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## NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES

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### **Sixth public hearing of the National Commission on Terrorist Attacks Upon the United States**

### **Statement of William P. Barr to the National Commission on Terrorist Attacks Upon The United States December 8, 2003**

Mr. Chairman and Members of the Commission, it is a pleasure to provide my views on the organization of our domestic intelligence and counterterrorism activities. By way of background, I served in the Administration of President George H.W. Bush as Assistant Attorney General for the Office of Legal Counsel, as Deputy Attorney General, and ultimately as Attorney General of the United States. Previously, I also served on the White House staff and at the Central Intelligence Agency. I am presently Executive Vice President and General Counsel of Verizon Communications. The views I express today are my own and do not reflect the views of any governmental agency or corporation with which I have been or

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*Vice Chair*

am presently associated.

My perspectives are based largely on my experience serving both on the intelligence and law enforcement side of government. They also arise from my experience on the Deputies' Committee of the NSC from 1989 through 1991 and from my efforts - both as Deputy Attorney General and later as Attorney General - at coordinating domestic counterterrorism activities.

I would like to focus my remarks on the idea advanced in some quarters of severing "domestic intelligence" from the FBI and creating a new domestic spy agency akin to Britain's MI-5. I think this is preposterous and goes in exactly the wrong direction. Artificial stove-piping hurts our counter-terrorism efforts. What we need to do now is meld intelligence and law enforcement more closely together, not tear them apart. We already have too many agencies and creating still another simply adds more bureaucracy, spawns intractable and debilitating turf wars, and creates further barriers to the kind of seamless integration that is needed in this area.

Apart from its inherent wrong-headedness, I cannot think of any step that - as a practical matter - would be more injurious to our counterterrorism efforts or more dangerous to the safety of the American people than the cost and disruption of setting up a new agency, while chopping up the existing security agencies, and doing all this while the threat of terrorism is at its height. The result would be to weaken the FBI and CIA as top personnel, experience, and resources are drawn from those agencies, while the new agency would face confusion, turf-fighting, impossible problems of coordination and all the distracting follies that inevitably flow from overlapping responsibilities, divided accountability, and needless duplication of infrastructure.

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Since 9/11, the criticism of the FBI as a counter-terrorism organization has focused on three related shortcomings. First, it is said that the Bureau focused on investigating terrorism solely as a criminal justice matter and sacrificed the need to gather intelligence to the exigencies of building particular cases for prosecution. Second, critics claim that the FBI failed to exchange information with other elements of the Intelligence Community. Finally, some have asserted that, due to its dispersed approach to building individual criminal cases, the Bureau never developed the capacity to fuse and analyze all available intelligence.

But these shortcomings are inherently fixable, and both Attorney General Ashcroft and FBI Director Mueller have moved vigorously and comprehensively to address them. Unfortunately, some say these reforms are doomed because the law enforcement and national security functions cannot co-exist in the same organization. They claim that the subordination of the national security function was the result of a deep institutional law enforcement bias within the FBI and this "mindset" will always mean national security objectives are sacrificed to law enforcement goals. This is flatly wrong.

The FBI has never been solely a law enforcement agency. It has always combined two functions, serving as the nation's criminal investigative arm, as well as its domestic security agency responsible for defending against foreign threats ranging from espionage to terrorism. Contrary to the critics' suggestions, the main impediment to the FBI's carrying out both roles was not any incapacity inherent in the agency itself. Rather, the root cause of the difficulty lies in the vast web of external legal constraints placed on the FBI by policymakers, including Congress and the courts, over the past 30 years. Moreover, apart from the restrictions placed on the Bureau, until 9/11 it was clearly not a national priority to bolster our domestic

security capabilities. My own efforts during the early 1990's to step up counterterrorism programs were consistently rebuffed by Congress.

For three decades leading up to 9/11, Congress was at the fore of a steady campaign to curtail the Bureau's domestic intelligence activities and impose on all its activities the standards and process of the criminal justice system. These constraints made it extremely difficult for the Bureau to pursue domestic security matters outside the strictures of the criminal justice process. Prohibitions on sharing grand jury information with intelligence agencies and with using intelligence information in criminal investigations created a "wall of separation." That separation effectively forced the Bureau to proceed largely on the criminal justice track if it wanted to preserve the option of using its law enforcement powers to incapacitate terrorists once they were detected.

The USA PATRIOT Act has now alleviated these constraints, allowing the closer meshing of law enforcement investigations with intelligence collection activities. Now that this artificial barrier has been removed, it would be a catastrophic mistake to deracinate domestic intelligence from the FBI and create a separate agency to perform this function. If there is one lesson we should learn from 9/11, it is that domestic intelligence and criminal investigation are inextricably related and should be integrated to the maximum extent possible. The right thing to do is to fix the problems that occurred at the FBI - and they are being fixed. Creating a new agency does not fix anything - it just makes the problem of coordination worse than before.

After all, in the FBI we start with the largest, most professional and highly trained "information gatherers" in the country, even in the world. The Bureau has always excelled at collection. Its capacity to conduct large-scale, complex investigations is unparalleled. Having

operated within the United States for almost a century, it has mastered the kinds of collection techniques and skill sets that are essential in developing information domestically, including questioning witnesses; interrogation; the use of sophisticated technical surveillance; the use of undercover operatives; surreptitious entries; and the most advanced forensics. Through decades it has built up a web of working relationships with 17,000 state and local police agencies, giving it access to literally hundreds of thousands of eyes and ears on the ground and the ability to reach almost seamlessly into any community in the country. Likewise, through its worldwide network of liaison relationships, it has access to the flow of information not only from foreign intelligence services but from foreign police organizations as well.

Building on this outstanding base, taking advantage of the new freedoms won in the USA PATRIOT Act, and learning from the lessons of the past, Attorney General Ashcroft and Director Mueller are well along in transforming the Bureau into the first-class counterterrorism organization it is uniquely situated to be. The Bureau has clearly set as its priority the prevention of terrorist attacks before they occur, using all available tools - both intelligence and law enforcement - in close coordination. Director Mueller has created as one of the very top posts in the Bureau the position of Executive Assistant Director for Intelligence, established an Office of Intelligence, and has otherwise built up substantial intelligence analytical capabilities. The Bureau has set up numerous mechanisms, such as its National Joint Terrorism Task Force and its Watch Center, to fuse and disseminate information throughout the Intelligence Community and state and local law enforcement agencies, and I am told by state and local law enforcement leaders that they are extremely pleased with the emerging cooperation and intelligence sharing that is taking place. It is organizing, staffing, and training so that intelligence activities are given proper priority

and pursued in tandem with law enforcement interests. It has reformed its dispersed case-management practices, now providing national coordination of significant cases. It is recruiting the skills, developing the culture, and creating the career paths necessary to ensure that its intelligence and law enforcement missions are pursued hand-and-glove.

Furthermore, the Attorney General has adopted new criminal and national security investigation guidelines that permit FBI agents to gather intelligence to identify terrorist threats and activities without waiting for the predication required for the opening of a formal investigation. This gives the FBI the latitude, within appropriate constitutional constraints, to perform its role of collector of domestic intelligence.

Its longstanding strengths, coupled with these reforms, now place the FBI in a unique position. It alone can bring to bear both intelligence gathering powers and criminal investigative powers; ensure the kind of close integration of these efforts so as to maximize the collection and sharing of information; and manage both sets of activities in a way that preserves the fullest range of responsive options once terrorists' plans have been uncovered.

While everyone likes to talk about "coordination," it is important to bear in mind the exceptional degree of coordination that is really essential in domestic counter-terrorism. Trying to identify and catch terrorists after they have infiltrated the country calls for a level of coordination that is intensive and real-time. It is not a leisurely business like estimating a rival nation's GDP or assessing its military forces. Coordination in the counterterrorism arena does not mean sending over reports at the end of each month. It calls for a fast-paced and dynamic process whereby leads developed in a criminal investigation may have to be exploited immediately through intelligence assets, and

conversely intelligence information may call for immediate law enforcement action. It is absurd to think that creating two separate agencies will permit the kind of integrated effort needed.

Some say that the advantage of a new American domestic spy agency is that it will bring "focus" to the gathering of intelligence. But after cutting the ribbon on its new headquarters building, just how is this agency going to track down foreign terrorists in the United States? The bottom line is that - given the sheer scale of our country, its legal system, and its culture - the job of collecting information within the country will necessarily depend on precisely the same people, infrastructure, and resources the FBI has in place. While analysis of intelligence requires centralization, the collection requires wide dispersion and intensive coverage throughout the country. Tracking terrorists or uncovering a cell may require, for example, rapidly locating and interviewing witnesses around the country; locating and tracking vehicles; checking hotel records in hundreds of establishments around the country within hours; canvassing thousands of stores to determine where a particular item was purchased; simultaneously surveilling scores of sites or individuals throughout the nation; preserving, managing and exploiting hundreds of pieces of physical evidence through advanced forensics. Who would do this?

Moreover, collection activities within the United States call for all the techniques and skill sets that the FBI has mastered, ranging from electronic surveillance to witness interviews. MI-5's largely made its mark penetrating Irish extremist groups. But in this country it is the FBI that has had almost a century of experience recruiting and managing undercover agents and informers, and unlike intelligence agencies, it can use both the carrot of money as well as the stick of criminal prosecution to induce cooperation. Further, the criticism that the Bureau has only a narrow law enforcement



perspective is plain wrong. As its successes against organized crime and Soviet espionage clearly demonstrate, the Bureau knows well how to defer law enforcement actions in order string out and exploit undercover operations for maximum intelligence value.

The situation faced by MI-5 in combating Irish extremist groups is vastly different from the one we face today in the United States. Britain is much smaller - with 56 local police forces instead of our 17,000 - and has far more flexible laws relating to security and civil rights. The fact is that, following the East African embassy bombings, the FBI has surpassed MI-5 and other Western security services in its ability to cover Middle Eastern terrorist groups. The FBI has been able to ferret out substantial information about terrorist activities in U.K. that had gone undetected, and MI-5 has drawn on FBI resources and talents in exploiting this information.

More importantly, there is an insurmountable problem in separating domestic intelligence from law enforcement in this country - and that relates to the end game. At the end of the day, the people looking for the terrorists are going to have to take action to incapacitate them. This may have to be done at an instant's notice. What exactly is the new domestic spy agency going to do to stop terrorists? We hear a lot of talk about "prevention," but what does that actually entail? Apart from any legal concerns, it is doubtful we will tolerate regular use of domestic hit squads. The fact is that within the United States, the end game will frequently involve using law enforcement powers to take people into custody to prosecute them, if not for terrorism than for some other offense that will still effectively neutralize them without exposing sensitive information.

But this means that intelligence activities must be conducted at every stage in a manner that preserves law enforcement options. This does



not require delaying or diminishing intelligence activities. It does mean that intelligence activities must be carried out with an awareness of law enforcement options and in tandem with efforts to preserve and perfect those options. If law enforcement powers are to be invoked, its standards must be satisfied. As leads are pursued, for example, it may be necessary to preserve evidence that can be used to support future arrest. Or it may be necessary to develop alternative evidence so as to protect sensitive sources and methods. Or it may be necessary to develop potential charges on a technical violation to have a sound basis to hold a suspect. In some cases, military tribunals might be an option, but even then legal standards must be satisfied. All of this requires full integration of intelligence collection with law enforcement activities. Perhaps in Britain the MI-5 can show up at police headquarters at the eleventh hour and demand they arrest somebody immediately. That will not cut it here. In short, counterterrorism in this country should not have an "exclusive focus" on intelligence if it is to be successful.

It has been suggested that, historically, intelligence collection has been shortchanged in the FBI because the agency is too focused on the end game of taking effective enforcement action. But I think it is even a worse mistake to believe that we should "focus" on intelligence collection in isolation from the agency responsible for responding to and acting upon the information. After all, we do not collect intelligence as an end in itself. We collect it so we can act upon it. And, within the United States, it will usually be law enforcement - and usually the FBI - that will have the responsibility to act.

In this regard, domestic counterterrorism intelligence is far more analogous to tactical battlefield intelligence than it is to strategic intelligence. By the time terrorists have penetrated our borders and are in a position to

launch attacks on domestic targets, information about their activities has an overwhelming tactical dimension and must have a direct nexus to the operational activities calculated to preempt the attacks. We do not tell our military forces that they have responsibility for defeating enemy forces in battle, and then take out of their hands responsibility for the tactical intelligence needed to win. By the same token, it is absurd to suggest that the FBI have responsibility for preempting domestic attacks and then remove domestic intelligence collection to a separate agency.

We should be focusing responsibility - not dispersing it. When you create a system that requires an intelligence agency to determine when something is ripe enough for action and then hand it off to the FBI for action, you have fragmented accountability for handling the threat. When something goes wrong, each is in a position to blame the other. What we need to do is clearly place responsibility in the FBI for handling the threat from detection to neutralization.

Nor can domestic intelligence be so insulated given our legal system. In the United States, domestic intelligence collection is subject to significant legal requirements and legal process. FISA, for example, requires preparing applications, going before judges, and establishing that there is evidence satisfying various legal standards. Even fully authorized intelligence activities can easily lapse into constitutionally suspect areas. Undercover operations can sometimes result, for example, in government agents participating in serious criminal conduct. The FBI has had almost a century of experience working within constitutional and legal safeguards. And while there have been lapses, there have also been lessons learned. In my view, the best way to ensure that domestic intelligence is carried out consistent with our civil liberties is to keep those activities in tandem with the law enforcement.

In the aftermath of a catastrophe, the impulse is to prescribe drastic changes to prevent a recurrence. We should resist that impulse when it comes to the basic organization of our domestic counterintelligence operations. Since 9/11, the Attorney General and the Director of the FBI have moved comprehensively to address the specific problems of the past. They have taken major steps to reorient the FBI toward prevention of attack. The principal legal obstacles to effective counterterrorism have been addressed. It is better to allow this transformation to continue than to cut it short and disrupt our national security operations with an ill-advised reorganization.

*William P. Barr is executive vice president and general counsel of Verizon. He heads the legal, regulatory and government affairs group.*

*Prior to the Bell Atlantic/GTE merger, Mr. Barr, former Attorney General of the United States, was executive vice president - government and regulatory advocacy, general counsel for GTE. He provided legal advice to senior management and the Board of Directors and directed activities of GTE's Legal Department. He also led legislative and regulatory advocacy activities for GTE and all of the corporation's operating units. He was responsible for GTE's Government Affairs staff in Washington, D.C., and for the Corporate Secretary's department.*

*Mr. Barr, who served as Attorney General under President George Bush from 1991 to 1993, was elected senior vice president and general counsel of GTE in June 1994. Immediately prior to joining GTE, he was a partner in the Washington, D.C., office of the Shaw, Pittman, Potts & Trowbridge law firm. He came to the Department of Justice as assistant attorney general in charge of the Office of Legal Counsel in 1989, and subsequently served as deputy attorney general before his appointment as Attorney General in November 1991. As*

*Attorney General, Mr. Barr established innovative programs to combat violent crime and set significant new enforcement policies in a wide range of areas, including financial institutions, civil rights and antitrust merger guidelines.*

*At the end of the Bush administration, he returned to Shaw, Pittman, Potts & Trowbridge, where he had been a partner from 1984 to 1989, and an associate from 1978 to 1982. From 1982 to 1983, Mr. Barr served on the White House Domestic Policy Staff under President Reagan. Prior to joining the law firm, he was law clerk to Judge Malcolm Wilkey of the U.S. Court of Appeals for the District of Columbia Circuit. From 1973 to 1977, he served in the Central Intelligence Agency as an analyst and later as assistant legislative counsel.*

*Mr. Barr received a bachelor's degree in government in 1971 and a master's degree in government and Chinese studies in 1973 from Columbia University. He received his juris doctor degree from George Washington University in 1977.*

*Mr. Barr serves on the board of Davis Selected Advisers and is a member of the bar in the District of Columbia and Virginia. He is also vice chairman of the board of directors of The College of William & Mary.*

National Commission on Terrorist Attacks Upon the United States  
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