

Justice Department Fails to Address 9/11 Intelligence Failures

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The hearings last week before the 9/11 Commission (formally the National Commission on Terrorist Attacks Upon the United States) highlighted domestic intelligence failures by the FBI and CIA before September 11. The independent, bipartisan commission was created by Congress in late 2002 and is due to release a report this July with an account of the circumstances surrounding the attacks and recommendations to guard against future attacks.

The hearings raised two key questions: 1) were legal barriers responsible for the pre-9/11 intelligence failures, and if so, are they still in place; and 2) is there a need for a new domestic intelligence agency? This essay explains why legal barriers were not responsible for the intelligence failures. The Department of Justice's insistence that legal barriers are to blame – and in turn that the Patriot Act was the correct response – is misleading at best and a distraction from the real intelligence failures at worst.

1. Domestic Intelligence Failures: a result of legal barriers or bureaucratic cultures?

The Commission's interim Staff Reports released last week detail multiple failures by the FBI to "know what it knew." While lower level agents had important information about Al Qaeda associates in the United States and sometimes shared that information with Headquarters, the higher-ups failed to understand the significance of the information, much less act on it. The FBI shared no information with the White House; the White House did not insist on being kept informed, despite the CIA's August 6 Presidential Daily Brief discussing the domestic threat from Bin Laden; and the CIA and the FBI failed to communicate in any effective way. The Staff Reports describe many missed opportunities in detail.¹

The Reports describe the Reno Justice Department's concerns about the FBI's counterterrorism efforts. For example, in 2000, Attorney General Reno wrote to Director Freeh that "it is imperative that the FBI immediately develop the capacity to fully assimilate and utilize intelligence information currently collected and contained in FBI files and use that knowledge to work proactively to identify and protect against emerging national security threats."

The Staff Reports describe Attorney General Ashcroft as ignoring these problems before September 11. While the Attorney General did make some public pronouncements about the importance of counterterrorism, there is no indication that he paid any attention to the red flags raised by Reno concerning the FBI's counter-terrorism work. Even after the CIA briefed him on July 5, 2001 that a "significant terrorist

¹ The Reports are available at www.9-11commission.gov.

attack was imminent” he did nothing because he said he “assumed the FBI was doing what it needed to do.” There is no explanation as to how he could have assumed this, given the multiple documents in the Justice Department’s files concerning the FBI’s problems and the fact that it only had an acting Director at that time.

Instead of addressing these findings, Attorney General Ashcroft went on the offensive before the Commission on April 13 and testified that the "wall" between law enforcement and intelligence was responsible for the 9/11 intelligence failures and that the Patriot Act has broken down that wall.

Neither claim is correct.

The “Wall”. The "wall" metaphor is shorthand for the recognition that separate authorities govern law enforcement and foreign intelligence investigations targeted against Americans. These authorities, designed to prevent a recurrence of domestic spying by the FBI and CIA, always recognized that international terrorism was both a law enforcement and intelligence matter. Contrary to the repeated mischaracterization by the Attorney General and others, the law never prohibited sharing information between law enforcement and intelligence communities; to the contrary, it expressly provided for such sharing. While the Foreign Intelligence Surveillance Act was interpreted to mean that prosecutors could not direct foreign intelligence wiretaps, as opposed to criminal wiretaps, the 9/11 failures had nothing whatsoever to do with the inability of prosecutors to direct such surveillance.²

None of the 9/11 failures to share information can be laid at the feet of the law. The claim is being used to obscure bureaucratic failures and to shore up support for the now controversial Patriot Act. As former Attorney General Reno recognized and as confirmed by the Staff Reports, the obstacles were “not legal barriers, but traditional agency cultures and the lack of interoperable technology.” She noted that at the FBI, “agents are not trained to share information with other agencies. Nor are they evaluated and rewarded based on their ability to generate and share information that other agencies might find useful.” This was true even after the FBI had identified prevention of terrorism as one of its top priorities in 1998 and recognized that it needed to improve its intelligence capabilities.³

Thus, Ashcroft’s claim that a 1995 memorandum issued by then-Deputy Attorney General Jamie Gorelick created the wall that was “the single greatest structural cause for September 11th” is both false and misleading. Separate procedures for law enforcement and intelligence surveillance have been on the books since at least 1978. . What’s more, as pointed out by Commission Member Slade Gorton, Ashcroft’s Deputy Attorney General Larry Thompson affirmed the Reno Justice Department procedures in August, 2001. And few commentators have noticed that the Gorelick memo in fact required information from a then pending terrorism prosecution to be shared with intelligence officials.⁴

² The only legal prohibition on sharing information was contained in the grand jury rules which limited when secret grand jury information could be shared with the CIA, a rule which had national security exceptions. See www.cnss.org/9.11commissionintelligence.htm. None of the 9/11 intelligence failures concerned grand jury information.

³ See *discussion of The 1998 Strategic Plan in Staff Statement no. 9 at 5.*

⁴ To see some key pre-Patriot Act documents relating to the “wall” between law enforcement and intelligence, go to: www.cnss.org/9.11commissionintelligence.htm.

The Patriot Act. The Attorney General's claim, endorsed by the President on April 19, that the Patriot Act addressed the 9/11 intelligence failures by breaking down the wall between law enforcement and intelligence thus rests on false assumptions about the wall and the failures. That claim exaggerates the changes made by the few relevant provisions in the Patriot Act and, most dangerously, overlooks the fact that the real cause of the failures is not addressed at all by the Act.

The Patriot Act contains a provision – proposed by Senator Leahy, not the Justice Department – making explicit that FISA information could be shared with law enforcement personnel (section 505). This provision alone would have addressed whatever confusion existed about the FISA requirements at the FBI and elsewhere. It is important to note that it did not repeal any pre-existing FISA provision prohibiting such sharing – because there was none. There was a provision requiring that the government's primary purpose when initiating FISA surveillance be foreign intelligence gathering. This provision had been interpreted to mean that prosecutors, as opposed to intelligence officials, could not direct FISA surveillance, although they could use information from such surveillance in their prosecutions. But there is no evidence that this restriction was the cause of the pre-9/11 failures. (The Patriot Act did eliminate this restriction and now allows prosecutors to bypass the criminal rules and command the use of these secret intelligence authorities when targeting Americans for criminal prosecution. Whatever the merits of this change, it does not address the failures to share information between intelligence personnel before 9/11.)⁵

To be clear, the Patriot Act specifically addresses information-sharing between the FBI and the CIA, but not in a way that addresses the agencies' failures relating to the 9/11 attacks. For example, the Act does not address the CIA's reluctance to share information with the FBI or other domestic agencies. It requires the Attorney General to turn over to the Director of Central Intelligence all "foreign intelligence information" obtained in any criminal investigation, including the most sensitive grand jury information and wiretap intercepts (secs 203 and 905). But instead of being limited to information relevant to counter-terrorism, the Act requires the Justice Department to give the CIA *all* information relating to any American's contacts or activities involving any foreign government, organization, or individual.

As the Staff Report finds, to this day "there is no national strategy for sharing information to counter terrorism." The Administration has never explained how the FBI or the CIA are now going to recognize what is important information that will identify and locate actual terrorists. The vacuum cleaner approach of these sections of the Patriot Act – to collect everything they can collect about everyone – can only be counter-productive in identifying useful information for counterterrorism purposes. The Patriot Act failed to provide safeguards for civil liberties, and it does not assure an effective counter-terrorism approach.

2. Should the U.S. create a new domestic intelligence agency?

Congress directed the 9/11 Commission to consider whether to recommend the creation of a new domestic intelligence agency and that proposal was discussed in the April 13-14 hearings. Such an

⁵ The Patriot Act and subsequent legislation also expanded the scope of personal information, which the government could seize in secret using intelligence authorities. See, for example, section 215 authorizing secret seizures of library records and commercial databases. See also Civil Liberties and Domestic Intelligence for a fuller discussion of these issues (<http://www.saisreview.org/PDF/24.1martin.pdf>).

agency, perhaps modeled after Great Britain's MI-5, would take over the domestic intelligence functions currently performed by the FBI.

None of the Clinton or Bush officials testifying last week supported the creation of such an agency. Both past and present FBI Directors said it would be a "grave mistake," to establish such a "state secret police" and pointed out that "if you look at the models around the world where this has been tried, it hasn't worked very well."

Creation of a domestic intelligence agency with no law enforcement responsibilities will exacerbate the "stovepiping" and lack of information-sharing of the pre-9/11 era, not fix it. Moreover, an agency that does not have to prosecute criminal cases in the federal courts will be insensitive to the constitutional guarantees those courts enforce. It will be impossible to provide adequate safeguards against improper spying activities against minorities or political dissidents, because of the essential secrecy involved in intelligence-gathering. If the 9/11 Commission determines that the FBI cannot be adequately reformed, the solution lies in the creation of a new anti-terrorism agency, perhaps housed elsewhere in the Justice Department, which would combine both law enforcement and intelligence-gathering responsibilities, not the creation of a separate intelligence agency.⁶

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⁶ For an analysis about why proposals for a new domestic intelligence agency modeled on Britain's MI5 are ill-advised on both effectiveness and civil liberties grounds, and an outline of a counter-terrorism approach that would facilitate information sharing while safeguarding civil liberties, see "Domestic Intelligence and Civil Liberties" by Kate Martin, SAIS Review, Volume 24, Number 1, Winter-Spring 2004 (<http://www.saisreview.org/PDF/24.1martin.pdf>).