

Testimony of

The Honorable Slade Gorton

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National Commission on Terrorist Attacks Upon the United States before the Senate Committee on the Judiciary

The 9/11 Commission Report

Chairman Hatch, Ranking Member Leahy, other distinguished Members of the Committee: We are honored by the opportunity to appear before you today. We are grateful to you, and to the Leadership of the Senate, for your prompt consideration of the Report and recommendations of the Commission.

As you know, the Commission's findings and recommendations were strongly endorsed by all Commissioners - five Republicans and five Democrats who have been active in the public life of our nation. In these difficult times, and in an election year, we think this unanimity is remarkable, and important. It reflects a unity of purpose to make our country safer and more secure in the face of the novel threat posed by transnational terrorism. We call upon the Congress and the Administration to respond to our Report in the same spirit of bipartisanship.

You have asked us discuss three subjects of special interest to this Committee: our findings and recommendations with respect to the Federal Bureau of Investigation; border security; and the USA PATRIOT Act. We will discuss each of these areas in turn.

The FBI

The FBI has for the past several decades performed two important but related functions. First, it serves as our premier federal law enforcement agency, investigating possible violations of federal criminal statutes and working with federal prosecutors to develop and bring cases against violators of those laws. Second, it is an important member of the Intelligence Community, collecting information on foreign intelligence or terrorist activities within the United States. That information can be used either for additional counterintelligence or counterterrorism investigation or to bring criminal prosecutions.

We focused on the FBI's performance as an intelligence agency combating the al Qaeda threat within the United States before 9/11. Like the Joint Inquiry of the Senate and House Intelligence Committees before us, we found that performance seriously deficient. Director Freeh did make counterterrorism a priority in the 1990s, and Dale Watson, his Counterterrorism chief, made valiant efforts to communicate that priority to agents in the field. But that priority did not effectively find its way into the daily work of the FBI's field offices. Nor did it result in the creation of a corps of intelligence officers and analysts with the professional qualifications and skills needed for an effective intelligence/counterterrorism operation.

Finally, when FBI agents did develop important information about possible terrorist-related activities, that information often did not get effectively communicated - either within the FBI itself or in the Intelligence Community as a whole.

Within the FBI itself, communication of important information was hampered by the traditional case-oriented approach of the agency and the possessive case-file mentality of FBI agents. And this Committee is only too familiar with the information technology problems that have long hampered the FBI's ability to "know what it knows." Even when information was communicated from the field to headquarters, it did not always come to the attention of the Director or other top officials who should have seen it. This was the case in the now-famous incidents, in the summer of 2001, of the Phoenix electronic communication about Middle Eastern immigrants in flight schools, and the Minneapolis Field Office's report to headquarters about the arrest of Zacarias Moussaoui.

The other internal barrier to communication of intelligence information between FBI intelligence officials and FBI criminal agents and federal prosecutors was the "wall" between intelligence and law enforcement that developed in the 1980s and was reinforced in the 1990s. Through a combination of court decisions, pronouncements from the Department of Justice and its Office of Intelligence Policy and Review, and risk-averse interpretations of those pronouncements by the FBI, the flow of information between the intelligence and criminal sides of the FBI and the Justice Department was significantly choked off - a phenomenon that continued until after 9/11, when the Congress enacted the USA PATRIOT Act, and when the Justice Department successfully appealed a FISA Court decision that had effectively reinstated the wall.

These failures in internal communications were exacerbated by a reluctance of the FBI to share information with its sister agencies in the Intelligence Community, with the National Security Council at the White House, and with state and local law enforcement agencies. This culture of non-sharing was by no means unique to the FBI, but the FBI was surely one of the worst offenders.

The FBI, under the leadership of its current Director, Robert Mueller, has undertaken significant reforms to try to deal with these deficiencies and build a strong capability in intelligence and counterterrorism. These include the establishment of an Office of Intelligence, headed by an Associate Director, Maureen Baginski, who is an experienced manager of intelligence systems. The FBI has embarked on an ambitious program to recruit qualified analysts, to train all agents in counterterrorism, and to develop career tracks for agents who want to specialize in counterterrorism or intelligence. The agency is also making progress, albeit slowly, in upgrading its internal information technology system. But, as Director Mueller himself has recognized, much more remains to be done before the FBI reaches its full potential as an intelligence agency.

Because of the history of serious deficiencies, and because of lingering doubts about whether the FBI can overcome its deep-seated law-enforcement culture, the Commission gave serious consideration to proposals to move the FBI's intelligence operations to a new agency devoted exclusively to intelligence collection inside the United States - a variant of the British Security Service, popularly known as MI-5.

We decided not to make such a recommendation for several reasons, set forth in our Report. Chief among them were the disadvantages of separating domestic intelligence from law enforcement and losing the collection resources of FBI field offices around the country, supplemented by relationship with state and local law enforcement agencies. Another major reason was civil liberties concerns that would arise from creating outside the Justice Department an agency whose focus is on collecting information from and about American citizens, residents, and visitors. The rights and liberties of Americans will be better safeguarded, we believe, if this sensitive function remains in an agency trained and experienced in following the law and the Constitution, and subject to the supervision of the Attorney General.

We also believe that while the jury is still out on the ultimate success of the reforms initiated by Director Mueller, the process he has started is a promising one. And many of the benefits that might be realized by creating a new agency will be achieved, we are convinced, if our important recommendations on restructuring of the Intelligence Community - creation of a National Counterterrorism Center and a National Intelligence Director with real authority to coordinate and direct the activities of our intelligence agencies - are implemented. An FBI that is an integral part of the NCTC and is responsive to the leadership of the National Intelligence Director will work even more effectively with the CIA and other intelligence agencies, while retaining the law enforcement tools that continue to be an essential weapon in combating terrorism.

What the Commission recommends, therefore, is that further steps be taken - by the President, the Justice Department, and the FBI itself -- to build on the reforms that have been undertaken already, and to institutionalize those reforms so that the FBI is transformed into an effective intelligence and counterterrorism agency. The goal, as our Report states, is to create within the FBI a specialized and integrated national security workforce of agents, analysts, linguists, and surveillance specialists who create a new FBI culture of expertise in national security and intelligence. This Committee will have a vital oversight role in monitoring progress by the FBI and ensuring that this new capacity so critical to our nation is created and maintained.

Border Control

As our Report makes clear, in the decade before 9/11, border security was not seen as a national security matter. From a strategic perspective, border policy focused on counternarcotics efforts, illegal immigration, and, more recently, the smuggling of weapons of mass destruction. Our government simply did not exhibit a comparable level of concern about terrorists' ability to enter and stay in the United States.

During that same period, however, al Qaeda studied how to exploit gaps and weaknesses in the passport, visa, and entry systems of the United States and other countries. Al Qaeda actually set up its own passport office in Kandahar and developed working relationships with travel facilitators - travel agents (witting or unwitting), document forgers, and corrupt government officials.

As we know, Al Qaeda's travel tactics allowed the 9/11 hijackers to enter the United States quite easily. Yet the Commission found that many of the 19 hijackers were potentially vulnerable to detection by border authorities. Although the intelligence as to their tactics was not developed at the time, examining their passports could have allowed authorities to detect from four to 15

hijackers. More effective use of information in government databases could have allowed border authorities to intercept up to three of the hijackers had they been watchlisted.

More robust enforcement of routine immigration laws, supported by better information, could also have made a difference. Two hijackers made statements on their visa applications that could have been shown to be false by U.S. government records available to consular officers. Many of the hijackers lied about their employment or educational status. Two hijackers could have been denied admission at the port of entry based on violations of immigration rules governing terms of admission. Three hijackers violated the immigration laws after entry, one by failing to enroll in school as declared, and two by overstays of their terms of admission.

Neither the intelligence community, nor the border security agencies or the FBI, had programs in place to analyze and act upon intelligence about terrorist travel tactics - how they obtained passports, made travel arrangements, and subverted national laws and processes governing entry and stays in foreign countries.

Congress during the 1990s took some steps to provide better information to immigration officials by legislating requirements for a foreign student information system and an entry-exit system. As we know, these programs were not successfully implemented before 9/11.

Since 9/11, some important steps have been taken to strengthen our border security. The Department of Homeland Security has been established, combining the resources of the former Immigration and Naturalization Service and the Customs Bureau into new agencies to protect our borders and to enforce the immigration laws within the United States. The visa process and the terrorist watchlist system have been strengthened. DHS has begun to implement, through the US VISIT program, a biometric screening system for use at the border.

These efforts have made us safer, but not safe enough. As a nation we have not yet fully absorbed the lessons of 9/11 with respect to border security. The need to travel makes terrorists vulnerable. They must leave safe havens, travel clandestinely, and use evasive techniques, from altered travel documents to lies and cover stories. Terrorist entry often can be prevented and terrorist travel can be constrained by acting on this knowledge.

Targeting terrorist travel is at least as powerful a weapon against terrorists as targeting their finances.

The Commission therefore has recommended that we combine terrorist travel intelligence, operations, and law enforcement in a strategy to intercept terrorists, find terrorist travel facilitators, and constrain terrorist mobility.

Targeting Terrorist Travel

Front line border agencies must not only obtain from the Intelligence Community - on a real-time basis information on terrorists; they must also assist in collecting it. Consular officers and immigration inspectors, after all, are the people who encounter travelers and their documents. Specialists must be developed and deployed in consulates and at the border to detect terrorists through their travel practices, including their documents. Technology has a vital role to play. The three years since 9/11 have been more than enough time for border officials to integrate into their

operations terrorist travel indicators that have been developed by the intelligence community. The intelligence community and the border security community have not been close partners in the past. This must change.

We also need an operational program to target terrorist travel facilitators -- forgers, human smugglers, travel agencies, and corrupt border officials. Some may be found here, but most will be found abroad. Disrupting them would seriously constrain terrorist mobility. While there have been some successes in this area, intelligence far outstrips action. This should be rectified by providing the interagency mandate and the necessary resources to Homeland Security's enforcement arm, Immigration and Customs Enforcement (ICE), and other relevant agencies, including the FBI.

This problem illustrates the need for a National Counterterrorism Center. Investigations of travel facilitators raise complicated questions: Should a particular travel facilitator be arrested or should he be the subject of continued intelligence operations? In which country should he be arrested? The NCTC could bring the relevant intelligence agencies to the table to coordinate and plan the best course of action.

Screening Systems

To provide better information to our consular officers and immigration inspectors, the government must accelerate its efforts to build a biometric entry and exit screening system. This is an area in which Congress has been active since the mid-1990's. It has been a frustrating journey. Congress first legislated an entry-exit system in 1996, to increase compliance with our immigration laws. It was not associated with counterterrorism, nor with biometric identification. As a practical matter, the entry-exit effort was not seriously funded until the end of 2002. By that time, aspects of a system were governed by four separate laws. The establishment of the Department of Homeland Security then changed the organizational context for implementing those laws.

The new Department is emerging from its difficult start-up period and is, we believe, poised to move forward to implement Congress's mandates in this area. We would like to stress four principles that we believe must guide our efforts in this arena.

First, the U.S. border security system must be an effective part of a larger network of screening points that includes our transportation system and access to vital facilities, such as nuclear reactors. The Department of Homeland Security should lead an effort to design a comprehensive screening system, addressing common problems and setting common standards with system-wide goals in mind.

Second, a biometric entry and exit screening system is fundamental to intercepting terrorists and its development should be accelerated. Each element of the system is important. The biometric identifier makes it difficult to defeat a watchlist by an alteration in spelling of a name, a technique relied upon by terrorists. The screening system enables border officials access to all relevant information about a traveler, in order to assess the risk they may pose. Exit information allows authorities to know if a suspect individual has left the country and to establish compliance with immigration laws.

Third, United States citizens should not be exempt from carrying biometric passports or otherwise enabling their identities to be securely verified. Nor should Canadians or Mexicans.

Fourth, there should be a unified program to speed known travelers, so inspectors can focus on those travelers who might present greater risks. This is especially important for border communities.

We believe that the schedule for completion of this biometric entry-exit screening system should be accelerated to the extent feasible. This will require additional annual funding, and a mandate to a central organizational authority, such as the US VISIT office, to manage the effort.

International Collaboration

We need to dedicate a much greater effort to collaboration with foreign governments with respect to border security. This means more exchange of information about terrorists and passports, and improved global passport design standards. Implicit in this recommendation is continued close cooperation with Mexico and Canada. One particularly important effort is to improve screening efforts prior to departure from foreign airports, especially in countries participating in the visa waiver program.

Immigration Law and Enforcement

We must be able to monitor and respond to entries along our long borders with Canada and Mexico, working with those countries as much as possible. Our law enforcement system ought to send a message of welcome, tolerance, and justice to members of the immigrant communities in the United States, while also fostering the respect for the rule of law. Good immigration services are one way to reach out that is valuable, including for intelligence. State and local law enforcement agencies need more training and partnerships with federal agencies so they can cooperate more effectively with those federal authorities in identifying terrorist suspects.

Finally, secure identification should begin in the United States. We believe that the federal government should set standards for the issuance of birth certificates and sources of identification such as drivers' licenses.

The agenda on immigration and border control, then, is multi-faceted and vital to our national security. The bottom line is that our visa and border control systems must become an integral part of our counterterrorism intelligence system. We must steer a course that remains true to our commitment to an open society that welcomes legitimate immigrants and refugees while concentrating our resources on identification of potential of potential terrorists and prevention of their entry into the United States.

The USA PATRIOT Act

The USA PATRIOT Act, passed in the wake of the 9/11 attacks, was substantially the product of this Committee. A number of provisions of the Act were relatively noncontroversial, updating existing authorities to take account of the digital age. But others were more far-reaching - granting to the FBI, the Department of Justice and other Executive Branch agencies important

new authorities to use in combating terrorism. For this reason, the Congress chose to sunset many of the provisions of the Act at the end of next year. We know that this Committee, and the House Committee on the Judiciary, will be holding hearings to determine whether to extend these expiring provisions and whether to make additional changes in the law.

The Commission did not canvass the entire range of issues raised by the USA PATRIOT Act in detail. We have limited our specific recommendations with respect to the USA PATRIOT Act to those provisions that bear most directly on our mandate - i.e., those that relate to information sharing in the intelligence and law enforcement communities. We believe that those provisions - breaking down the wall that prevented the FBI from sharing intelligence information gathered under the Foreign Intelligence Surveillance Act (FISA) with federal prosecutors, and allowing the Justice Department to share grand jury information with other intelligence and law enforcement agencies - should be extended. They are important in their own right, and they have helped spur the increased sharing of information throughout the Intelligence Community that is vital to a successful counterterrorism program.

We made a general recommendation that applies not only to consideration of other provisions of the USA PATRIOT Act, but also to other legislative or regulatory proposals that may impinge on individual rights or liberties, including personal privacy. The burden in all cases should be on those proposing the restriction to show that the gains that will flow in terms of national security are real and substantial, and that individual rights and liberties will be adequately protected. We recommend the establishment of appropriate guidelines for such programs. We also recommend the establishment in the executive branch of an oversight office or board to be a watchdog to assure maximum protection of individual rights and liberties in these programs.

We conclude with what we said in our Report:

We must find ways of reconciling security with liberty, since the success of one helps protect the other. The choice between security and liberty is a false choice, as nothing is more likely to endanger America's liberties than the success of a terrorist attack at home. Our history has shown us that insecurity threatens liberty. Yet, if our liberties are curtailed, we lose the values that we are struggling to defend.

We would be pleased to respond to your questions.