond in good faith, and I know that the Commission members will react in that same way.

I hope that you will be available if we have additional questions. I appreciate your service in this matter very much, and appreciate your testifying here today.

Mr. BREMER. Thank you, Mr. Chairman.

[The prepared statement of Mr. Bremer follows:]

PREPARED STATEMENT OF AMBASSADOR L. PAUL BREMER III

Mr. Chairman, Members of the Subcommittee, thank you for the opportunity to appear before the Subcommittee this afternoon to review the conclusions and recommendations of the National Commission on Terrorism.

The threat of terrorism is changing dramatically. It is becoming more deadly and it is striking us here at home. Witness the 1993 bombing of the World Trade Center, the thwarted attacks on New York's tunnels, and the 1995 plot to blow up 11 American airliners. If any one of these had been fully successful, thousands would have died. Crowds gathered to celebrate the Millennium were almost certainly the target for the explosives found in the back of a car at the U.S. border in December 1999. The Annual Report of the Canadian Security Intelligence Service, released earlier this month, cites the Millennium arrests as an example of today's threat: that of "an international ad hoc coalition of terrorists" who "have expressed the intention of causing harm to Americans and their allies." Overseas, more than 6,000 casualties were caused by just three anti-U.S. attacks, the bombings of a U.S. barracks in Saudi Arabia and of the U.S. embassies in Kenya and Tanzania.

If three attacks with conventional explosives injured or killed 6,000, imagine the consequences of an unconventional attack. What if a release of radioactive material made 10 miles of Chicago's waterfront uninhabitable for 50 years? What if a biological attack infected passengers at Dallas-Fort Worth Airport with a contagious disease?

It could happen. Five of the seven countries the U.S. Government considers terror-supporting states are working on such weapons and we know some terrorist groups are seeking so-called weapons of mass destruction.

Congress established the National Commission on Terrorism to assess U.S. efforts to combat this threat and to make recommendations for changes. The Commission found that while many important efforts are underway, America must immediately take additional steps to protect itself.

First, we must do a better job of figuring out who the terrorists are and what they are planning. First-rate intelligence information about terrorists is literally a life and death matter. Intelligence work, including excellent cooperation with Jordan, thwarted large-scale terrorist attacks on Americans overseas at the end of last year. Such welcome successes should not blind us to the need to do more.

Efforts to gather information about terrorist plots and get it into the hands of analysts and decisionmakers in the federal government are stymied by bureaucratic and cultural obstacles. For example, who better to tell you about the plans of a terrorist organization than a member of that organization? Yet, a CIA officer in the field hoping to recruit such a source faces a daunting series of reviews by committees back at headquarters operating under guidelines that start from the presumption that recruiting a terrorist is a bad thing. This presumption can be overcome, but only after an extensive process designed to reduce the risk from such a recruitment to as near zero as possible.

Even if a young case officer makes it through this gauntlet, will the potential terrorist recruit still be around? Will the attack have already occurred? These guidelines were issued in response to allegations that the CIA had previously recruited individuals guilty of serious acts of violence. The Commission found that whatever their intention, they have come to constitute an impediment to effect intelligence collection and should not apply to counterterrorism sources. CIA held officers should be as free to use terrorist informants as prosecutors in America are to use criminal informants.

We also need more vigorous FBI intelligence collection against foreign terrorists in America and better dissemination of that information. FBI's role in collecting intelligence about terrorists is increasingly significant. Thus, it is essential that they employ the full scope of the authority the Congress has given them to collect that information. Yet, the Commission found that the Attorney General guidelines that govern when the FBI can open a preliminary inquiry or full investigation are unclear (they run to over 40 pages). The Commission heard testimony from both serving and retired agents that they are often unsure whether the circumstances of a particular case meet the criteria, which contributes to a risk-averse culture. Thus, the Commission recommends that the Attorney General and the Director of the FBI develop guidance to clarify the application of the guidelines, specifically the facts and circumstances that merit the opening of a preliminary inquiry or full investigation.

Another problem affecting the FBI's terrorism investigations is the overly cautious approach by the Office of Intelligence Policy and Review (OIPR) within the Department of Justice in reviewing applications for electronic surveillance against international terrorism targets. The Commission concluded that OIPR is requiring a higher standard than required by the Foreign Intelligence Surveillance Act in approving applications submitted by the FBI. The Justice Department came to the same conclusion in its report on the Wen Ho Lee matter, finding that OIPR was needlessly restrictive of the statute. The Commission therefore recommends that the Attorney General direct that OIPR not require information in excess of what is mandated by the probable cause standard under FISA. The Commission also recommends additional OIPR personnel to ensure timely review of FISA applications.

Once the information is collected by the FBI, technology shortfalls and institutional practices limit efforts to exploit the information and get it into the hands of those who need it—such as intelligence analysts and policymakers. The Commission recommends increased resources to meet FBI's technology needs, particularly in the area of encryption. More than 50 percent of the FBI's field offices report encountering encryption in criminal, counterintelligence or terrorist activity. In many of these cases, the FBI has difficulty in gaining timely access to the plain text of lawfully seized evidence, greatly hampering investigations and efforts to protect the public safety.

In the President's budget request, the FBI specified urgent requirements for improved technology, including the formation of a Technical Support Center to respond to the increased used of encryption. The Commission urges the Subcommittee to give the request careful consideration and to work with your colleagues on the Appropriations Committee to ensure this critical need is adequately funded. We also have a recommendation designed to improve the ability of agencies to quickly identify, locate, and use translators—a perennial problem that plagues not just intelligence agencies but is particularly critical for time sensitive needs such as preventing a terrorist attack.

This de-crypted and translated information is only valuable, however, if it gets to the people who need it. Dissemination of general intelligence information has not traditionally been an important part of FBI's mission. They do a good job of sharing specific threat information but, otherwise, sharing of information is not given a high priority. In fact, if the information is not specific enough to issue a warning or is not relevant to an investigation or prosecution, it may not even be reviewed. Information collected in field offices often never even makes it to headquarters. There is a dangerous possibility, however, that the unreviewed information could be the key to preventing an attack in the future.

The World Trade Center case is an example of this problem. In 1992, Ahmed Mohamed Ajaj entered the U.S. with Ramzi Yousef. In addition to several passports, Ajaj carried with him manuals containing instructions on constructing bombs of the type used in the WTC bombing. But more than seven years later, Ajaj's notebooks and manuals, specific pages of which were submitted as evidence during the WTC trial, have yet to be disseminated to the intelligence community for full translation and exploitation of the information.

The CIA faces a similar problem with the information it collects overseas in trying to protect sources and methods while disseminating the information as quickly and

as broadly as possible to those who need it. CIA addresses this with dedicated personnel, called reports officers, located overseas and at headquarters who are responsible for reviewing, prioritizing, and distilling collected information for timely distribution. The Commission recommends that the FBI establish its own cadre of reports officers. To disseminate effectively the information while protecting criminal prosecutions and privacy rights, the FBI reports officers should be trained both in the information needs of the intelligence community and the legal restrictions that prohibit disclosure of some types of law enforcement information. To take on this new mission, the FBI must be provided the additional resources that would be required.

Recent events have also demonstrated what terrorists could do if they decided to use their increasingly sophisticated computer skills to perpetrate a cyber attack. A vigorous plan for defending against such attacks must be a national priority. In addition, because cyber attacks are often transnational, international cooperation is essential. The Commission therefore recommends that the Secretary of State take the lead in the drafting and signing of an international convention on cyber crime. There is a current draft Council of Europe convention on cyber crime and the U.S. is participating in the negotiations. The Commission did not take a position on the current draft, which is months away from a final version. The draft does, however, contain some important provisions that will aid in international investigations of cyber attacks. The convention would make cyber attacks criminal offenses in all the signatory countries. It also recognizes that with cyber attacks, cooperation in international investigations must be accomplished in a matter of hours, before critical evidence disappears.

The Commission also strongly recommends measures to improve the lagging technological capabilities of the National Security Agency, the FBI and the CIA so that they don't completely lose their ability to collect intelligence against techno-savvy terrorists. These agencies, particularly the NSA, require funding to close the gaps in technology.

On the policy front, the United States needs to go after anyone supporting terrorists, from state sponsors, to nations that turn a blind eye to terrorist activity, to private individuals and organizations who provide material support to terrorist organizations.

Mr. Chairman, three of the state sponsors of terrorism. Iran, Syria and North Korea are currently undergoing internal changes. In the case of Iran, while the Americans may hope that President Khatemi can institute sensible political and economic reforms, the regrettable fact is that Iran continues to be the world's primary terrorist nation. Indeed, in the period since Khatemi's election, Iranian support for terrorists opposed to the peace in the Middle East has actually increased. Furthermore, there are indications that Iran was involved in the 1996 bombing attack in Saudi Arabia that killed 19 Americans. We think it is vital that the American government makes a sustained effort to enlist our allies in pressuring Iran to cooperate in the Khobar Towers bombing investigation. Until there is a definitive change in Iranian support for terrorism, we recommend that our government make no further gestures towards the Iranian government.

It is too early to tell if the death of Syrian dictator Hafez Assad will bring any change in that country's long support for terrorism. In conversations which American officials have with the new leaders of Syria, it should be made clear that Syria cannot expect normal relations with the outside world until it takes concrete, measurable steps to stop its support for terrorists. Hopefully the new leader of that country will come to understand that such a step is the prerequisite to obtaining the Western trade and investment essential to modernize Syria's economy.

Similarly, it is too soon to know if the dramatic summit in Pyongyang two weeks ago will pay dividends in getting North Korea to stop its support for terrorism. For years, that country has provided safehaven and support to radical Japanese terrorists. The communist government itself has been guilty of savage and bloody acts of terrorism, including an attempt to kill the entire South Korean cabinet and blowing up a South Korean airliner. More recently, the government is suspected of having sold weapons to terrorist groups.

Recognizing the importance of encouraging change in North Korea, the U.S. Government last week eased a number of long-standing prohibitions against contacts between our two countries. But wisely the U.S. has left in place those sanctions which flow from the North's continued support for terrorism. And I believe our government should insist, as with Iran and Syria, that the North take specific concrete steps to stop its support for terrorism before giving them a clean bill of health.

The other countries the U.S. identifies as state sponsors (Cuba, Sudan, Iraq and Libya) should be made to understand that we will continue sanctions until they take

concrete steps to cease all support for terrorism. In addition, the Taliban regime in Afghanistan should be designated a state sponsor.

There are also states that, while they may not actively support terrorists, seem to turn a blind eye to them. Congress gave the President the power to sanction nations that are not fully cooperating against terrorism, but the power has not been effectively exercised. There are candidates for this category. For example, Pakistan has been very helpful at times, yet openly supports a group that has murdered tourists in India and threatened to kill U.S. citizens. NATO ally Greece seems indifferent to the fight against terrorism. Since 1975 terrorists have attacked Americans or American interests in Greece 146 times. Greek officials have been unable to solve 145 of those cases. And just this month, terrorists struck again with the cowardly assassination in Athens of the British Defense Attache.

As today's terrorist groups receive less monetary support from states, they must seek funding elsewhere, such as individual sympathizers and non-government organizations (NGOs). Thus, disrupting these non-state sources of funding for terrorism has an increased importance. The Commission recommends that the U.S. government use the full range of legal and administrative powers at its disposal against these funding sources. The current strategy against terrorist fundraising is too focused on prosecutions for providing material support to designated foreign terrorist organizations (FTOs). While these cases are not impossible to make, it is very difficult to prosecute and convict under the FTO statute. The Commission therefore recommends a broader strategy against terrorist fundraising. Money laundering, tax, fraud and conspiracy statutes all lend themselves to aggressive use against terrorist organizations, their front groups and supporters.

To implement this broad strategy, the Commission recommended the formation of a joint task force of all U.S. Government agencies with information and authority relevant to terrorist fundraising, as well as an expanded role for the Treasury Department's Office of Foreign Assets Control. As the Commission's report was going to press, the resident announced a Counterterrorism Funding Request that included the formation of an interagency National Terrorist Asset Tracking Center and an expanded OFAC. The President also requested funding for additional DoJ prosecutors, which would support the Commission's recommendation for using all available criminal statutes against terrorists. The Commission therefore urges support for the President's funding request.

In addition, because international cooperation is necessary in many cases of terrorist fundraising, the Commission calls for the ratification of the International Convention for the Suppression of the Financing of Terrorism. This new UN treaty would criminalize terrorist fundraising in the signatory countries and provide for cooperation in the investigation and prosecution of those crimes.

It is difficult to predict whether terrorists will use chemical, biological, radiological or nuclear weapons. But it is troubling to note that the FBI reports that there has been a dramatic increase in the number of threats to use such agents in the U.S. over the past 4 years. The consequences of even a small-scale incident are so grave that certain weaknesses in American approach should be addressed immediately.

Three concrete steps should be taken right now to reduce the risk that terrorists will get their hands on a biological weapon: criminalize unauthorized possession of the most worrisome biological agents, strengthen safeguards against theft of these agents, and control the sale of equipment necessary for weaponizing biological agents. Examples of this critical equipment include specialized fermenters, aerosol and freeze-drying equipment. Controls on biological agents should be as stringent as those applied to critical nuclear materials.

The Commission also examined the actions that the U.S. Government would have to take in a catastrophic threat or attack, and the legal authorities for such actions. The Commission found that most of the needed legal authorities exist, but are scattered throughout different federal statutes. There are also some gaps in legal authorities. For example, there are gaps in the quarantine authority of cities and States and no clear federal authority with regard to vaccinations. It is not clear that law enforcement officials are aware of their powers for certain types of searches in emergency situations. If government officials are not fully aware of the extent of their legal authorities, there is the danger that in a crisis situation they will be hesitant to act or act improperly. The Commission therefore recommends that the President direct the preparation of a manual outlining existing legal authorities for actions necessary in a catastrophic threat or attack and that the President determine whether additional authorities are needed to deal with catastrophic terrorism.

Let me also take this opportunity to clarify the record on a couple of our recommendations that have been incorrectly reported in the press. First, there have been some reports claiming that the Commission recommends putting the Depart-

ment of Defense in charge of responding to terrorist attacks in the U.S. This is not true. What we said, and I am now quoting from the report, is that "in extraordinary circumstances, when a catastrophe is beyond the capabilities of local, state, and other federal agencies, or is directly related to an armed conflict overseas, the President may want to designate DoD as a lead federal agency." (Emphasis added.)

The Commission did not recommend or even suggest an automatic leading role for the Defense Department in all cases. But if we undertake contingency planning for a catastrophic terrorist attack in the U.S., we must consider all plausible contingencies, including the possibility of a federalized National Guard force operating under the direction of the Secretary of Defense. Not to do so would be irresponsible. In making this recommendation, the Commission had in mind the lessons of the catastrophic attack on Pearl Harbor. In the hysterical aftermath of the attack, two of America's great liberals, Franklin Roosevelt and Earn Warren, locked up Japanese-Americans. The best way to minimize any threat to civil liberties in such an extraordinary scenario is through careful planning, including a thorough analysis of the relevant laws, the development of appropriate guidelines, and realistic training. Thus, the Commission recommended that the National Security Advisor, the Secretary of Defense, and the Attorney General develop detailed plans for this contingency.

The second recommendation that has been misrepresented has to do with foreign students in the U.S. The Commission looked at the larger concern of border security and the difficulty of dealing with the massive flows of people crossing U.S. borders every day. But with only six months, the Commission did not have time to develop a full recommendation on how to improve it. It is a huge problem, and one that probably would benefit from a full review by Congress or the executive branch (or another commission). The Commission was alerted to one aspect of the problem dealing with a long-standing program relating to foreign students in the U.S.

For decades, the INS has required colleges and universities to collect and maintain information on the foreign students enrolled in their institutions. This has included information on citizenship, status (e.g. full or part-time), the date the student commenced studies, their field of study, and the date the student terminated studies. The purpose was to ensure that foreigners who came to the United States as students did not break the law by staying after they had finished, or stopped, their studies. Until recently this data was managed manually and was thus not available to the government in a timely manner.

The bombing of the World Trade Center in 1993 showed the weakness of this long-standing process when it was discovered that one of the bombers had entered this country on a student visa, dropped out and remained here illegally. He was subsequently tried and convicted for his role in that terrorist attack, which took six American lives and injured over 1000 others. He is currently serving a 240-year prison term.

Concerned about the obvious inadequacy of the long-standing program to collect information about foreign students, in 1996 Congress directed the Attorney General to modernize that system. In response, the INS established a pilot program using an Internet-based system to report electronically the information colleges and universities had already been collecting for many years.

The pilot program, called CIPRIS, covers approximately 10,000 foreign students from all countries who are enrolled in 20 colleges, universities, and training programs in the southern U.S. The purpose is to bring the visa-monitoring system into the 21st century. After several years experience, the INS has concluded that CIPRIS is effective and has proposed to apply it nationwide.

The Commission reviewed CIPRIS and the criticisms of the program, the primary one being the INS proposal to have the universities collect the fees needed to support the program. It is my understanding that, while the universities opposed the idea of having to collect the fee, they did not oppose the main objective of the program to require reporting of information on foreign students.

The Commission concluded that monitoring the immigration status of foreign students is important for a variety of reasons, including counterterrorism. The Commission did not believe, however, that it was in a position to recommend specifically that the CIPRIS program be implemented.

The Commission is not recommending any new requirements on foreign students in the United States. The Commission's position is consistent with regulations that have been in place for many years, and with the view of Congress which mandated the creation of a program to more efficiently keep track of the immigration status of foreign students.

As the danger that terrorists will launch mass casualty attacks grows, so do the policy stakes. To protect her citizens, America needs a sustained national strategy in which leaders use first-rate intelligence to direct the full range of measures-diplo-

matic, economic and commercial pressures, covert action and military force-against terrorists and their state sponsors.

Mr. Chairman, at this point I would like to introduce my fellow Commissioners who are here today: the Commission's Vice Chairman, Mr. Maurice Sonnenberg, Ms. Jane Harman, Ms. Juliette Kayyem, Mr. John Lewis and Mr. James Woolsey. In addition to those here today, the Commission included Dr. Richard Betts, Gen. Wayne Downing, Dr. Fred Ikle and Mr. Gardner Peckham. It was a privilege to work with this group of dedicated individuals.

[Whereupon, at 3:42 p.m., the subcommittee was adjourned.]

A P P E N D I X

ADDITIONAL SUBMISSIONS FOR THE RECORD

THE PREPARED STATEMENT OF ALEXANDER PHILON

GREECE'S POLICY AGAINST TERRORISM

Combating terrorism is a top priority for the government as well as for the people of Greece, because of the lives lost, foreign and mainly Greek, the threats against persons and properties and also because of the damage caused to Greece, one of the safest countries in Europe.

The government has declared a relentless war against terrorism and seeks the mobilization of the whole Greek society for tackling this phenomenon, which threatens many countries. Greek people realize more than ever the harm done to the country and this was evident from the unprecedented outpouring of public sympathy to the family of Brigadier Saunders and from many comments in the Greek press.

Greece has been closely cooperating with the law enforcement authorities of the U.S. and with the relevant authorities of other countries such as Scotland Yard who are helping Greek police in the investigation of the murder of Brigadier Saunders. We have enhanced the anti-terrorism unit's resources and personnel, many of which have been trained in the U.S. and other countries. It should be pointed out, in this framework, that an FBI unit operates in Greece in close cooperation with the Greek authorities and a Greek-U.S. memorandum on bilateral police cooperation will be signed shortly. This ongoing cooperation has been repeatedly confirmed publicly by the U.S. Administration. In view of the need to tackle terrorism on an international basis, the Greek government has also launched a joint initiative within the European Union to combat terrorism.

The safety of U.S. diplomats serving in Greece has always been of outmost concern of the Greek government and their protection, in collaboration with the U.S. Embassy in Athens, has also been assured.

The reward for any information leading to the apprehension of the terrorists has been doubled to the sum of \$ 2.8 mil.

Measures are being prepared to increase the effectiveness of the existing legal framework including a provision for the exclusion of jurors from the composition of courts trying terrorists and the formulation of a witness protection system.

As to the rumors that the governing socialist party "turned a blind eye to terrorism", no evidence has ever been forwarded to the Greek authorities.

Furthermore from 1975–1981 and 1990–1993 conservative governments in Greece, were not successful in tracking down terrorist groups, even though the son-in-law of the then-Prime Minister Mitsotakis was assassinated by the 17 November terrorist organization.

Finally why should the Greek ruling party allow itself to be branded as passive in combating terrorism when, in fact, its own members and premises have been targeted and when prominent Greek citizens have been assassinated and Greece itself is the ultimate victim of this scourge? In fact, the very aim of terrorism is to destabilize the country and also to create problems between Greece and her European Union partners and NATO allies.

HARVARD UNIVERSITY,
JOHN F. KENNEDY SCHOOL OF GOVERNMENT,
Cambridge, MA, June 27, 2000.

Hon. JON KYL,
U.S. Senate,
Washington, DC.

DEAR SENATOR KYL:

As a former Commissioner on the National Commission on Terrorism, it is an honor to respond to your request regarding the important recommendations of the Commission in regard to combating terrorism, and, in particular, the Commission's recommendation concerning the Foreign Intelligence Surveillance Act (FISA). Under the exceptional leadership of Ambassador L. Paul Bremer, the Commission came together to explore, debate and resolve some of the main issues confronting American counter-terrorism policy. While all Commissioners agreed on the vast majority of recommendations, I could not concur in the section and recommendation regarding the FISA. Report at 10-12.

The Commission's recommendation proceeds on the proper assumption that the constitutional probable cause standard applies here as it would in an ordinary criminal investigation. Every member of the Commission is committed to ensuring that the constitutional and statutory protections are met in the most lawful and efficient manner. We should not lose sight of this critical point of agreement. Nevertheless, I did not concur in this portion of the report.

The question before the Commission was: given the FBI's concerns that the process for securing a wiretap under FISA was slow and unwieldy, how can we fix it? As a preliminary matter, it is important to put these concerns in context. This issue involves the possible surveillance of persons while they are lawfully in the United States; 880 wiretaps were approved alone last year. The FISA court has never, except possibly once, denied an application. Moreover, when Congress passed FISA, it was not simply to ensure that appropriate surveillance could be undertaken. It was also to ensure that the FBI's use of secret wiretaps not be abused. To that end, Congress established the Office of Intelligence Policy and Review (OIPR), a group of specialized attorneys who were charged with ensuring that the FBI had put forth adequate evidence to show probable cause. I believe Congress was correct in making the judgment that such an institutional safeguard was necessary.

In this respect, I concur with the Commission's recommendation that there should be more cooperation between law enforcement agencies and, if necessary, greater resources for the OIPR attorneys who work with the FBI to ensure that the probable cause standard is met. These steps may go a long way towards addressing the concerns that the FBI identified.

The more difficult questions concern the kind and amount of information that OIPR attorneys should request from the FBI before it proceeds to apply for a court order under the FISA. The Commission Report concludes that "to obtain a FISA order, the statute requires only probable cause to believe that someone who is not a citizen or legal permanent resident of the United States is a member of an international terrorist organization. In practice, however, OIPR requires specific evidence of wrongdoing or specific knowledge of the group's terrorist intentions in addition to the person's membership in the organization before forwarding the application to the FISA court." Report at 11. The Commission then recommends that "[t]he Attorney General should direct that the Office of Intelligence Policy and Review not require information in excess of that actually mandated by the probable cause standard in the Foreign Intelligence Surveillance Act." Report at 12. The report therefore suggests that OIPR has in some cases requested information in excess of what the statute requires. Report at 11.

In my view, OIPR may be justified in construing the statute in specific cases to require information of a target's knowledge of a group's intentions or activities. "Membership" is potentially a very broad status. Its meaning is uncertain in this context, and the statute nowhere defines what evidence demonstrates membership. In many cases, there may be no membership list, and thus evidence of membership would have to be based on less formal indicators. In other cases, a person may be included in the membership list of an organization, even though his initial membership pre-dated the objectionable activities of the organization and even though his contacts with that organization during the period in which it was engaged in terrorist activities have been non-existent. Such a person could have an entirely passive connection to the organization. He also may be entirely unaware of the activities of the organization that has drawn the attention of law enforcement. As a result, it would be quite surprising if Congress intended to authorize surveillance of such a person without any additional showing being made. OIPR does not seem to me

to have been acting in excess of its statutory mandate in proceeding on that assumption.

The language of the FISA statute seems consistent with this conclusion. It provides that an application for surveillance is met if “on the basis of the facts submitted by the applicant there is probable cause to believe that * * * the target of the electronic surveillance is a foreign power or an agent of a foreign power.” 50 U.S.C. Sec. 1 804(a)(3)(4)(A). The statute defines a “foreign power” to include “a group engaged in international terrorism or activities in preparation therefor[.]” The statute goes on to provide that an “[a]gent of a foreign power” means * * * any person other than a United States person, who * * * acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power. * * *” It further provides that an “agent of a foreign power” can include one who “acts for or on behalf of a foreign power” which engages in certain specified activities. In addition, the Act provides that an agent of a foreign power is one who “knowingly aids or abets” any person in certain specified activities or “knowingly conspires with any persons to engage in such activities. * * *” 50 U.S.C. 1801, et seq.

These provisions indicate that it may be entirely appropriate for OIPR to have sought the kind of additional information that it has apparently requested in some cases. The Act defines an “agent of foreign power” to be a person who “acts . . . as a member of a foreign power.” The verb “acts” signals that something more than passive membership may be required. Indeed, subsequent provisions defining “agent of a foreign power” refer to the targeted person either “knowingly aiding or abetting” or “knowingly conspiring.” These provisions contemplate a target who is somehow actively engaged in, or knowingly aware of, proscribed activities. As I have said, the statute does not define what evidence suffices to prove membership. In this context, in particular, that is likely to be a difficult, fact-intensive inquiry in which evidence of a target’s knowledge of an organization’s activities and intentions may be quite relevant.

One must also assume that, whatever the statutory standard, the constitutional protections within the Fourth Amendment must also be met before a FISA application can be granted. The Commission and I are in agreement on this point. In my view, the Constitution may require more than simply showing that the target retained formal membership in an organization with which he has had little or no contact for a significant period of time. It may require showing that the target has at the very least some awareness that the organization of which he is a member is a “group engaged in international terrorism or activities in preparation therefor.” It could therefore be relevant in an analysis of probable cause to determine when the target became a member of the targeted organization. It could be relevant as well to determine the nature of the person’s involvement with that organization during the time period in which it was engaged in terrorist activities.

In sum, as I read the statute, and understand the constitutional standard, the facts of each case must be carefully considered to ensure that the legal standards—whether statutory, constitutional, or both—have been met. That careful consideration is one appropriately carried out by the attorneys that Congress foresaw would have the expertise to make such judgments. The recommendation that the Attorney General direct OIPR attorneys to require no more than what the statute requires is not necessarily objectionable. I am concerned, however, that the recommendation, if followed, would preclude the OIPR from asking questions of the FBI that are in accord with the proper legal standard rather than in excess of it.

I realize that the Commission would still require the FBI to maintain court approval and thus that the FISA court would serve as an important check on any application. That check would apply even if OIPR were directed to approve any application to wiretap a person who was formally a member of a targeted organization. But, courts are often quite deferential to law enforcement in this area. And, perhaps, appropriately so. For that very reason, however, the executive branch has a special obligation to satisfy itself before it asks a court to reach that conclusion. That is particularly true where, as here, the determination of probable cause turns on fact intensive judgments about the precise details of a target’s connection to an organization that, in many circumstances, will be operating outside this country. As a result, one must give some room for discretion and judgment by the very attorneys who need to make the case and who are trained to make such judgments. In fact, I think the Justice Department’s record of success in FISA cases in court thus far is in part attributable to its willingness to abide by that obligation. The Department’s care in this regard no doubt bolsters its credibility in those cases in which a court may be hesitant to grant a request. Therefore, I did not concur in the Commission’s recommendation.

In explaining my disagreement with the Commission on this issue, I do not mean to detract from the important ways in which this report does respond to the very

real concerns of persons from communities who are often peculiarly affected by our counterterrorism policies. In particular, I think it is important to highlight in this regard the Commission's important recommendation concerning the use of secret evidence by the INS to remove aliens from the United States who are suspected of terrorism or other national security threats.

Nearly two dozen people have been detained on the basis of secret evidence, some for two years or more. They can not see the evidence. Their counsel can not see the evidence. It is significant, for me, that nearly all, if not all, are Arabs or Muslims. The Commission noted that "resort to the use of secret evidence without disclosure even to cleared counsel should be discontinued, especially when criminal prosecution through an open court proceeding is an option." Report at 32.

Some have suggested, perhaps appropriately, that it is necessary to limit the use of this practice even more than the Commission recommends. Nonetheless, the Commission has made substantial progress on secret evidence and has suggested several protections—mandatory declassified summaries and access to a counsel who is cleared to review national security materials but who could also provide adequate representation—be put in place. I hope that its recommendation will serve as the basis for a reconsideration of this practice by both the Congress and the Department of Justice.

I appreciate the opportunity to further explain my views regarding the Commission's recommendations.

Sincerely,

JULIETTE KAYYEM,
Commissioner, National Commission on Terrorism.

