

# Backgrounder

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## What the 9/11 Commission's Report Should Contain: Four Recommendations for Making America Safer

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The congressionally chartered National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission) is due to issue its final report soon. The most important part of this report will be the commission's proposals on how better to meet the threat of transnational terrorism.

Reviewing the testimony provided to the commissioners and the interim findings prepared by their staff suggests some of the key recommendations that should emerge. In particular, a solid set of proposals should address four key areas: implementing responsible intelligence reform, reauthorizing the "sunset" provisions of the USA PATRIOT Act, promoting new technologies that can provide both better security and enhanced protection of civil liberties, and improving congressional oversight.

### **In the Wake of Tragedy**

A little over one year after the horrifying September 11 strikes on New York and Washington, Congress passed and President George W. Bush signed into law a bill<sup>1</sup> creating an independent, bipartisan national commission chartered to prepare a full and complete account of the circumstances surrounding the terrorist attacks and make recommendations to guard against future threats. The commission's research focused on eight areas:

- Al-Qaeda and the organization of the September 11, 2001, attacks;
- Strategic intelligence collection, analysis, and management;

### **Talking Points**

- The 9/11 Commission's report should call for responsible intelligence reform, including rethinking the structure of the national intelligence community, strengthening the DHS, and providing additional resources to combat terrorism.
- The Commission's report should support reauthorization of the provisions of the PATRIOT Act that are scheduled to expire.
- The Commission's report should promote the use of information technology programs, particularly data mining.
- The Commission's report should advocate establishing permanent homeland security oversight committees in the House of Representatives and the Senate.

This paper, in its entirety, can be found at:  
[www.heritage.org/research/homelanddefense/bg1778.cfm](http://www.heritage.org/research/homelanddefense/bg1778.cfm)

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- Law enforcement and intelligence collection inside the United States;
- Counterterrorism policies;
- Terrorist financing;
- Border security;
- Commercial aviation and transportation security; and
- The immediate response to the attacks.

Supported by a team of 80 support staff and a budget of \$15 million, the commission reviewed over 2 million pages of documents; conducted over 1,000 interviews, including sessions with the President and high-ranking officials in the Administration; and held several high-profile public hearings. In the course of its investigation, the commission received unprecedented access to all the materials and sources that it felt it needed to complete a thorough investigation. As its own Web site points out, the commission “has had access to every document it asked to see.”<sup>2</sup> In addition to its own efforts, the commission drew on the findings of the joint congressional inquiry conducted by the Senate and House intelligence committees.<sup>3</sup>

At times, testimony and questioning during the 9/11 Commission’s public hearings appeared rancorous and partisan, designed more to fix blame than to determine how best to improve American security.<sup>4</sup> There are high hopes, however, that the commission’s final report will reflect more sober judgement and stick to its congressional mandate. Only a report

widely perceived as thorough, balanced, forward-looking, and nonpartisan is likely to gain widespread approval and acceptance by Congress and the Administration as a blueprint for further reform.

Reviewing the testimony provided to the commission and the interim findings prepared by the commission’s staff suggests some of the key proposals that might emerge.

### The Place for Responsible Intelligence Reform

Recognizing the need for greater integration of information on terrorist activities, Congress and the Administration undertook several initiatives after the 9/11 attacks. The Homeland Security Act of 2002 called for creating within the new Department of Homeland Security (DHS) an Information Analysis and Infrastructure Protection Directorate (IAIP) with significant responsibilities for integrating and analyzing law enforcement and intelligence information.<sup>5</sup> In addition, the President established the Terrorist Threat Integration Center (TTIC) to coordinate the analysis of all domestic counterterrorism intelligence and the Terrorist Screening Center (TSC) to integrate information on various terrorist watch lists.<sup>6</sup>

While creation of the new centers was an important step, both the findings of the joint congressional inquiry and testimony before the 9/11 Commission suggest the need for broader and more comprehensive reforms. One important issue that they addressed is the position of the Director of Central

1. Public Law 107–306. The commission was originally required to report no later than May 27, 2004. Congress later passed Public Law 108–207, which extended the reporting deadline to July 26 and the termination date for the commission’s activities to August 26.
2. National Commission on Terrorist Attacks Upon the United States, “Frequently Asked Questions,” at [www.9-11commission.gov/about/faq.htm#q2](http://www.9-11commission.gov/about/faq.htm#q2) (July 5, 2004).
3. Select Committee on Intelligence, U.S. Senate, and Permanent Select Committee on Intelligence, U.S. House of Representatives, *Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001*, December 2002, at [www.gpoaccess.gov/serialset/creports/911.html](http://www.gpoaccess.gov/serialset/creports/911.html) (July 12, 2004).
4. James Jay Carafano, “Outside View: Terrorism Time Out,” *Heritage Foundation Commentary*, April 6, 2004, at [www.heritage.org/Press/Commentary/ed041604a.cfm](http://www.heritage.org/Press/Commentary/ed041604a.cfm). This article first appeared on United Press International.
5. Public Law 107–296, Section 201.
6. James Jay Carafano and Ha Nguyen, “Better Intelligence Sharing for Visa Issuance and Monitoring: An Imperative for Homeland Security,” *Heritage Foundation Background* No. 1699, October 27, 2003, at [www.heritage.org/Research/HomelandDefense/BG1699.cfm](http://www.heritage.org/Research/HomelandDefense/BG1699.cfm).

Intelligence (DCI), the nominal head of the national intelligence community of 15 federal agencies and departments. The DCI, who also serves as the head of the Central Intelligence Agency, has no directive authority over the community. Instead of retaining the DCI, the joint inquiry concluded:

Congress should amend the National Security Act of 1947 to create and sufficiently staff a statutory Director of National Intelligence who shall be the President's principal advisor on intelligence and shall have the full range of management budgetary and personnel responsibilities needed to make the entire U.S. intelligence community operate as a coherent whole.<sup>7</sup>

At the same time, the committees argued for further strengthening the IAIP's intelligence role:

Congress and the Administration should ensure the full development within the Department of Homeland Security of an effective all-source terrorism information fusion center that will dramatically improve the focus and quality of counterterrorism analysis and facilitate the timely dissemination of relevant intelligence information.<sup>8</sup>

Testimony before the 9/11 Commission was less conclusive, although still strongly in favor of reforming the overall leadership of the intelligence community. James Schlesinger, a former Director of Central Intelligence, argued for strengthening the DCI rather than replacing the position with a Director of

National Intelligence (DNI).<sup>9</sup> John Deutch, another former DCI, made a similar recommendation.<sup>10</sup> However, James Steinberg argued for creating a DNI and made the case for strengthening the intelligence role of the DHS.<sup>11</sup> On the other hand, the witnesses offered little support for creating a separate domestic intelligence service to supersede the counterterrorism investigative responsibilities of the FBI.

Few instruments for battling terrorism are more important than effective intelligence. Recommendations for rethinking the structure and resources available to the national intelligence community should top the agenda of the 9/11 Commission's report. Clearly, one priority should be strengthening the leadership of the national intelligence community.

Reinforcing the role of the DHS in consolidating, integrating, and disseminating domestic terrorism intelligence and warnings might also rank high among the commission's recommendations. Specifically, the report should push for placing both the TTIC and TSC under the oversight of the DHS and consolidating their functions with the IAIP, thus making the DHS the single integrator of domestic intelligence as envisioned by the Homeland Security Act.<sup>12</sup>

### Reauthorizing the PATRIOT Act

Passed with overwhelming bipartisan support, the USA PATRIOT Act facilitates information sharing among law enforcement and intelligence agencies, provides greater authority to track and intercept communications, and allows for tools

7. Select Committee on Intelligence and Permanent Select Committee on Intelligence, "Recommendations of the Final Report of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence Joint Inquiry into the Terrorist Attacks of September 11, 2001," December 10, 2002, p. 1, at [intelligence.senate.gov/recommendations.pdf](http://intelligence.senate.gov/recommendations.pdf) (July 12, 2004).
8. *Ibid.*, p. 2.
9. James Schlesinger, statement before the National Commission on Terrorist Attacks Upon the United States, October 14, 2003, at [www.9-11commission.gov/hearings/hearing4/witness\\_schlesinger.htm](http://www.9-11commission.gov/hearings/hearing4/witness_schlesinger.htm) (July 12, 2004).
10. John Deutch, statement before the National Commission on Terrorist Attacks Upon the United States, October 14, 2003, at [www.9-11commission.gov/hearings/hearing4/witness\\_deutch.htm](http://www.9-11commission.gov/hearings/hearing4/witness_deutch.htm) (July 12, 2004).
11. James B. Steinberg, statement before the National Commission on Terrorist Attacks Upon the United States, October 14, 2003, at [www.9-11commission.gov/hearings/hearing4/witness\\_steinberg.htm](http://www.9-11commission.gov/hearings/hearing4/witness_steinberg.htm) (July 12, 2004).
12. For further recommendations, see James Jay Carafano, "An Agenda for Responsible Intelligence Reform," Heritage Foundation Executive Memorandum No. 931, May 13, 2004, at [www.heritage.org/Research/HomelandDefense/em931.cfm](http://www.heritage.org/Research/HomelandDefense/em931.cfm).

used in other criminal enquiries to be employed in counterterrorism investigations.<sup>13</sup> Several authorities provided under the law are temporary measures that will expire or “sunset” in December 2005 unless reauthorized by Congress.

Since its inception, the act has been a subject of controversy. Despite the fact that there have been no documented instances of abuse, critics complain that the law allows for undue infringements on civil liberties.

In contrast to the public debate, both the commission’s staff and witnesses testifying during public hearings have reaffirmed the importance of the law in improving national counterterrorism operations while also finding no specific faults with checks and balances provided in the law to ensure that law enforcement authorities are properly employed. A staff statement prepared by the commission concluded that the act “has provided additional investigative tools and has lowered or removed legal hurdles that were widely believed to have hindered the FBI’s intelligence investigations.”<sup>14</sup>

In addition, witnesses from both sides of the political aisle praised the act’s value. Former Attorney General Janet Reno lauded the act: “[G]enerally everything that’s been done in the PATRIOT Act has been helpful, I think, while at the same time maintaining the balance with respect to civil liberties”<sup>15</sup> Attorney General John Ashcroft offered that:

[T]he USA PATRIOT Act tore down this wall between our intelligence and law enforcement personnel in 2001.... [T]he PATRIOT

Act extended powers in the fight against terror that were already well-understood powers in the fight against drugs and organized crime, so that we weren’t treading down new constitutional territory.<sup>16</sup>

And Larry Thompson of the Brookings Institution noted:

I recall reading just recently some comments by Senator Dianne Feinstein in which she said there’s been a great deal of concern and angst and misinformation about the PATRIOT Act. She said that she called the office of the American Civil Liberties Union (ACLU) and asked the ACLU to provide her of any instance of an abuse by the Department of Justice of the PATRIOT Act.... And the ACLU told her they were not aware of any abuse, any instance of the law being misapplied.... The point is, that with respect to the PATRIOT Act, I believe that there has been a great deal of misinformation.<sup>17</sup>

Based on its own research and expert testimony provided in public hearings, the 9/11 Commission should offer a strong endorsement of the PATRIOT Act. The commissioners ought to encourage Congress to reauthorize the powers that are due to sunset in 2005. Among these are the very provisions that brought down the “wall” in the first place. As the most recent 9/11 hearings have made clear, transnational terrorist threats will continue for years to come. In 2006, the U.S. will still need the powers of the PATRIOT Act to protect Americans.<sup>18</sup>

13. Charles Doyle, *The USA Patriot Act: A Legal Analysis*, Congressional Research Service, April 15, 2002.

14. National Commission on Terrorist Attacks Upon the United States, “Reforming Law Enforcement, Counterterrorism, and Intelligence Collection in the U.S.,” *Staff Statement No. 12*, at [www.9-11commission.gov/hearings/hearing10/staff\\_statement\\_12.pdf](http://www.9-11commission.gov/hearings/hearing10/staff_statement_12.pdf) (July 12, 2004).

15. Janet Reno, testimony before the National Commission on Terrorist Attacks Upon the United States, April 13, 2004, transcript at [www.9-11commission.gov/archive/hearing10/9-11Commission\\_Hearing\\_2004-04-13.htm](http://www.9-11commission.gov/archive/hearing10/9-11Commission_Hearing_2004-04-13.htm) (July 12, 2004).

16. John Ashcroft, testimony before the National Commission on Terrorist Attacks Upon the United States, April 13, 2004, transcript at [www.9-11commission.gov/archive/hearing10/9-11Commission\\_Hearing\\_2004-04-13.htm](http://www.9-11commission.gov/archive/hearing10/9-11Commission_Hearing_2004-04-13.htm) (July 12, 2004).

17. Larry Thompson, testimony before the National Commission on Terrorist Attacks Upon the United States, December 8, 2003, transcript at [www.9-11commission.gov/archive/hearing6/9-11Commission\\_Hearing\\_2003-12-08.htm](http://www.9-11commission.gov/archive/hearing6/9-11Commission_Hearing_2003-12-08.htm) (July 12, 2004).

18. James Jay Carafano and Paul Rosenzweig, “Patriotic Day: 9/11 Commission Recognizes Importance of the Patriot Act,” Heritage Foundation *WebMemo* No. 480, April 15, 2004, [www.heritage.org/Research/HomelandDefense/wm480.cfm](http://www.heritage.org/Research/HomelandDefense/wm480.cfm).

## Providing Security and Preserving Civil Liberties

One of the cornerstones of the Administration's homeland security efforts concerns employing information technology (IT) to identify high-risk people and cargo. The intent is to focus scarce intelligence and law enforcement assets on likely terrorist activities while preserving civil liberties and offering the minimum impediment to legitimate trade and travel. Initiatives include several ambitious IT programs, including efforts to strengthen border and transportation security like the US-VISIT (United States Visitor and Immigrant Status Indicator Technology) program; CAPPS II (Computer Assisted Passenger Prescreening System); and ACE (Automated Commercial Environment).

It is likely that terrorists preparing for an attack would leave an electronic trail of interactions with the government, both outside and within the United States, through purchases, travel, and other activities, just as anybody else living in the modern world does. These new IT programs are part of America's competitive advantage over the terrorists. The technology can be used to sift through a wide array of data and establish links between terrorist suspects. While these programs are potentially powerful instruments for fighting terrorism, however, they have raised significant concerns over violating privacy rights.

The public testimony before the 9/11 Commission reaffirms the conclusion that the U.S. should not accept trade-offs between better security and protecting civil liberties. IT programs can be implemented with appropriate safeguards and oversight that will allow homeland security regimes to meet both priorities.

John Gannon, Staff Director for the House Select Committee on Homeland Security, rightly told the commission that, "when you deal with those [intelligence] communities, there are very significant civil liberty and privacy issues that have to be

addressed.... [D]eveloping a new model for information sharing, I think that is—that will help us to address the problem."<sup>19</sup> Likewise, Stewart Baker, former General Counsel of the National Security Agency, reaffirmed "the importance of being alert to the risk to civil liberties in times of crisis. I think that's been the message from the beginning, not that we need to sacrifice civil liberties."<sup>20</sup>

The commission should reiterate the importance of exploiting IT to develop new and more effective counterterrorism tools. In particular, the 9/11 Commission should explicitly endorse the use of data integration technology—also known as knowledge discovery (KD) technology—and link analysis to better identify high-risk targets by drawing data from both government and commercially available databases. In summary the commission should recommend that:

- Congressional authorization be required before deploying KD technology;
- KD technology be used to examine individual subjects only in compliance with internal guidelines and only with a system that "builds in" existing legal limitations on access to third-party data;
- KD technology be used to examine general terrorist patterns only if each pattern query is authorized by a Senate-confirmed official using a system that (a) allows only for the initial examination of government databases and (b) disaggregates individual identifying information from the pattern analysis;
- Individual anonymity be protected by ensuring that disclosure of individual identities requires a federal judge's approval;
- The *only* consequence of identification by pattern analysis be limited—by statute or regulation—to additional investigation;
- A robust legal mechanism be provided to correct false positive identifications;

19. John Gannon, testimony before the National Commission on Terrorist Attacks Upon the United States, October 14, 2003, transcript at [www.9-11commission.gov/archive/hearing4/9-11Commission\\_Hearing\\_2003-10-14.htm](http://www.9-11commission.gov/archive/hearing4/9-11Commission_Hearing_2003-10-14.htm) (July 12, 2004).

20. Stewart A. Baker, testimony before the National Commission on Terrorist Attacks Upon the United States, December 8, 2003, transcript at [www.9-11commission.gov/archive/hearing6/9-11Commission\\_Hearing\\_2003-12-08.htm](http://www.9-11commission.gov/archive/hearing6/9-11Commission_Hearing_2003-12-08.htm) (July 12, 2004).

- Heightened accountability and oversight be instituted, including internal policy controls and training, executive branch administrative oversight, enhanced congressional oversight, and civil and criminal penalties for abuse; and
- The use of KD technology for non-terrorism investigations be prohibited by statute.<sup>21</sup>

### **Congressional Oversight of the Department of Homeland Security**

One area in which scant progress has been made since 9/11 is establishing effective congressional supervision. Without question, Congress has a major role to play in establishing an effective homeland security regime.

The Homeland Security Act of 2002, which created a lead federal agency for many domestic security activities, was only the first step. Building an effective department requires sound strategies, solid programs, personnel reforms, and integrating information technologies. Congressional oversight—led by committees and professional staffs with the experience and expertise to address difficult, complex issues—plays an important role in achieving these ends.

At present, supervision of DHS operations is fragmented and incoherent. The Government Reform Committee provides nominal oversight in the Senate, and the House has established a temporary select committee. Nevertheless, jurisdiction over DHS activities remains divided among dozens of committees and subcommittees in both houses. For example, in the House, the Committee on the Judiciary has retained expressed jurisdiction over immigration policy, the Committee on Resources has retained responsibility for managing the U.S. coastal zone, and the Committee on Transportation and Infrastructure has retained authority over the U.S. Coast Guard (now part of the DHS); federal emergency management; and all transportation regulatory agencies, including

the Transportation Security Administration (also part of the DHS).

The result has been oversight overload. From January to June 2004, DHS representatives testified at a staggering 126 hearings—an average of one-and-a-half testimonies for every day of the legislative session. In addition, a typical day for the DHS includes at least a dozen meetings or briefings with legislators and staff.

The amount of time spent preparing, participating, and responding to queries from Capitol Hill is not the only issue. Beyond testifying before multiple committees, DHS representatives must accept oversight from these committees because many DHS initiatives cut across the roles and missions of the federal government, and strong congressional input and feedback is necessary. However, multiple committees—with their multiple interests and multiple and sometimes conflicting priorities—exacerbate the challenge of building a comprehensive, focused national security regime.

To date, the 9/11 Commission has held hearings on “Terrorism, Al Qaeda, and the Muslim World,” “Intelligence and the War on Terrorism,” “Emergency Preparedness,” “Security and Liberty,” “Borders, Transportation, and Managing Risk,” “Counter-terrorism Policy,” “Law Enforcement and the Intelligence Community,” and other politically charged topics. However, the commission’s public hearings have not addressed the role of Congress in promoting homeland security and the question of whether Congress is appropriately organized to face the threat of terrorism. The commission has called only a few current and past Members of Congress to testify.<sup>22</sup>

The 2 million pages of documents and recorded testimony will give the staff more than enough material to document the need for better congressional oversight. Failure to address this critical issue, on the other hand, would leave a significant and embarrassing apparent gap in the commission’s analysis.

21. Paul Rosenzweig, “Proposals for Implementing the Terrorism Information Awareness System,” Heritage Foundation *Legal Memorandum* No. 8, August 7, 2003, at [www.heritage.org/Research/HomelandDefense/lm8.cfm](http://www.heritage.org/Research/HomelandDefense/lm8.cfm).

22. Michael Scardaville, “9/11 Commission’s Executive Focus Ignores Half the Picture,” Heritage Foundation *WebMemo* No. 518, June 7, 2004, at [www.heritage.org/Research/HomelandDefense/wm518.cfm](http://www.heritage.org/Research/HomelandDefense/wm518.cfm).

The 9/11 Commission should call for Congress to consolidate supervision over the DHS by establishing permanent committees in both houses with full jurisdiction over the DHS as well as a role in the oversight of all critical national homeland security programs.<sup>23</sup> For example, the oversight function of these committees should be extended to include implementation of the Homeland Security Act, the visa issuance and monitoring provisions in the PATRIOT Act, and the Enhanced Border Security and Visa Entry Reform Act, particularly in the area of intelligence sharing. Leaving jurisdiction over DHS programs fragmented across a dozen committees runs counter to the intent behind the Homeland Security Act of 2002.

Where necessary, the homeland security committees should share jurisdiction on key issues with other committees. For example, the homeland security committees should share oversight of visa and immigration issues with the judiciary committees. On the other hand, the homeland security committees should not include the chairmen and ranking members from other committees. This practice would only impede effective cooperation, as these members are likely to be as concerned about preserving the prerogatives of their own committees as they are about advancing the cause of homeland security.

### What the 9/11 Commission's Report Should Recommend

When the National Commission on Terrorist Attacks Upon the United States releases its final report, its findings and recommendations should focus on building the homeland security system that the nation needs for the 21st century. The final report's four key recommendations should:

- **Call** for responsible intelligence reform, including rethinking the structure of the national intelligence community, strengthening the DHS, and providing additional resources to combat terrorism;
- **Urge** reauthorization of provisions of the PATRIOT Act that are scheduled to expire in December 2005;
- **Promote** the use of information technology programs, particularly data mining or integration, that protect civil liberties and promote more effective counterterrorism operations by establishing an office for the development of advanced information technologies in the Department of Homeland Security; and
- **Recommend** that the House of Representatives and the Senate establish permanent homeland security oversight committees.

### Conclusion

The global war against terrorism will be a long, protracted conflict. The federal government needs to be properly structured and to have the tools that it needs to protect Americans today, tomorrow, and 10 and 20 years from now, and Congress should be appropriately organized to support this effort. A balanced, forward-looking, and nonpartisan final report from the 9/11 Commission would be a significant step in the right direction.

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23. Michael Scardaville, "Congress Must Reform Its Committee Structure to Meet Homeland Security Needs," Heritage Foundation Executive Memorandum No. 823, July 12, 2002, at [www.heritage.org/Research/HomelandDefense/EM823.cfm](http://www.heritage.org/Research/HomelandDefense/EM823.cfm).