

# Report for Congress

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## **The Intelligence Community and 9/11: Congressional Hearings and the Status of the Investigation**

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Richard A. Best, Jr.  
Specialist in National Defense  
Foreign Affairs, Defense, and Trade Division

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## Summary

The terrorist attacks of September 11, 2001 led many to inquire whether there had been a failure by United States intelligence agencies to collect all available information about the plots that led to the attacks, to analyze it properly, and disseminate it in time to protect the American public. Congressional intelligence committees responded by launching an unprecedented Joint Inquiry to investigate the Intelligence Community's record in regard to the 9/11 attacks and make recommendations for further legislative action. The Joint Inquiry began its investigation in February 2002 and held public hearings in September and October. Findings, conclusions, and recommendations were made public in December 2002; release of the final report is anticipated in 2003.

In public hearings, the Joint Inquiry's Staff Director traced salient aspects of the Inquiry's work and emphasized that, whereas the Intelligence Community provided ample warning of an impending attack in mid-2001 against the U.S. by the Islamic terrorist group headed by Osama Bin Laden, the Community did not learn in advance the plans for the aircraft hijackings that occurred on September 11.

The Joint Inquiry focused on several underlying problems. For a number of Constitutional, statutory, and organization reasons, information collected by intelligence agencies has historically not been routinely used for law enforcement purposes. Similarly, information collected in preparation for trials has not been routinely forwarded to intelligence agencies. In an era in which terrorists work abroad to launch attacks in the U.S., some have argued that the "walls" between intelligence and law enforcement have complicated the ability of any agency to put together a complete picture of evolving plots. Explaining the complexity of this situation was a major contribution of the Inquiry, although the issue of breaching these "walls" remains complicated and controversial.

In addition, the Inquiry examined the role of the FBI. There were criticisms of the Bureau's ability to: process and store information; provide communications links between field offices and headquarters; process applications for surveillance; and coordinate with intelligence agencies. More fundamentally, the intelligence committees examined priorities that, prior to September 11, 2001, did not emphasize counterterrorism to the extent that has subsequently been considered necessary.

The Intelligence Authorization Act for FY2003 (P.L. 107-306) establishes an independent commission to assess the role of agencies throughout the government with regard to the 9/11 attacks. This independent commission, to be headed by former New Jersey Governor Thomas H. Kean, will build upon the investigatory record of the Joint Inquiry, but might reach further to assess organizational issues and the proper relationship of law enforcement and intelligence agencies. This report will be updated as circumstances dictate.

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# The Intelligence Community and 9/11: Congressional Hearings and the Status of the Investigation

## Introduction

In February 2002, the two congressional intelligence committees launched a Joint Inquiry into the terrorist attacks of September 11, 2001 that destroyed the World Trade Center and a portion of the Pentagon. In a press release committee leaders announced that “Among the purposes of this joint effort is ascertaining why the Intelligence Community did not learn of the September 11<sup>th</sup> attacks in advance, and to identify what, if anything, might be done to better the position [of] the Intelligence Community to warn of and prevent future terrorist attacks and other threats of the 21<sup>st</sup> Century.”<sup>1</sup>

After months of assembling data and taking testimony, public hearings began on September 18, 2002 that included extended presentations of the staff findings and conclusions thus far reached by the staff. The series of hearings concluded on October 17 with testimony by the Director of Central Intelligence (DCI) and the Director of the Federal Bureau of Investigation (FBI). It is expected that a final report will be prepared for release in early 2003.

As the Joint Inquiry completes its work and committee members draft their final report, on November 27, 2002 Congress passed the FY2003 Intelligence Authorization Act which establishes an independent commission with a charter to conduct a wide-ranging investigation and assessment of the events surrounding the 9/11 attacks. The commission, which will be headed by former New Jersey Governor Thomas H. Kean (appointed by President Bush on December 16, 2002 after the initial appointee, former Secretary of State Henry Kissinger, withdrew),<sup>2</sup> is

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<sup>1</sup>An Initial Scope of Joint Inquiry adopted and made public by the two intelligence committees in June 2002 listed the Inquiry’s purposes, *viz.*, investigating the evolution of the international terrorist threat to the U.S. and the response of the Intelligence Community, what was known prior to September 11 about the scope and nature of possible attacks, what was subsequently learned about the events, whether there were systemic problems that affected intelligence agencies’ ability to learn of or prevent the attacks, the interaction of intelligence agencies with federal, state, and local officials, ways in which responses to past problems had affected counterterrorism, and other information that would allow the intelligence committees to propose legislation and administrative or structural changes if determined to be necessary or desirable.

<sup>2</sup>Other commission members are former Representative Lee H. Hamilton (who will serve as vice chairman); Richard Ben-Veniste, a former Federal prosecutor; Senator Max Cleland;  
(continued...)

intended to take the evidence and findings produced by the Joint Inquiry into consideration as it undertakes its work which is planned to take some 18 months. The commission is expected to make recommendations concerning organizational and statutory changes to enhance the ability of the entire government to prevent future terrorist attacks.

## The Joint Inquiry of the Intelligence Committees

In the immediate aftermath of September 11, 2001, there was widespread support for an investigation of the performance of relevant agencies would be necessary following, in part, the precedent of the congressional investigation of the Japanese attack on Pearl Harbor in 1941.<sup>3</sup> The Administration indicated some concern at the time that a wide-ranging investigation could make heavy demands on senior policymakers at a time of crisis (similar arguments had been made during World War II and the major congressional inquiry of Pearl Harbor did not begin until after hostilities ended in 1945). Nevertheless, public anxieties about a possible “intelligence failure” led to the conclusion that an official investigation was needed.

The House voted to establish an independent commission to investigate the attacks during consideration of the FY2002 Intelligence Authorization bill (H.R. 2883), but the provision was dropped by the conference committee because some Members preferred that Congress conduct its own investigation with a mandate focused primarily on the role of intelligence and law enforcement agencies. In February 2002, the two intelligence committees initiated a Joint Inquiry with a staff separate from that of the existing intelligence committees. Difficulties over staff assignments complicated the Inquiry’s early months. The first staff director, L. Britt Snider, a former general counsel of the Senate Intelligence Committee and inspector general of the Central Intelligence Agency (CIA), resigned in April 2002 as a result of concerns about some of his staff appointments. It was some weeks later that Eleanor Hill, a former inspector general of the Defense Department, took over as staff director. Public hearings, originally anticipated in May, were postponed several times and finally began in mid-September.

The Joint Inquiry staff has consisted of twenty-four professionals with backgrounds in intelligence collection, analysis, management, law enforcement, investigations and oversight. The staff was divided into five investigative teams to investigate different aspects of the question. The teams are assigned to CIA, the FBI, and the National Security Agency (NSA). In addition, documents were collected and

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<sup>2</sup>(...continued)

Fred Fielding, a former White House Counsel; Jamie Gorelick, a former Assistant Attorney General; former Senator Slade Gorton; John F. Lehman, a former Secretary of the Navy; Representative Tim Roemer; and former Illinois Governor James R. Thompson.

<sup>3</sup>For background on the congressional investigations of Pearl Harbor, see Wayne Thompson, “The Pearl Harbor Inquiry, 1945,” in *Congress Investigates: A Documented History, 1792-1974*, ed. by Arthur M. Schlesinger, Jr. and Roger Bruns (New York: Chelsea House, 1975); Martin V. Melosi, *Shadow of Pearl Harbor: Political Controversy over the Surprise Attack, 1941-1946* (College Station, Tx: Texas A & M University Press, 1977).

interviews conducted at other federal agencies, including the Treasury, Defense, State, Justice, Transportation, and Energy Departments as well as some private sector individuals and organizations. Ms. Hill indicated that the staff has reviewed over 400,000 pages of documents, identified over 66,000 pages for the Inquiry's central records, and documented some 400 interviews and technical discussions.<sup>4</sup>

The hearings have also revealed some disagreements about Joint Inquiry procedures. Some Members have expressed concern about making public an interim report that had not been approved by the committees.<sup>5</sup> Complaints have surfaced that intelligence agencies have at times been uncooperative in providing information to committee staff. On the other hand, great offense was taken when a briefing book prepared by Inquiry staff for committee members to use on September 26 suggested that a CIA official might "dissemble" in regard to a certain line of questioning. Some Members opposed the holding of public hearings prior to the completion of the investigation and there have been reports of communications breakdowns within the committee.<sup>6</sup>

Nevertheless, the September-October 2002 public hearings and the public statements of Ms. Hill have provided insights into the directions taken by the Joint Inquiry staff as well as the staff conclusions that the two committees may draw from the investigation as they prepare their report. Public hearings included testimony by representatives of victims' families, by law enforcement and intelligence officials involved in the counterterrorism efforts, by outside experts on the intelligence and law enforcement communities, and by current and former senior officials from the National Security Council (NSC) and the intelligence and law enforcement communities.

## **Analysis Presented by Staff Director**

Eleanor Hill, in her initial public statement before the Joint Inquiry on September 18, emphasized:

... the Intelligence Community did have general indications of a possible terrorist attack against the United States or U.S. interests overseas in the spring and summer of 2001 and promulgated strategic warnings. However, it does not appear to date that the Intelligence Community had information prior to September 11 that identified precisely where, when and how the attacks were to be carried out.<sup>7</sup>

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<sup>4</sup>Eleanor Hill, Staff Director, Joint Inquiry Staff, *Joint Inquiry Staff Statement, Part I*, September 18, 2002, pp. 4-6.

<sup>5</sup>See comments of Senator Kyl, Joint House and Senate Select Intelligence Committee Hearing, September 18, 2002, FDCH Political Transcripts, p. 56.

<sup>6</sup>See the comments of Senator Shelby, Joint House and Senate Select Intelligence Committee Hearing, September 18, 2002, FDCH Political Transcripts, p. 6.

<sup>7</sup>Joint Inquiry Staff Statement, Part I, Eleanor Hill, Staff Director, Joint Inquiry Staff, (continued...)

Ms. Hill traced the history of the Intelligence Community's concern with the international terrorist threat back into the 1980s and its focus on Al Qaeda from the early 1990s. A Counterterrorist Center (CTC) had been established at the CIA in 1986 consisting of personnel from various intelligence agencies and the FBI. By mid-2001 it consisted of some 400 personnel; a special unit within the CTC to monitor Osama bin Laden had been created in 1996. Ms. Hill traced the response of agencies to the series of terrorist attacks, including the one on the New York World Trade Center in February 1993, an unsuccessful plot to bomb New York City tunnels, the 1996 Khobar Towers bombing, a plot to kill the Pope in Manila and blow up 12 U.S.-owned airliners over the Pacific Ocean, a plan to attack the Los Angeles Airport in December 1999, the August 1998 bombings of two U.S. Embassies in Africa, and the attack on the *USS Cole* in October 2000. Despite extensive casualties and property damage that have been inflicted by Al Qaeda, she noted that effective intelligence and law enforcement work by U.S. agencies, in cooperation with foreign countries, disrupted other planned attacks that would have been very costly.

Ms. Hill surveyed the response of government agencies to terrorist attacks prior to 2001 and noted that they represented a threat much different from those that existed during the Cold War. By the mid-1990s, however, a National Intelligence Estimate called attention to a "new breed" of terrorists who had no state sponsor, was loosely organized, had an Islamic agenda, and a "penchant for violence."<sup>8</sup> By 1996 attention had focused on Osama bin Laden and Al Qaeda operating out of Afghanistan. Ms. Hill discussed the increasing focus of intelligence and law enforcement agencies on terrorism and the augmentation and creation of special units to track them, cooperative efforts with foreign governments to suppress terrorist groups and to arrest individuals involved in terrorism, the development of new legal strategies, and the expansion of the FBI presence overseas.

Ms. Hill noted that intelligence agencies issued growing warnings of attacks in the spring and summer of 2001 although she acknowledged that it was the "general view" of intelligence officials that an attack was more likely to occur overseas. She cited a briefing prepared for senior government officials in early July 2001:

Based on a review of all-source reporting over the last five months, we believe that UBL [Bin Laden] will launch a significant terrorist attack against U.S. and/or Israeli interests in the coming weeks. The attack will be spectacular and designed to inflict mass casualties against U.S. facilities or interests. Attack preparations have been made. Attack will occur with little or no warning.<sup>9</sup>

The Staff Director further suggested that although the Intelligence Community had consistently reported on Al Qaeda activities, a comprehensive listing of terrorist

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<sup>7</sup>(...continued)  
September 18, 2002, p. 7.

<sup>8</sup>Eleanor Hill, Staff Director, Joint Inquiry Staff, Joint Inquiry Staff Statement, Hearing on the Intelligence Community's Response to Past Terrorist Attacks Against the United States from February 1993 to September 2001, October 8, 2002, p. 8.

<sup>9</sup>Eleanor Hill, Staff Director, Joint Inquiry Staff, Joint Inquiry Staff Statement, Part I, September 18, 2002, *Ibid.*, p. 23.

threats to the United States had not been prepared, nor was specific attention given to the possibility of using hijacked aircraft to attack U.S. facilities. Despite the threat warnings issued in mid-2001, there was not a comprehensive effort to educate the American public.

As Ms. Hill indicated in a lengthy statement on September 24, the Inquiry devoted extensive attention to an electronic communication sent in July 2001 from the FBI field office in Phoenix, Arizona, calling for further investigation of individuals with possible ties to foreign terrorist organizations who were attending flight colleges and universities in the U.S. The communication (often referred to as the “Phoenix Memorandum”) was forwarded to FBI Headquarters, but did not receive sustained attention there nor were its recommendations acted upon prior to September 11. The episode reflected a number of administrative, legal, and policy barriers that, taken together, Ms. Hill argued, may have prevented the FBI from perceiving a pattern of planning for a terrorist attack using commercial aircraft. She concluded: “The FBI handling of the Phoenix EC is symptomatic of a focus on short-term operational priorities, often at the expense of long-term strategic analysis.”<sup>10</sup>

The Inquiry also addressed the question of three of the hijackers who had come to the attention of the Intelligence Community prior to September 11, 2001. (Except for two who had received speeding tickets, none of the hijackers had come to the attention of law enforcement agencies.) Khalid al-Mihdhar and Nawaf al-Hazmi (hijackers of Flight 77 which crashed into the Pentagon) were identified in early 2000 as having attended a meeting in Malaysia with a known Al Qaeda operative. As the Staff Director stated on September 20, the Joint Inquiry staff concluded that the names of these individuals should have been included in watchlists maintained by the State Department, the Immigration and Naturalization Service, and the Customs Service that might have led to their being denied entry into the U.S.<sup>11</sup> In subsequent testimony, the DCI concurred in this judgment and indicated that the reason for the failure was the absence of a formal system in place for watchlisting suspected terrorists, a lack of formal training, and the heavy counterterrorist workload.<sup>12</sup> It was only in August 2001 that the CIA recommended that four Bin Laden-related individuals, including al-Mihdhar and Nawaf al-Hazmi, be watchlisted and denied entry into the U.S. although by this time both of the latter were already present in this country. The failure by CIA to provide earlier information on these men drew particular criticism from Members, some of whom questioned whether individual intelligence officials had been held accountable.<sup>13</sup>

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<sup>10</sup>Eleanor Hill, Staff Director, Joint Inquiry Staff, *The FBI’s Handling of the Phoenix Electronic Communication and Investigation of Zacarias Moussaoui Prior to September 11, 2001*, September 24, 2002, p. 2.

<sup>11</sup>Eleanor Hill, Staff Director, Joint Inquiry Staff, *The Intelligence’s Community’s Knowledge of the September 11 Hijackers Prior to September 11, 2001*, p. 6.

<sup>12</sup>Written Statement for the Record of the Director of Central Intelligence Before the Joint Inquiry Committee, 17 October 2002, pp. 15-16.

<sup>13</sup>See the questioning by Senator Levin, House and Senate Intelligence Committees, Hearing, October 17, 2002, FDCH Political Transcripts.



The Inquiry also delved extensively into the widely publicized case of Zacarias Moussaoui, a French citizen seeking flight instruction in the U.S. who was detained by the FBI in Minneapolis, Minnesota in August 2001, and remains under arrest pending trial on charges of conspiracy to commit aircraft piracy. Moussaoui was arrested on August 16, 2001 on immigration-related charges after suspicions had been reported by an employee of the flight school in Minnesota that he had recently enrolled in. FBI officials in Minnesota sought a warrant to investigate his notes and computer disks, but authorization was not approved prior to September 11. There was, according to Ms. Hill, excessive caution along with misunderstandings of the requirements of the relevant statutes and lengthy debates over the advisability of a criminal search warrant vs. a search under the provisions of the Foreign Intelligence Surveillance Act (FISA).<sup>14</sup> At one point the FBI had intended to deport Moussaoui to France in order that French officials could search his belongings and forward the results back to the U.S.

Moving to more general concerns, Ms. Hill described a number of basic limitations to the U.S. response to the rise of Al Qaeda. First was the “unsolved problem of sanctuary.” The U.S. had little capability to oppose or even to closely monitor the network of training camps and headquarters in Afghanistan.<sup>15</sup> Some diplomatic pressure was brought to bear on the then-government of Afghanistan and President Clinton ordered missile strikes on a presumed Al Qaeda site in August 1998, but, as she stated, “there was little effort to integrate all the instruments of national power—diplomatic, intelligence, economic, and military—to address this problem.”<sup>16</sup>

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<sup>14</sup>The effects of the provisions of FISA are discussed below.

<sup>15</sup>Former National Security Adviser Samuel Berger testified that the CIA had maintained no significant assets in Afghanistan after our withdrawal from the region in 1989. Comment by Berger, House and Senate Select Intelligence Committees, Committee Hearing, September 19, 2002, p. 5-6.

<sup>16</sup>Eleanor Hill, Staff Director, Joint Inquiry Staff, *Hearing on the Intelligence Community’s Response to Past Terrorist Attacks Against the United States from February 1993 to September 2001*, October 8, 2002, p. 14. Former National Security Adviser Berger has argued that insufficient public and congressional support existed to enable the Administration to take stronger measures against Afghanistan; “I don’t think there [was] anybody up here [on Capitol Hill] calling for an invasion of Afghanistan. I don’t think there [was] anybody in the press calling for an invasion of Afghanistan. I just don’t think that was something we would have had diplomatic support [for]. We would not have had basing support. And, so, I don’t [think] the kind of full-scale war that we’ve seen since 9/11 was feasible, unfortunately, before that.” House and Senate Intelligence Committees, Committee Hearing, FDCH Political Transcripts, September 19, 2002, p. 35. Some observers would note that the Clinton Administration had not focused on building a public consensus around the dangers of Al Qaeda operating out of Afghanistan. Only after September 11 did the U.S. seek regime change in Afghanistan; as DCI George Tenet stated, “*Nothing did more for our ability to combat terrorism than the President’s decision to send us into the terrorist’s sanctuary. By going in massively, we were able to change the rules for the terrorists. Now they are the hunted.*” Written Statement for the Record of the Director of Central Intelligence Before the Joint Inquiry Committee, 17 October 2002, p. 26 (italics in original).

Furthermore, Ms. Hill noted that government agencies were fighting terrorists “without the benefit of what some would call their most potent weapon in that effort: an alert and committed American public.”<sup>17</sup> She stated that, while senior intelligence and law enforcement officials were well aware of the threat from Al Qaeda, there had been little effort to mobilize public opinion. She added that neither the Clinton nor the Bush Administration before September 11 brought home to the American public the extent of danger they faced from terrorist attacks.

Secondly, the Staff Director expressed specific concerns about the performance of the FBI. She concluded that the Bureau remained focused on individual prosecutions and “did not systematically and thoroughly make the changes necessary to fight terrorism in the United States.” The Bureau, she argued, had very few officials assigned to counterterrorism (especially outside the New York Field Office) and give the effort a relatively low priority.

A fundamental problem, Ms. Hill argued, was an inability to systematically collect information on terrorist plots against targets in the U.S.:

The FBI was not able to gather intelligence from disparate cases nationwide to produce an overall assessment of [Al Qaeda’s] presence in the United States. The FBI’s decentralized structure contributed to the Bureau’s inability to correlate the knowledge its components possessed. In addition, the FBI’s case-based approach led the terrorist threat to be viewed through a narrow lens.<sup>18</sup>

According to Ms. Hill’s statement, the FBI did not concentrate on radical activity in the U.S. She stated that former National Security Adviser Berger had testified that “the FBI assured him that there was little radical activity in the United States and that this activity was ‘fully covered.’” There was, she added, a particular disinclination to target suspects residing outside the U.S. (who could of course subsequently enter the country). She concluded: “The FBI’s limited attention to the danger at home reflects a huge gap in the U.S. government’s counterterrorism structure: a lack of focus on how an international terrorist group might target the United States itself. No agency appears to have been responsible for regularly assessing the threat to the homeland.”<sup>19</sup> The Joint Inquiry staff concluded that the FBI has been structured to concentrate on gathering evidence on crimes to an extent that strategic analysis of threats to the homeland did not receive adequate attention.<sup>20</sup>

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<sup>17</sup>Eleanor Hill, Staff Director, Joint Inquiry Staff Statement, October 17, 2002, p. 5.

<sup>18</sup>Eleanor Hill, Statement of October 8, 2002, p. 16.

<sup>19</sup>Eleanor Hill, Statement of October 8, 2002, p. 17.

<sup>20</sup>The Inquiry received testimony from a former DIA analyst that the Justice Department did not share information it collected with intelligence agencies: “...US agencies conducted a vigorous investigation, to include a physical search, of the [A] Qaeda cell leader in Nairobi nearly a year prior to the 1998 Embassy bombings. Almost all of the results of this effort were never shared with the terrorism analytical community due to concerns about the criminal case. Most of the information was never properly exploited. In fact, a great deal of it was only translated after the bombings themselves.” Statement for the Record, *Lessons Learned and Actions Taken in Past Events*, 8 October 2002, Kie C. Fallis, p. 6. Ms. Hill (continued...)

Ms. Hill addressed the question of the extent to which a law enforcement approach to terrorist attacks was appropriate. “U.S. Government officials apparently never intended to rely exclusively on law enforcement to fight terrorism. By default, however, law enforcement tools became the primary instrument of American counterterrorism strategy.”<sup>21</sup> A number of individuals with terrorist connections were prosecuted for immigration law violations; such efforts complicated the efforts of terrorists but they concentrated on underlings rather than the masterminds who were abroad and beyond the reach of U.S. justice. In addition, the need to prepare for trials led to a disinclination by the FBI to cooperate with intelligence agencies out of concern that evidence might be tainted by a link with intelligence agencies and not usable in court proceedings. Osama Bin Laden was himself indicted in June 1998, but that did not obstruct his activities.

The Staff Director drew attention to the institutional “walls” that had been erected to govern the use of information acquired by intelligence and law enforcement agencies. Many of the walls derived from the provisions of the Foreign Intelligence Surveillance Act which was enacted in 1978 in order to ensure that the Fourth Amendment protections against unreasonable searches were not undermined by employing electronic surveillance that had been authorized for foreign intelligence-gathering purposes.<sup>22</sup> Ms. Hill noted that many of the “walls” derived from guidance provided by the FISA Court and that FISA procedures have been under judicial review.<sup>23</sup>

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<sup>20</sup>(...continued)

also noted that the arrest of one individual in 1990 suspected of terrorist ties produced forty-seven boxes of notes and paramilitary manuals, but “it would be at least two years before much of the information was actually translated.” Eleanor Hill, Statement of September 18, 2002, p. 2.

<sup>21</sup>Deputy Defense Secretary Wolfowitz noted in his testimony on September 19 the “puzzlement of many Americans at why the FBI didn’t provide some of this information [regarding terrorist plots]. In fairness to [the] FBI, it ought to be pointed out that, for very good, substantial reasons, they are not supposed to report information on Americans to intelligence agencies. This is an issue we’ve go to confront now, but they weren’t—it’s not that they were stupid. They’re there under a different set of rules, rules that require people to be very careful about information that can be prosecuted.” Comment by Wolfowitz, Senate and House Intelligence Committees, Committee Hearing, FDCH Political Transcripts, September 19, 2002, p. 15.

<sup>22</sup>See (name redacted), *The Foreign Intelligence Surveillance Act: An Overview of the Statutory Framework*, CRS Report RL40465, Updated April 29, 2002. The National Security Act of 1947 specifically provided that the CIA would have no domestic law enforcement powers or internal security functions (50 USC 403-3(d)(1)) in order to avoid creating the sort of intelligence organizations that existed in European dictatorships. During the Cold War it was relatively simple to discriminate between foreign and domestic threats, but even during that time procedures that have complicated intelligence collection against terrorist groups were established as a result of criticisms of expansive intelligence collection efforts against domestic opponents of the Vietnam War who were alleged, in large measure incorrectly, to have been working on behalf of foreign Communist elements.

<sup>23</sup>The Foreign Intelligence Surveillance Court of Review made public its decision in a case dealing with processes for obtaining FISA court orders on November 18, 2002 that reflected (continued...)

Many observers believe that, certainly in retrospect, the “walls,” or at least the procedures established to maintain them, “snowballed” into an unworkable and counterproductive set of bureaucratic hurdles. “Snowballed” was the term employed by an FBI official in the New York Field Office who complained when information on Khalid Al-Mihdhar and Nawaf Al-Hazmi was not made available to him out of concern that his role as a criminal case investigator would be contaminated by intelligence materials. He wrote on August 29, 2001:

Whatever has happened to this—someday someone will die—and wall or not—the public will not understand why we were not more effective and throwing every resource we had at certain ‘problems.’<sup>24</sup>

Ms. Hill noted that “walls” between law enforcement and intelligence also came into play in regard to efforts by the New York FBI office to use full criminal investigative resources against al-Mihdhar after information was obtained about a tangential connection to the *Cole* attack.

Once it was determined in late August 2001 that Khalid al-Mihdhar was in the United States, the search to determine his whereabouts was constrained by FBI policies and practices regarding the use of intelligence information in FBI criminal investigations. This limited the resources that were made available for the FBI to conduct the search during a time in which al-Mihdhar and al-Hazmi were purchasing their September 11 tickets and traveling to their last rallying points.<sup>25</sup>

A major theme of the investigation has been inadequate communication between and among the various intelligence and law enforcement agencies. Ms. Hill noted that former FBI Director Freeh had maintained that the Bureau had provided all available intelligence acquired by the Bureau to the CIA, but this was “an assertion that individuals at the working level at the CIA strongly contest....”<sup>26</sup> She concluded: “The events of September 11, 2001 have led to an almost universal acknowledgment in the United States Government of the need for consolidating and streamlining collection, analysis, and dissemination of information concerning threats to the United States and its interests.”<sup>27</sup> There was no single point at which all the evidence relating to terrorist threats within the U.S. could be sifted and the various “dots” connected.

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<sup>23</sup>(...continued)

in part the evidence presented to the Joint Inquiry.

<sup>24</sup>Prepared Statement of a New York Special Agent before the Select Committee on Intelligence, United States Senate, and the Permanent Select Committee on Intelligence, House of Representatives, September 20, 2002, p.3.

<sup>25</sup>Eleanor Hill, Statement of September 24, 2002, p. 22.

<sup>26</sup>Eleanor Hill, Staff Director, Joint Inquiry Staff, Joint Inquiry Staff Statement, *Hearing on the Intelligence Community’s Response to Past Terrorist Attacks Against the United States from February 1993 to September 2001*, October 8, 2002, p. 20.

<sup>27</sup>Eleanor Hill, Staff Director, Joint Inquiry Staff, *Counterterrorism Information Sharing with Other Federal Agencies and with State and Local Governments and the Private Sector*, October 1, 2002, p. 16.

Some observers have urged caution, however. They are concerned that the removal of “walls” separating different types of information and analytical functions could jeopardize not only necessary administrative divisions of effort, but also important civil liberties by permitting the use of information obtained by intrusive intelligence methods for criminal justice purposes and a much wider dissemination of sensitive grand jury information to a large number of intelligence agencies.

## Public Testimony by Witnesses

The public hearings conducted by the two intelligence committees provided an opportunity to describe how intelligence and law enforcement agencies had reacted to the rise of radical Islamic terrorism in the 1990s and the attacks on Bin Laden’s organization by the Clinton Administration (although covert operations were only briefly mentioned). Considerable attention was given to explaining why intelligence on the terrorist connections of two individuals who turned out to be hijackers had not been passed on to the State Department and INS as soon as the information had been acquired. In addition, the hearings addressed the history of a memorandum from the FBI’s Phoenix office calling attention to the presence of flight school students with possible terrorist connections.<sup>28</sup> The committees also focused on unsuccessful efforts by the FBI’s Minneapolis field office to seek legal approval to search Moussaoui’s affects.<sup>29</sup> Finally, the hearings included discussion of proposals to reorganize intelligence and law enforcement agencies to improve their counterterrorism capabilities.

In general, the testimony suggested that government agencies were well aware of the hostile intentions of Al Qaeda and similar groups. A number of serious terrorist attacks were thwarted and those who planned them were arrested and convicted. Efforts were made to enlist the assistance of foreign governments with mixed success. The hearings provided descriptions of complex procedural problems relating to the sharing of information from intelligence and law enforcement sources and suggestions were made that agencies need better guidance on dealing with these issues.<sup>30</sup> The hearings also reflected a number of instances when information could have been shared in accordance with then-existing procedures that might have provided clues to the unfolding September 11 plot.

The hearings opened on September 18 with impassioned testimony by two representatives of the families of those killed in the 2001 attacks. **Kristen Breitweiser**, whose husband worked in the World Trade Center, pointed to September 11th as “the devastating result of a catalogue of failures on behalf of our government and its agencies.” She went on to note a number of specific failures by

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<sup>28</sup>See Eleanor Hill, Staff Director, Joint Inquiry Staff, *The FBI’s Handling of the Phoenix Electronic Communication and Investigation of Zacarias Moussaoui Prior to September 11, 2001*, September 24, 2002 [As Supplemented October 17, 2002], especially pp. 3-5.

<sup>29</sup>Ibid.

<sup>30</sup>For background on this issue, see CRS Report RL30252, *Intelligence and Law Enforcement: Countering Transnational Threats to the U.S.*, by Richard A. Best, Jr.

government agencies and asked for an investigation by an independent commission.<sup>31</sup> Similarly, **Stephen Push**, another family representative, stated that “one thing is already clear to me from the news reports about the intelligence failures that led to the attacks: If the intelligence community had been doing its job, my wife, Lisa Raines, would be alive today. She was a passenger on flight 77, the plane that was crashed into the Pentagon.”<sup>32</sup>

Former National Security Adviser **Samuel Berger** testified on September 19 about the increasing priority that the Clinton Administration had given to counterterrorism during its tenure, increasing budgets for the counterterrorism effort, and the creation of a White House-level Counterterrorism Security Group to review threats and follow up on them. Like other witnesses, Berger noted successes in stopping some terrorist attacks such as the 1993 plot to bomb New York bridges and tunnels, the conspiracy to blow up 12 U.S. commercial airliners in 1995, and an attack on the Los Angeles airport planned for January 2000. He noted, however, that the FBI was not as focused on counterterrorism as the CIA: “the view we received from the Bureau was that Al Qaeda had limited capacity to operate in the U.S. and any presence here was under surveillance.”<sup>33</sup> Berger urged the improvement of coordination and integration of intelligence, strengthening the role of the DCI over the entire intelligence effort (while establishing a separate position of director of the CIA), and greater emphasis on predictive intelligence which would provide tactical warning. Berger also emphasized the importance of human intelligence, a covert action capability, and adding resources to the analytical effort. Berger indicated that “by and large, if there was a flood of intelligence information from the CIA, there was hardly a trickle from the FBI.”<sup>34</sup>

**FBI Director Robert S. Mueller, III** provided a summary of information on the nineteen hijackers, their travel to the U.S., attendance at flight schools, and the financial transactions that supported them along with a chronology of their activities from their arrival in the U.S. through September 11, 2001. He summarized:

Clearly, these 19 terrorists were not supermen using extraordinarily sophisticated techniques. They came armed with simple box cutters. But they also came armed with sophisticated knowledge about how to plan these attacks abroad without discovery, how to finance their activities from overseas without alarm, how to communicate both here and abroad without detection, and how to exploit the vulnerabilities inherent in our free society.

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<sup>31</sup>Comments by Kristen Breitweiser, Joint House and Senate Select Intelligence Committee, Committee Hearing, FDCH Political Transcript, September 18, 2002, p. 9.

<sup>32</sup>Ibid., Comments by Stephen Push, pp. 15-16. Push made a number of recommendations for restructuring the nation’s intelligence effort, including the creation of a new domestic intelligence agency, closer links with state and local law enforcement agencies, and setting up a separate oversight subcommittee specifically for intelligence on terrorism.

<sup>33</sup>Samuel R. Berger, Joint Intelligence Committee Testimony, Washington, D.C., September 19, 2002, p. 6.

<sup>34</sup>Comment by Berger, House and Senate Select Intelligence Committees, Committee Hearing, FDCH Political Transcripts, September 19, 2002, p. 12.

There were no slip ups. Discipline never broke down. They gave no hint to those around them what they were about. They came lawfully. They lived lawfully. They trained lawfully. They boarded the aircraft lawfully. They simply relied upon everything from the vastness of the Internet to the openness of our society to do what they wanted to do without detection.<sup>35</sup>

Mueller acknowledged:

We have heard, and we acknowledge, the valid criticisms, many of which have been reiterated by this Committee. For example, the Phoenix memo should have been disseminated to all field offices and to our sister agencies; and the 26-page request form Minneapolis for a FISA warrant should have been reviewed by attorneys handling the request.<sup>36</sup>

Testimony from Mueller was supplemented by his predecessor **Louis Freeh** who had left office in June 2001. On October 8, 2002 Freeh described the counterterrorist efforts of the Bureau during his tenure. The number of FBI special agents assigned to counterterrorism more than doubled. The stationing of some 44 legal attaches in U.S. embassies throughout the world represented one step to improve the acquisition of information on terrorist activities. The legal attaches have also been helpful in facilitating the extradition (or transfer) of suspected terrorists to the U.S. or other countries. In addition, some 56 Joint Terrorism Task Forces (JTTFs) have been established to integrate the investigative capabilities of the FBI with those of local law enforcement agencies. The FBI's Counterterrorism Center was established in 1996 to coordinate threat analysis and counterterrorist operations in the U.S. In lengthy testimony on October 8, Freeh described his involvement in the investigation of the 1996 bombing of the Khobar Towers apartment complex in Saudi Arabia that resulted in the deaths of 19 American servicemen with 500 wounded. The FBI received cooperation from the Saudi government, and acquired direct access to several suspects who may have had Iranian connections. Freeh acknowledged that "Khobar represented a national security threat far beyond the capability or authority of the FBI or Department of Justice to address. Neither the FBI Director nor the Attorney General could or should decide America's response to such a grave threat."<sup>37</sup>

Freeh acknowledged longstanding problems in the FBI's often criticized information technology (IT) capabilities: "We didn't just wake up one day and realize that our IT systems were unable to perform even basic functions, such as e-mail and electronic files that were available in other government agencies and the private

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<sup>35</sup>Statement for the Record, FBI Director Robert S. Mueller III, Joint Intelligence Committee Inquiry, 9/25/02, p. 14.

<sup>36</sup>Testimony of Robert S. Mueller, III, Director, Federal Bureau of Investigation Before the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence, October 17, 2002, p. 6.

<sup>37</sup>Statement of Louis J. Freeh, Former FBI Director, before the Joint Intelligence Committees, October 8, 2002, p. 33.

sector.”<sup>38</sup> Necessary upgrades were delayed, however, and new systems began to be acquired only in September 2000. Freeh pointed out that September 11 changed many of the rules under which FBI officials had previously operated. “For example, FBI Agents were not permitted without special circumstances to visit a suspect group’s web site or to attend its public meetings.”<sup>39</sup> In May 2002 the Justice Department issued new guidelines to remove such restrictions.<sup>40</sup>

**Admiral Lowell Jacoby**, the Director of the Defense Intelligence Agency (DIA), expressed his concern about barriers that prevent analysts from having access to all available information, in one of the few presentations that directly addressed the analytical process. He argued that there is a need to create “a new paradigm wherein ‘ownership’ of information belonged with the analysts and not the collectors.”

In my opinion, one of the most prolonged and troubling trends in the Intelligence Community is the degree to which analysts—while being expected to incorporate the full range of source information into their assessments—have been systematically separated from the raw material of their trade. In fact, while I acknowledge there are many pockets where groundbreaking, innovative, true all-source analysis is occurring, they are the exception, not the rule.<sup>41</sup>

Testimony in public sessions suggested widespread support for breaking down barriers to a freer exchange of information among law enforcement and intelligence agencies. Especially emphatic was **Mary Jo White**, the former U.S. Attorney for the Southern District of New York and a lead figure in important terrorism investigations, who stated:

The single most important recommendation I would make to the Committees would be to address the full range of issues presented by the bifurcation of the intelligence and law enforcement communities and functions, as they operate in international terrorism investigations, including the permissible use of FISA and the dissemination and use of the product of FISA searches and surveillances.<sup>42</sup>

Her comments were echoed by the Director of NSA, General **Michael Hayden**, who testified on October 17 that:

As a practical matter, we have chosen *as a people* to make it harder to conduct electronic searches for a law enforcement purpose than for a foreign intelligence

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<sup>38</sup>Louis Freeh Statement, October 8, 2002, p. 36.

<sup>39</sup>Louis Freeh Statement, October 8, 2002, p. 43.

<sup>40</sup>See Bill Miller, “Ashcroft: Old Rules Aided Terrorists; FBI Agents Get Freer Hand; Civil Liberties Groups Criticize New Guidelines,” *Washington Post*, May 31, 2002, p. A13.

<sup>41</sup>Statement for the Record for the Joint 9/11 Inquiry, 1 October 2002, *Information Sharing of Terrorism-Related Data*, Rear Admiral Lowell E. Jacoby, US Navy, Acting Director, Defense Intelligence Agency, p. 6.

<sup>42</sup>Statement of Mary Jo White, Former United States Attorney for the Southern District of New York before the Joint Intelligence Committees, October 8, 2002, p. 27.



purpose. This is so because law enforcement electronic searches implicate not only 4<sup>th</sup> Amendment privacy interests, but also 5<sup>th</sup> Amendment liberty interests. After all, the purpose of traditional law enforcement activity is to put criminals behind bars.

Hayden's challenge to Congress was almost identical to that of Ms. White:

Let me close by telling you what I hope to get out of the national dialogue that these committees are fostering. I am not really helped by being reminded that I need more Arabic linguists or by someone second-guessing an obscure intercept sitting in our files that *may* make more sense today than it did two years ago. What I really need you to do is talk to your constituents and find out where the American people want that line between security and liberty to be.<sup>43</sup>

**James Gilmore**, the Chairman of the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction, also testified that his panel continues "to believe that improvements in intelligence and information sharing are central to the nation's efforts to combat terrorism. They are, as we see it, the most crucial and fundamental requirement."<sup>44</sup>

The Director of Central Intelligence, **George J. Tenet**, testified in a public hearing on October 17. In his prepared remarks, Tenet traced Intelligence Community tracking of the emergence of Bin Laden as a terrorist leader during the 1990s, especially after his move from the Sudan to Afghanistan in 1996, his issuance of various fatwas against the U.S., and his involvement in terrorist attacks on U.S. forces.<sup>45</sup> Tenet alluded to a comprehensive operation plan prepared in 1999 to disrupt Al Qaeda finances, impede their activities and bring Osama Bin Laden to justice. The plan included not only heightened analytical efforts to track Al Qaeda but also to act against the terrorist organization. Seeking candidates fluent in Middle Eastern and South Asian languages and with police, military, business, technical, or academic experience, CIA recruited and trained officers for counterterrorist assignment. Tenet stated: "By 9/11, a map would show that these collection programs and human networks were in place in such numbers to nearly cover Afghanistan. This array meant that, when the military campaign to topple the Taliban and destroy [Al Qaeda] began last October, we were able to support it with

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<sup>43</sup>Statement for the Record by Lieutenant General Michael V. Hayden, USAF, Director, National Security Agency/Chief, Central Security Service Before the Joint Inquiry of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence, 17 October 2002, pp. 11-12.

<sup>44</sup>Testimony of James S. Gilmore, III, Chairman, Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction Before the Joint Hearing of the U.S. Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence on the Joint Inquiry in the September 11 Attacks, October 1, 2002, p. 27.

<sup>45</sup>Bin Laden and Al Qaeda were not, however, the Intelligence Community's sole counterterrorist interest; through the mid-1990s Hizballah (which had been responsible for more deaths of Americans than any other group prior to 9/11), Hamas, the Egyptian Islamic Jihad, and other groups were even more important.

an enormous body of information and a large stable of assets.”<sup>46</sup> Tenet pointed to a number of successes—some 70 terrorists being brought to justice throughout the world, an array of efforts aimed at preventing any terrorists attacks at the time of the Millennium, and other efforts taken in conjunction with several European governments to “identify and shatter” terrorist groups operating against American and local interests in Europe. Other CIA initiatives were conducted in the Middle East and East Asia. Tenet noted the upsurge in reports of potential terrorist activities in the spring and summer of 2001 as being “[t]he only occasions in this reporting where there was a geographic context, either explicit or implicit, [and] it appeared to point abroad, especially to the Middle East.”<sup>47</sup>

In general, Tenet and other executive branch officials were well aware of the danger of an Al Qaeda attack, especially in mid-summer 2001, but had the perception that a near-term attack was most likely to occur abroad, most likely in the Middle East. There was also a focus on a longer-term threat of a catastrophic attack within the U.S. that would employ chemical, biological, or nuclear weapons.<sup>48</sup> While there had been instances in the past when airplanes had been hijacked by terrorists and reports of plots to drive airplanes into buildings, these reports appeared within a vast flow of data and analysts saw no reason to concentrate on them. They also suggest that clues are far easier to perceive in hindsight rather than when they first come in, mixed with many thousands of other bits of information that were irrelevant.

As was the case with other Intelligence Community leaders, Tenet noted the effect of budgetary reductions in the early 1990s. He claimed that CIA lost nearly one in four of its positions (although he did not indicate whether these positions were tied to Cold War missions that were no longer relevant to the concerns of policymakers). At the same time, however, Tenet argued that funding for counterterrorism had increased; CIA’s funding level for counterterrorism just prior to September 11 was more than fifty percent above the FY1997 level. Tenet argued that in the fall of 1998 he asked that intelligence funding for FYs2000-2005 be increased by more than \$2 billion annually and that similar requests were made for FYs 2001-2005 and FYs 2002-2007. “Only small portions of these requests were approved.” He noted that supplemental appropriations beginning in FY1999 supported the counterterrorist mission, but argued that supplemental appropriations could not be counted on to build multi-year programs.<sup>49</sup>

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<sup>46</sup>DCI Statement, October 17, 2002, p. 10.

<sup>47</sup>DCI Statement, October 17, 2002, p. 19.

<sup>48</sup>See for instance Comments by Deputy Secretary of Defense Paul Wolfowitz and Deputy Secretary of State Richard Armitage in Senate and House Intelligence Committees, Committee Transcript, FDCH Political Transcripts, October 19, 2002, p. 11.

<sup>49</sup>DCI Statement, October 17, 2002, p. 24-25. Dale Watson, a former FBI counterterrorism official, testified that, “In ‘00 the FBI requested 180 agents and 680 for support in the ‘00 budget. What comes out the other end approved by Congress is five support people. In the ‘01 budget we asked for 30 agents, 397 support people. And what comes out the other end is 0-0. In the ‘02 budget we asked for 203 agents, 104 support, and what comes out the other end is 8 agents and 56 support people. . . . [I]n the ‘02 supplemental, right after 9/11, we received 297 agents and 823 support people.” Comment by Watson, Senate and House

(continued...)

## **Committee Findings, Conclusions, Recommendations and Additional Views of the Vice Chairman**

On December 10, 2002, the two intelligence committees released a series of findings, conclusions, and recommendations pending release of a complete report when security review is completed. In addition, Senator Shelby, the Vice Chairman of the Senate Intelligence Committee, made public an extensive statement of his additional views. These documents are available on the web site of the Senate Select Committee on Intelligence.<sup>50</sup>

In large measure, the findings, conclusions, and recommendations are consistent with Ms. Hill's earlier public assessments. The findings emphasize that no agency had information on the time, place, or specific nature of the attacks. They describe, however, specific information that was available to agencies and "that appears relevant to the events of September 11" but was not fully exploited. The findings further suggested systemic weaknesses of intelligence and law enforcement communities: an absence of emphasis on the counterterrorist mission, a decline in funding, limited use of information technology, poor inter-agency coordination, insufficient analytic focus and quality, and inadequate human intelligence. Above all, there was a lack of a government-wide strategy for acquiring and analyzing intelligence and for acting on it to eliminate or reduce terrorist threats.

On the basis of these findings, the two intelligence committees made a number of recommendations, including the creation of a Cabinet-level position of Director of National Intelligence, separate from the position of Director of the CIA, who would establish priorities for collection, analysis, and dissemination throughout the Intelligence Community and manage and oversee the execution of Intelligence Community budgets. Also included was a recommendation calling for a government-wide strategy for combating terrorism prepared by the NSC with an intelligence component prepared by the Director of National Intelligence.

A number of recommendations centered on the newly-established Department of Homeland Security (DHS), which should become "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, both within and beyond the boundaries of the Intelligence

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<sup>49</sup>(...continued)

Intelligence Committees, Committee Hearing, FDCH Political Transcripts, September 26, 2002, p. 9.

<sup>50</sup>[<http://intelligence.senate.gov>]. Several of the findings were redacted for national security reasons. The complete *Report of the Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001* (H.Rept. 107-792) is awaiting declassification.

Community.”<sup>51</sup> DHS should have “full and timely access to all counterterrorism-related intelligence information, including ‘raw’ supporting data as needed.”<sup>52</sup>

A number of recommendations addressed the need to improve the FBI’s capabilities for intelligence gathering and analysis. Expressing concern that the FBI might be unable to redirect its focus from criminal cases to intelligence gathering, the intelligence committees raise the possibility of creating a new agency to perform those functions. Other recommendations deal with the need for addressing the technological challenges facing NSA. The committees also urged “sustained, long-term investment in counterterrorism capabilities that avoid dependence on repeated stop-gap supplemental appropriations.”<sup>53</sup>

In his 84-page statement of Additional Views, Senator Shelby, the Vice Chairman of the Senate Intelligence Committee, criticized the inability or unwillingness of the DCI to exert greater management and budgetary authority over the Intelligence Community and called for a reexamination of the intelligence provisions of the National Security Act of 1947. He expressed concern about the failure of the Joint Inquiry to identify any of the individuals whose decisions, in his view, left the country unprepared on September 11, 2001. He identified several senior Intelligence Community leaders whom he believes should be faulted for inadequate efforts to “overcome the institutional and cultural obstacles to inter-agency cooperation and coordination that bedeviled counterterrorism efforts before the attacks.”<sup>54</sup>

Senator Shelby noted that “the U.S. Intelligence Community is hard-wired to fight the Cold War” and must be more agile and responsive to vague, shifting transnational threats. Nevertheless, he does not argue that the Intelligence Communities should be “hard-wired” to fight terrorists, but rather “*we need an Intelligence Community agile enough to evolve as threats evolve, on a continuing basis.*” Further, “we must not only learn the lessons of the past but learn *how to keep learning lessons as we change and adapt in the future.*” The Intelligence Community must, he suggests, develop “ways to ‘swarm’ personnel and resources from various portions of the Community upon issues of particular importance as circumstances demand.”<sup>55</sup>

In addition, Senator Shelby joined his colleagues in lamenting the lack of coordination and information sharing among agencies. He criticized the dominant role of collection agencies in maintaining control of information as “incompatible

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<sup>51</sup>“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. 4.

<sup>52</sup>Ibid.

<sup>53</sup>Ibid., p. 11.

<sup>54</sup>“Additional Views of Senator Richard C. Shelby, Vice Chairman, Senate Select Committee on Intelligence, September 11 and the Imperative of Reform in the U.S. Intelligence Community,” December 10, 2002, p. 11.

<sup>55</sup>Ibid., pp. 18-19 (italics in the original).

with our intelligence needs in the 21<sup>st</sup> century.” He also supported Admiral Jacoby, the DIA Director, in calling for “information-holders to give analysts ‘deeper’ and less conditional access to data than they have ever before enjoyed, and [he continued] we must equip analysts with the tools needed to ‘mine’ these data-streams for useful information.”<sup>56</sup> He recalled that law enforcement agencies during the 1990s accumulated a great deal of information about Al Qaeda and other terrorist groups that “remained locked away in law enforcement evidence rooms, unknown to and unstudied by counterterrorism (CT) analysts within the Intelligence Community.”<sup>57</sup>

The FBI was a particular target of the Vice Chairman: the Bureau “has shown a disturbing pattern of collapse and dysfunction in its counterintelligence and counterterrorism functions.”<sup>58</sup> Senator Shelby suggested that “some kind of radical reform of the FBI is in order, indeed, is long overdue,” although he did not specifically advocate a new domestic intelligence collection agency.<sup>59</sup>

Senator Shelby also addressed the role of human intelligence (humint) in counterterrorism. Although CIA officials have stated that they had operatives in Afghanistan before September 11, “careful observers should not confuse the periodic infiltration of operations for brief *liaison* meetings with friendly warlords for a real HUMINT or paramilitary presence.”<sup>60</sup> Shelby criticized the excessive dependence on traditional human agents based in embassies whose primary function involves contact with the intelligence services of the host government. There is, he argues, a need for getting “undercover agents out (and at risk) amongst the ‘target’ population.”<sup>61</sup> This, he also suggests, is an area in which the law enforcement agencies have valuable experience from which the CIA could learn.

## An Independent Commission: Possible Issues

With the passage of the Intelligence Authorization Act for FY2003 (P.L. 107-306) Congress approved the establishment of an independent commission to assess the background to the September 2001 attacks.<sup>62</sup> The President signed the legislation on November 27, 2002. A major consideration is providing assurance to the families of victims and the public that the investigation of the background to 9/11 has not been affected by an effort to shield government officials from censure and that all

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<sup>56</sup>Ibid., pp. 37, 36.

<sup>57</sup>Ibid., p. 56.

<sup>58</sup>Ibid., p. 61.

<sup>59</sup>Ibid., p. 76.

<sup>60</sup>Ibid., p. 77.

<sup>61</sup>Ibid., p. 78.

<sup>62</sup>See CRS Report RS21310, *The Intelligence Community and 9/11: Proposals for an Independent Commission*, by Richard A. Best, Jr.

relevant factors have been taken into consideration regardless of the restrictions of security classification.

The independent commission will examine the facts and causes relating to the attacks of September 11 and evaluate the evidence regarding the attacks gathered by all relevant government agencies, making use of information gathered by the Joint Inquiry and other investigations, and report findings, conclusions, and recommendations for corrective measures. The independent commission is expected to secure information from government agencies (by subpoena, if necessary), conduct hearings, and submit findings, conclusions, and recommendations within 18 months.

An independent commission may make a far-reaching study of organizational arrangements for collecting, analyzing, and disseminating information about terrorist threats. It might address the question of whether the DCI should have additional authority to manage intelligence resources to focus on key priorities. This proposal has been made a number of times over the years, and although the DCI's authorities to establish priorities and oversee budget submissions have been strengthened in recent years, a consensus has not yet emerged that the DCI should have direct control of the major intelligence agencies in the Defense Department.

Another issue concerns the appropriate role of intelligence agencies in tracking terrorists who may conduct operations in the U.S. This includes the role of long-established "walls" that separate intelligence and law enforcement that have been partially dismantled by the USA Patriot Act and other legislation. Also, some observers believe that an independent commission could usefully review the relationship of intelligence and information functions in the Department of Homeland Security (DHS) before they become formalized and difficult to alter.<sup>63</sup>

Some believe that the overall relationship between intelligence and law enforcement requires detached scrutiny. Frederick Hitz, a former CIA Inspector General, testified on October 3 that there is a need for Congress to revisit the prohibition in the National Security Act of 1947 against CIA involvement in domestic law enforcement activities since the public will insist that the various agencies cooperate in preventing future terrorist attacks.<sup>64</sup> On the other hand, some observers remain concerned that, although exceptional efforts to gather information on Al Qaeda and some other terrorist groups are justified and widely supported by the public, extensive use of traditional intelligence methods in domestic law enforcement efforts could eventually undermine civil liberties and the entire justice system. As Senator Graham, Chairman of the Senate Intelligence Committee, testified in June 2002:

Finally, I believe that the events of September 11 compel a re-examination of the scope, methodology, and limitations governing domestic collection of terrorism-related intelligence. When, where, and under what circumstances should the

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<sup>63</sup>See CRS Report RS21283, *Homeland Security: Intelligence Support*, by Richard A. Best, Jr.

<sup>64</sup>Testimony of Frederick Hitz, Morning Session of a Joint Hearing of the House and Senate Select Intelligence Committees, October 3, 2002, Federal News Service, p. 18.

government collect intelligence about the activities of U.S. citizens? Of lawful visitors to our Nation? What techniques should be used and what techniques should be prohibited? Is the present government structure, in which the FBI is primarily responsible for collection of intelligence, foreign and domestic, within the United States, adequate? Should we enhance our domestic collection capabilities, and if so, how?

... this is a thorny subject, in which we must balance deeply-held civil liberty and privacy concerns with the need to protect our nation. This will not be easy.<sup>65</sup>

The Joint Inquiry has sought to determine and describe the background to the attacks of September 11, 2001. In describing procedures that may have affected the ability of governmental officials to gain advance notice of the terrorists' plans, the Inquiry focused on testimony that suggested available information in the possession of some agencies was not fully shared with others in a timely manner. Congress and the executive branch have acted in the USA Patriot Act, in other legislation, and in changed administrative procedures to address these issues. Some observers, however, have criticized these changes, arguing that the roles of intelligence and law enforcement are inherently different and that mixing them can undermine the civil liberties of U.S. persons. Some observers suggest that the independent commission, receiving extended testimony from intelligence, law enforcement, and legal experts, could play a useful role in the achievement of a public consensus on the proper balance between needs to protect the nation against international terrorists and to protect civil liberties.

## Conclusion

The final report of the two intelligence committees is expected to be submitted in 2003 after it has been declassified. It will reflect the views of Members, which may not necessarily coincide with the conclusions of the Joint Inquiry staff. It may include judgments on the performance of agencies and their leaders. It may propose changes in the responsibilities of agencies. It will undoubtedly influence the oversight of the counterterrorist effort during the 108<sup>th</sup> Congress. The two committees have, however, already made public a considerable amount of evidence, analysis, and testimony that will support a deeper understanding of the background to the September 11 attacks. The emphasis appears to be focused on a perceived need to bridge the "walls" between intelligence and law enforcement and to encourage the FBI's current concentration on counterterrorism.

The investigations and the assessments of the tragic events of September 11, 2001 have not yet been concluded. Thus far, a number of statutory changes have been enacted and a new Department of Homeland Security has been established. Many observers believe that further changes may be necessary, especially in regard

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<sup>65</sup>Prepared Testimony Before the Senate Governmental Affairs Committee, June 27, 2002, by Senator Bob Graham, D-Florida, Chairman, Senate Select Committee on Intelligence, reprinted in U.S. Congress, Senate, 107<sup>th</sup> Congress, 2d session, Committee on Governmental Affairs, Hearings, *A Review of the Relationship Between a Department of Homeland Security and the Intelligence Community*, S. Hrg. 107-562, June 26 and 27, 2002, p. 195.

to intelligence and law enforcement, to confront what is likely to be a lengthy campaign against the forces of international terrorism. Some believe that there should be more precise statutory protections of civil liberties. The character and extent of any changes remain under discussion.



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