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9/11 Commission Recommendations: A Civil Liberties Oversight Board

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Summary

Among the recommendations made by the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) in its final report was the creation of a board within the executive branch to oversee adherence to guidelines on, and the commitment to defend, civil liberties by the federal government. This report examines this recommendation and its realization, and will not be updated.

The final report of the 9/11 Commission recommended that “there should be a board within the executive branch to oversee adherence to the guidelines we recommend and the commitment the government makes to defend our civil liberties.”¹ This recommendation was the third and final one made in a section of the report captioned “The Protection of Civil Liberties.” In the other two, the commission recommended that (1) the President, in the course of determining the guidelines for information sharing among government agencies and by them with the private sector, “should safeguard the privacy of individuals about whom information is shared”; and (2) the “burden of proof for retaining a particular governmental power should be on the executive, to explain (a) that the power actually materially enhances security and (b) that there is adequate supervision of the executive’s use of the powers to ensure protection of civil liberties. If the power is granted,” the report added, “there must be adequate guidelines and oversight to properly confine its use.”² Read together, these recommendations called for a board to oversee adherence to presidential guidelines on information sharing that safeguard the privacy of individuals about whom information is shared, and adherence to guidelines on the executive’s continued use of powers that materially enhance security. The report offered no additional commentary on the composition, structure, or operations of the recommended board. Such a board, however, had been proposed in December 2003 in the fifth and final report of the Advisory Panel to Assess Domestic Response Capabilities

¹ U.S. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (Washington: GPO, 2004), p. 395.

² *Ibid.*, pp. 394-395.

for Terrorism Involving Weapons of Mass Destruction, chaired by former Virginia Governor James S. Gilmore III.³

Background

Traditionally, in the American governmental experience, the preservation of civil liberties — those rights and privileges specified in, or thought to be implied by, the Constitution — has been pursued in, and determined by, largely the federal courts. Prototypes of the civil liberties oversight board recommended by the 9/11 Commission might be found in the civil rights policy area. During World War II, for example, the Committee on Fair Employment Practice was created as a subunit of the Office for Emergency Management within the Executive Office of the President. Established by E.O. 9346 of May 27, 1943, the panel investigated complaints of alleged discrimination involving race, creed, color, or national origin, in federal agencies, industries performing federal contracts or otherwise essential to the war effort, and unions of employees in such industries.⁴ The committee's jurisdiction did not, however, extend to the armed forces. It also had some fact-finding and policy responsibilities. It was composed of six members representing labor and management. It was eventually terminated by the National War Agency Appropriation Act of 1946.⁵

Another prototype might be found in the eight-member United States Commission on Civil Rights, an independent agency within the executive branch that makes findings of fact, but has no enforcement authority. The commission's findings and recommendations are submitted to the President and Congress for consideration and appropriate action. The panel collects and studies information on discrimination or denials of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin; or in the administration of justice in such areas as voting rights, enforcement of federal civil rights laws, and equal opportunity in education, employment, and housing.⁶

Finally, a model identified by the 9/11 Commission in its report is the Intelligence Oversight Board (IOB) of the President's Foreign Intelligence Advisory Board (PFIAB), which, it was noted, "in the past, had the job of overseeing certain activities of the intelligence community."⁷ Established by E.O. 12334 of December 4, 1981, the three-member IOB was responsible for informing the President of any intelligence activities that any board member believed to be in violation of the Constitution, statutory law, or presidential orders or directives; and forwarding to the Attorney General reports received

³ U.S. Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction, *V. Forging America's New Normalcy: Securing Our Homeland, Preserving Our Liberty* (Arlington, VA: Rand Corporation, 2003), pp. 22-23

⁴ 3 C.F.R., 1943-1948 Comp., pp 1280-1281.

⁵ 59 Stat. 473.

⁶ See 42 U.S.C. § 1975-1975a; for a recent evaluation of the Commission, see *U.S. General Accounting Office, U.S. Commission on Civil Rights: More Operational and Financial Oversight Needed*, GAO Report GAO-04-18 (Washington: October 2003).

⁷ U.S. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, p. 395.

concerning intelligence activities that the board believed might be unlawful. The board was authorized to conduct such investigations as it deemed necessary to carry out its functions.⁸ In 1993, with the reestablishment of PFIAB by E.O. 12863, the IOB was reconstituted as a committee of the board.⁹

Charter

When recommending the creation of a civil liberties oversight board, the 9/11 Commission offered no details on how this chartering would occur, or on the composition or structure of the panel. Options for establishing the board included a statute legislated by Congress, an executive order issued by the President, or an administrative directive by an appropriate executive branch official other than the President. The chartering instrument would specify the composition of the board, the manner in which its members are selected and approved, and the basic administrative structure and procedures of the board, as well as personnel and budget arrangements.

To provide the board with operational independence within the executive branch, provision might be made in its charter that its membership would be balanced in terms of political interests, drawn from certain professions, and serve staggered terms of set duration. The budget request of the board might be submitted concurrently to the Office of Management and Budget for inclusion in the President's budget and to Congress for its information. The board might be obligated to provide the President and Congress with an annual report on its operations, and its leadership otherwise required — by specification in the charter or through the appointment approval process — to keep Congress informed of board activities.

Mission

According to the report of the 9/11 Commission, the recommended civil liberties oversight board would “oversee” department and agency adherence to (1) presidential guidelines for information sharing, which “should safeguard the privacy of individuals about whom information is shared”; and (2) guidelines confining the use of a government power which “actually materially enhances security.” The board would also monitor “the commitment the government makes to defend our civil liberties.”¹⁰ While Section 892 of the Homeland Security Act requires the President to prescribe homeland security information sharing procedures, it is not clear if the commission's reference to “presidential guidelines” for information sharing pertains to the procedures mandated by this section.¹¹ Furthermore, the source of the guidelines confining the use of a government power is not evident. Also, when such an oversight board is created, its charter may include other specific or general oversight responsibilities in addition to those provided by the 9/11 Commission.

⁸ 3 C.F.R., 1981 Comp., pp. 216-217.

⁹ 3 C.F.R., 1993 Comp., pp. 632-634.

¹⁰ U.S. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, pp. 394-395.

¹¹ See 116 Stat. 2253.

On August 27, 2004, President George W. Bush issued E.O. 13353 establishing the President's Board on Safeguarding Americans' Civil Liberties within the Department of Justice.¹² Chaired by the Deputy Attorney General and composed of 19 other senior counsels and leaders largely from within the intelligence and homeland security communities, the board may advise the President regarding civil liberties policy, gather information and make assessments regarding such policy and its implementation, make recommendations to the President, refer information about possible violations of such policy by a federal official or employee for prompt action, enhance cooperation and coordination among federal departments and agencies in implementing such policy, and undertake other efforts to protect civil liberties as the President may direct.

Legislative Implementation

Among the initial bills offered to implement the recommendations of the 9/11 Commission was one introduced on September 7, 2004, by Senator John McCain (S. 2774).¹³ Title IX would have established a five-member Privacy and Civil Liberties Oversight Board within the Executive Office of the President. While board members were to be appointed by the President with Senate confirmation, and would not concurrently hold any other federal government position, their term of office was not specified, suggesting that they served at the pleasure of the President. Among the functions specified for the board to perform were the provision of advice and counsel to the President and the executive departments and agencies on policy development and implementation related to protection of the nation from terrorism; provision of advice and counsel to the President and the executive departments and agencies to ensure that privacy and civil liberties were appropriately considered in the development and implementation of terrorism policy; continual review of such policy and its implementation, including information sharing practices, to ensure that privacy and civil liberties were protected; receipt and review of reports from privacy and civil liberties officers prescribed elsewhere in the legislation; and periodic submission, not less than semiannually, of reports to Congress and the President. Read the first time, the bill was placed on the Senate legislative calendar. A companion bill was introduced in the House on September 9 by Representative Christopher Shays (H.R. 5040) for himself and 32 cosponsors, and was referred to 10 committees. No further action was taken on either proposal.

A somewhat similar bill to implement the recommendations of the 9/11 Commission was offered by Representative Nancy Pelosi (H.R. 5024) on September 8. Title V directed the President to determine guidelines for acquiring, accessing, using, and sharing information about individuals among federal, state, and local governments, as well as the private sector. It also would have established "within the executive branch a board to oversee adherence to" the President's afore mandated guidelines and "the commitment the Government makes to defend civil liberties." No additional details regarding the board were specified. The bill was referred to 11 House committees, but no further action was taken on it.

¹² *Federal Register*, vol. 69, Sept. 1, 2004, p. 53585-53587.

¹³ See *Congressional Record*, daily edition, vol. 150, Sept. 8, 2004, pp. S8869-S8915.

Selected by the Senate majority and minority leaders to lead the effort to implement the recommendations of the 9/11 Commission legislatively, Senator Susan Collins, the chair of the Committee on Governmental Affairs, and Senator Joseph Lieberman, the ranking minority member on the panel, initially discussed the general terms of their reform bill at a September 15, 2004, press conference. One of its components was to be a civil liberties oversight board.¹⁴ The text of the legislation was made public in draft form on September 20. The Committee on Governmental Affairs began a markup of the Collins proposal on September 21, and completed their action the following day when the committee ordered the amended measure favorably reported as an original bill. Introduced by Senator Collins as an original bill on September 23, the legislation (S. 2840) was denominated the National Intelligence Reform Act.¹⁵ The proposal was also introduced a second time that day, with Senator Lieberman as a cosponsor (S. 2845). At the end of the day, a unanimous-consent agreement was reached providing that, on September 27, the Senate would begin consideration of the latter bill (S. 2845). A bill very similar to the Senate vehicle was introduced in the House on September 24 by Representative Christopher Shays with bipartisan support (H.R. 5150), but no further action was taken on this measure

As the Senate began consideration of the reform bill (S. 2845) on September 27, the legislation, among other provisions, mandated the establishment of a Privacy and Civil Liberties Oversight Board within the Executive Office of the President (EOP). Its chair and four additional members were to be appointed by the President with Senate confirmation for six-year terms. These provisions regarding the board remained in the bill, which the Senate adopted in amended form on a 96-2 vote on October 6.

In the House, the vehicle for implementing the recommendations of the 9/11 Commission was introduced by Representative Dennis Hastert on September 24 and was denominated the 9/11 Recommendations Implementation Act (H.R. 10). The bill drew upon a September 16 draft proposal for strengthening the intelligence capabilities of the federal government which the President had submitted to Congress, with additional input from committee chairs who had held hearings on the findings and recommendations of the 9/11 Commission during August and the early weeks of September. As a result, the bill contained various provisions not found in the counterpart Senate bill (S. 2845), as introduced. The House bill was referred to the Committees on Armed Services, Education and the Workforce, Energy and Commerce, Financial Services, Government Reform, International Relations, the Judiciary, Rules, Science, Transportation and Infrastructure, and Ways and Means, as well as the Permanent Select Committee on Intelligence and the Select Committee on Homeland Security. Five of these panels — Armed Services, Financial Services, Government Reform, Intelligence, and Judiciary — conducted markups and ordered the resulting versions of the legislation reported on September 29.

¹⁴ Amy Klamper and John Stanton, "Intelligence: ... As Collins, Lieberman Unveil a Response to 9/11 Panel," *CongressDailyPM*, Sept. 15, 2004, available at [<http://nationaljournal.com/pubs/congressdaily/dj040915.htm>]; Philip Shenon, "Intelligence Proposals Gain in Congress," *New York Times*, Sept. 16, 2004, p. A15.

¹⁵ See *Congressional Record*, daily edition, vol. 150, Sept. 23, 2004, pp. S9615-S9638.

As introduced, the House bill (H.R. 10) mandated a Civil Liberties Protection Officer — to be appointed by a new National Intelligence Director (NID) — within the office of the NID to serve as a civil liberties and privacy overseer of the intelligence community, but no provision was made for a civil liberties oversight board. The version of the bill ordered reported by the Committee on the Judiciary included a provision, added during markup, establishing a Privacy and Civil Liberties Oversight Board very similar to the one created by the Senate counterpart measure (S. 2845), except it would have been an independent agency within the executive branch and not located in the EOP. This provision, however, was omitted from the version of the bill reported from the Committee on Rules on October 7.¹⁶ The board, constituted as an EOP agency, would have been included in the House bill pursuant to an amendment substituting the text of the Senate counterpart bill, as introduced (S. 2845), and the earlier McCain bill, as introduced (S. 2774),¹⁷ but this amendment was defeated on a 203-213 vote.¹⁸ The version of the House bill adopted on a 282-134 vote on October 8 made no provision for a civil liberties oversight board.

The conference committee version of the intelligence reform legislation retained the mandate for a Privacy and Civil Liberties Oversight Board.¹⁹ Located within the EOP, the board would consist of a chair, vice chair, and three additional members, all appointed by, and serving at the pleasure of, the President. Nominees for the chair and vice chair positions would be subject to Senate approval. While the board would have most of the review and advice responsibilities contained in the Senate-adopted version of the legislation, it would not have subpoena power, but may request the assistance of the Attorney General in obtaining desired information from persons other than federal departments and agencies. Also, the eight privacy and civil liberties officers that the Senate-adopted version of the legislation would have established within specified departments and agencies were addressed in a sense of Congress provision stating “that each executive department or agency with law enforcement or antiterrorism functions should designate a privacy and civil liberties officer.” On December 7, the House, on a 336-75 vote, agreed to the conference committee report; the Senate gave its approval the following day on an 89-2 vote, clearing the intelligence reform legislation for the President’s signature. On December 17, President George W. Bush signed the legislation into law.²⁰

¹⁶ See *ibid.*, Oct. 7, 2004, pp. H8726-H8792.

¹⁷ For the text of the amendment, see U.S. Congress, House Committee on Rules, *Providing for Consideration of H.R. 10, 9/11 Recommendations Implementation Act*, H.Rept. 108-751, a report to accompany H.Res. 827, 108th Cong., 2nd sess. (Washington: GPO, 2004), pp. 5-152; *Congressional Record*, daily edition, vol. 150, Oct. 7, 2004, pp. 8792-H8833.

¹⁸ *Congressional Record*, daily edition, vol. 150, Oct. 7, 2004, p. H8850.

¹⁹ See U.S. Congress, House, Committee of Conference, *Intelligence Reform and Terrorism Prevention Act of 2004*, H.Rept. 108-796, a report to accompany S. 2845, 108th Cong., 2nd sess (Washington: GPO, 2004).

²⁰ P.L. 108-458; 118 Stat. 3638.