



WASHINGTON LEGISLATIVE OFFICE
Laura W. Murphy
Director

915 15th Street, NW Washington, D.C. 20005
(202) 544-1681 Fax (202) 546-0738

American Civil Liberties Union

Testimony at a Hearing on

“9/11 Commission Recommendations: Counterterrorism Analysis and
Collection – The Requirement for Imagination and Creativity”

Permanent Select Committee on Intelligence

of the

House of Representatives

Submitted by
Timothy H. Edgar
Legislative Counsel

August 4, 2004

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Chairman Goss, Ranking Member Harman and Members of the Committee:

I am pleased to appear before you today on behalf of the American Civil Liberties Union and its more than 400,000 members, dedicated to preserving the principles of the Constitution and Bill of Rights, to explain the ACLU’s views on the recommendations for reform of the intelligence community proposed in the Final Report of the National Commission on Terrorist Attacks Upon the United States (“9/11 Commission Report”).

The 9/11 Commission report exhaustively details significant failures of the intelligence agencies, including the Federal Bureau of Investigation (FBI) and the Central Intelligence Agency (CIA), and proposes major structural changes to address those failures.

The failure to “connect the dots” to prevent the terrorist attacks of 9/11 must rank among the worst intelligence failures in American history. No one doubts the necessity of reorienting an intelligence community built to fight the Cold War to focus on the national security threats of the 21st Century. The ACLU strongly favors reforming the intelligence community in a way that enhances national security, encourages openness, and protects civil liberties.

The 9/11 Commission’s most sweeping proposed solution is a powerful National Intelligence Director (NID) and a National Counter-Terrorism Center (NCTC) that would centralize power over both foreign and domestic intelligence collection agencies in the White House. The way in which the recommendation centralizes power over both foreign and domestic surveillance in the White House raises serious civil liberties concerns.

The NID is given authority, though the NCTC, not only over what intelligence agencies – including the FBI – should collect, but also what actions they should take based on that intelligence. The NID hires the FBI’s Director of Intelligence and the chief intelligence officer of the Department of Homeland Security, one of whom will also be the NID’s deputy for “homeland intelligence.” The proposed structure poses real dangers of rendering the FBI and other domestic agencies subservient to the mindset – and methods – of the CIA and other intelligence agencies that operate overseas.

Putting the intrusive powers of domestic national security surveillance in the hands of a “top spy” at the White House, rather than a “top cop” at the Department of Justice, raises real risks of making sensitive domestic national security investigations a servant of the President’s political or ideological goals.

The last major reforms of the intelligence community were put in place in the 1970’s, in the wake of Watergate, following the revelations of the special Congressional committee led by Senator Frank Church. The Church Committee’s exhaustive post-Watergate investigation found that the problems of illicit spying went far beyond President Nixon.

The Committee found that the intelligence community had been an active participant in highly charge political battles involving the civil rights movement and the Vietnam War. The FBI, CIA, Department of Defense and other intelligence agencies had been involved in widespread spying on ordinary Americans – and illegal covert operations. Most famously, the Church Committee detailed the FBI’s wiretapping of Martin Luther King, Jr., and a covert operation, personally directed by FBI Director J. Edgar Hoover, to use derogatory information derived from those wiretaps to destroy King as a national civil rights leader.

The Church Committee’s final report led to important reforms designed in part to prevent the intelligence community from being misused to serve the political or ideological interests of the incumbent Administration. These reforms included, among other things, the adoption of Attorney General guidelines for the FBI’s national security and criminal investigations, enforcement of the limits on the CIA’s involvement in domestic spying, and internal controls on the National Security Agency’s monitoring of the electronic communications of United States persons.

These reforms of the intelligence community were vitally necessary to ensure that intelligence activities in a democratic society remain under the rule of law. They remain vitally important today, as the public and political pressure to prevent terrorist attacks poses the danger of encouraging intelligence agents to violate fundamental civil liberties and human rights.

The 9/11 Commission should be applauded for avoiding the easy – and wrong – scapegoat of civil liberties and human rights protections for intelligence failures. According to the Commission, pre 9/11 intelligence failures were, largely, failures of analysis and information-sharing. These failures were not the result of legal restrictions that are designed to protect civil liberties, but as a result of a culture and bureaucracy that hoarded information.

As outlined, however, the 9/11 Commission’s recommendations would put too much power in a White House official with access to the agencies of government that spy on Americans. The answer, however, is not to do nothing.

Rather, the answer is to reform intelligence gathering and analysis while incorporating safeguards that will protect civil liberties, and that will respect the special sensitivity of

domestic surveillance. This testimony outlines fifteen such recommendations and explains why they are vital to ensuring intelligence reform does not sacrifice civil liberties.

A New Intelligence Chief Must Be Accountable, Not Political

Intelligence chief should be independent and should not be a White House official. In a democratic society, domestic surveillance must serve the goals of preventing terrorism, espionage and other serious crime, not the political goals of the party in power. As we have learned from past mistakes, the temptation to use the intelligence community to further a political agenda is ever-present.

Misuse of intelligence powers, both foreign and domestic, for political ends can occur under any Administration. Direct White House control of intelligence powers and access to sensitive intelligence files have been responsible for serious mistakes that undermine civil liberties and accountability, and have lessened the confidence of Americans in their government.

- **Watergate and other Nixon spying abuses.** Under Richard Nixon, the worst spying abuses were a result of efforts – directed by White House staff with intelligence backgrounds calling themselves the “plumbers” – to spy on political and ideological opponents. The plumbers conducted a warrantless secret search of a doctor’s office to obtain medical records involving national security whistleblower Daniel Ellsberg. White House staff also directed covert wiretaps of journalists – such as columnist Jack Anderson – and other prominent persons, without the knowledge of FBI Director J. Edgar Hoover. President Nixon also ordered a secret search (never carried out) of the Brookings Institution, which he regarded as a symbol of the “Eastern Establishment” hostile to his political agenda. The Watergate break-in itself was a direct outgrowth of these and many other spying activities directed from the White House.
- **Iran-*contra*.** Under Ronald Reagan, a covert operation conducted by National Security Council staff member Lt. Col. Oliver North led to the most serious crisis of Reagan’s presidency when it was revealed that the operation involved trading arms for hostages and using the proceeds to provide assistance to Nicaraguan rebels. The use of White House staff was intended to bypass the intelligence community in pursuit of a highly controversial Reagan Administration policy that Congress had specifically banned.
- **Filegate.** Under Bill Clinton, White House political staff obtained hundreds of confidential FBI files on prominent Republicans that had been created from extensive background checks designed to protect national security. The resulting “Filegate” scandal represented a serious abuse of an FBI security investigation process for political ends and was a major controversy that distracted attention from the President’s policy agenda.

In spite of these lessons, the 9/11 Commission's recommendations place effective control over the intelligence community – including parts of the FBI, Department of Homeland Security, and other agencies that exercise domestic surveillance powers – in the Executive Office of the President (the White House) and fail to include any mechanism (such as a fixed term) to ensure the National Intelligence Director's autonomy. The proposal seriously increases the risk of spying for political ends.

As proposed by the Commission, the NID's powers would include:

- The power to submit a unified budget for national intelligence, including for domestic surveillance programs,
- The power to approve and submit nominations to the president for the chiefs of all the composite intelligence agencies, including the FBI's Director of Intelligence and the principal intelligence official at the Department of Homeland Security.
- The power to set personnel policies to establish standards for education and training, including within domestic agencies.
- The current authorities of the Director of Central Intelligence (DCI) as head of the intelligence community, including the power under the USA PATRIOT Act to set "requirements" for FBI wiretaps and other intelligence surveillance within the United States.

The NID would also replace the DCI as the principal adviser to the President on intelligence matters affecting the national security. The NID would be located in the Executive Office of the President, but would be subject to Senate confirmation.

The NID would oversee a number of national intelligence centers, housed in disparate agencies, assigned to track particular national security concerns like counter-proliferation, narco-trafficking or relations with China.

The NID would also appoint three deputy NIDs for foreign intelligence, military intelligence, and homeland intelligence:

- The Director of the CIA, who would also serve as the deputy NID for foreign intelligence,
- The Undersecretary of Defense for Intelligence, who would also serve as the deputy NID for military intelligence, and
- The deputy NID for homeland intelligence, who would either be the FBI's Director of Intelligence, or the Director of the Department of Homeland Security's infrastructure and intelligence office.

Within the Executive Office of the President, the NID would take the reins of a powerful new National Counter-Terrorism Center (NCTC), which would take over the terrorism intelligence analysis responsibilities of the Terrorism Threat Integration Center (currently run by the DCI). The NCTC would also have the explicit power to “task” collection for intelligence agencies and to plan intelligence operations.

The proposed structure centralizes too much power over both foreign and domestic intelligence in the White House, and risks a re-run of the mistakes that led to Watergate, *Iran-contra*, “Filegate,” and other significant abuses of Presidential power.

The placement of the National Intelligence Director in the White House could also frustrate Congressional oversight. White House officials have long received, on separation of powers grounds, far less scrutiny from Congress than agency heads and other Executive Branch officials. White House officials are not usually subject to Senate confirmation and do not usually testify before Congress on matters of policy. Executive privilege may be claimed as a shield for conversations between the President and his advisors from both Congressional and judicial inquiries.

The controversy over whether Condoleeza Rice, President Bush’s national security advisor, could or should testify publicly before the 9/11 Commission is an excellent example of how the prerogatives of the President with respect to White House advisors can complicate oversight by Congress and other investigative bodies.

President Bush announced on Monday, August 2, a proposal for a national intelligence director that is not a White House or Cabinet official, but instead heads an independent office. Likewise, bills proposed by leading Democratic members of the House and Senate intelligence committees do not make that person a White House official.

Rep. Jane Harman, the ranking member of this Committee, has introduced legislation to create a “Director of National Intelligence.” Like President Bush’s proposal, H.R. 4140, the “Intelligence Transformation Act,” places the new intelligence director in an independent office, not the White House. The leading Senate legislation takes the same approach.¹

The placement of the intelligence community under effective White House control could politicize intelligence activities. The National Intelligence Director and the National Counter-Terrorism Center, if they are established, should be accountable to the President, but they should not be servants of the President’s political or ideological agenda.

Pitfalls of greater power for head of the CIA. Chairman Porter Goss (R-FL) has introduced a different intelligence reorganization bill, H.R. 4584, the “Directing Community Integration Act.” The Goss bill rejects a new intelligence director and

¹ Senate bills include S. 190, the “Intelligence Community Leadership Act of 2003,” sponsored by Senator Feinstein (D-CA) and S. 1520, the “9-11 Memorial Intelligence Reform Act,” sponsored by Senators Graham (D-FL), Feinstein (D-CA) and Rockefeller (D-WV).

instead enhances the powers of the DCI over community-wide responsibilities, including domestic collection of intelligence, while leaving the DCI as the head of the CIA.

The Goss bill is, in some respects, even worse than the Commission's proposal for a White House NID, because it contemplates much greater involvement of the DCI – the head of a foreign intelligence agency – in domestic intelligence matters. The Goss bill would even go so far as to render toothless the current prohibition on CIA involvement in domestic activities by amending it to bar “police, subpoena, or law enforcement powers within the United States, *except as otherwise permitted by law or as directed by the President.*”²

The person who is charged with overseeing the activities of the intelligence community – the fifteen agencies across the government designed to ensure policymakers have access to accurate, timely information about threats to the nation's security – should not be a White House or Cabinet official who answers to the President's political and ideological agenda. Giving more direct domestic spying powers to the head of the CIA – a foreign intelligence agency with methods and tactics wholly inappropriate for domestic use – is no answer either.

Recommendation #1: The National Intelligence Director (NID) should not be a Cabinet or White House official and the National Counter-Terrorism Center (NCTC) should not be placed in the Executive Office of the President, nor should stronger community-wide powers be given to an official who continues to head the CIA. A new head of the intelligence community, if one is created, should instead head an independent Office of the Director of National Intelligence.

Intelligence chief should be independent, subject to Congressional oversight, and serve a fixed term. Congress must ensure that the National Intelligence Director is appointed by and with the advise and consent of the Senate, and that the NID will regularly testify before Congress. The Office of the NID and the NCTC must also be answerable to Congress. Congress must make clear that key officials will be asked to testify and that the NID and the NCTC are expected to provide answers to questions, relevant documents, and cooperate with Congressional inquiries.

The Commission recommends that the Director of the CIA should serve a fixed term, like the Director of the FBI, that does not coincide with the President's term. The FBI Director's tenure provides some insulation from partisan politics, and helps protect the FBI's image as a servant of the American people, not of the party in power. Insulating the CIA further from political pressure is a welcome step.

However, ensuring a powerful intelligence chief – who will wield substantial authority over the CIA, FBI and other agencies – is independent and respected across party lines and ideological divides is equally vital. Of course, the President should – as with the FBI Director and other nonpartisan officials – retain ultimate authority to dismiss the NID for

² H.R. 4584 § 102(a) (amending 50 U.S.C. § 401-1(c) and repealing § 403-3(d) (emphasis added).

cause, but the National Intelligence Director should not be a part of the President's political "team."

Ensuring the intelligence community works well together is an extremely important responsibility that must remain above partisan politics or the appearance of serving an ideological agenda. The President should, of course, appoint the National Intelligence Director, with Senate approval, and should retain the power to fire the director for poor performance. As with the head of the FBI or the Chairman of the Federal Reserve Board, however, the director should serve a fixed term that does not coincide with the President's term.

An analogy to the Chairman of the Federal Reserve Board may help illustrate why a fixed term would strengthen, not weaken, the intelligence agencies. The independence of the federal reserve board does not mean monetary policy is a less important function of economic policy than spending and taxation. Rather, it reflects the critical need to insulate decisions over the money supply from partisan politics. Interest rates have economic implications, but pose a serious temptation for political manipulation to serve the reelection interests of the incumbent administration. As a result, these decisions are thought to pose a unique risk that requires a federal reserve board with political independence.

Likewise, intelligence judgments – such as the risk posed by terrorism or weapons of mass destruction – are equally subject to a danger of political manipulation. Creating a fixed term for the director of the CIA does not solve this problem if a more powerful national intelligence director remains subject to dismissal at the President's pleasure and is part of the President's political "team."

Recommendation #2: The National Intelligence Director must be subject to Senate confirmation and Congressional oversight, and should, like the Director of the CIA, have a fixed term that does not coincide with that of the President.

Make Sure a "Top Cop," Not a "Top Spy," Is in Charge of Surveillance Operations within the United States

FBI intelligence director should remain answerable to FBI Director, not to head of the intelligence community. The United States has – historically and to the present day – entrusted the domestic collection of information about spies, terrorists, and other national security threats to federal and state law enforcement, with the FBI playing the most important role. The reason is simple: Americans do not believe the government should investigate you if you are not involved in a crime – if your activities, however unpopular, are not illegal.

For this reason, the CIA – a pure spy agency with no law enforcement functions – has been barred from domestic surveillance ever since it was created by the National Security Act in 1947. President Truman – a strong opponent of Communism and a hawk on security – shared the concerns of many Americans about the CIA's establishment as a

peacetime agency. Truman believed that a permanent secret spy agency could, if allowed to operate on American soil, use espionage techniques – including blackmail, extortion and disinformation – against American citizens who were critical of government policy or the incumbent administration, but had broken no law. With Truman’s support, the National Security Act, sometimes described as the CIA’s “charter,” contains a prohibition – which stands today – on the CIA’s exercising any “police, subpoena, or law enforcement powers or internal security functions.”³

Truman’s concerns were not just with bureaucratic turf – whether the FBI or the CIA was the lead agency in collecting information about national security threats within the United States. Truman believed that the domestic collection of information about national security threats should generally be handled as a law enforcement matter. Indeed, Truman often clashed with FBI Director Hoover over whether the FBI had any business using break-ins, illegal wiretaps, and other spy techniques, at one point saying Hoover’s advocacy of such methods risked transforming the FBI into the equivalent of the Gestapo.⁴ Truman did not just want to prevent the CIA itself from operating on American soil – he wanted to ensure that a CIA-style agency did not become dominant in domestic collection of intelligence about national security threats.

The “tools” of foreign intelligence agents include break-ins (also called “black bag jobs”), searches and surveillance outside the oversight of a traditional warrant process that requires probable cause of criminal activity, infiltration and spying on lawful political activity, and “dirty tricks” including extortion, bribery and blackmail. These spy techniques operate – and are designed to operate – outside the normal laws of any given society and its system of checks and balances.

The American system of government, with its high respect for the autonomy of the individual, simply cannot tolerate the use of many such techniques domestically, on its own citizens or residents. While the use of intelligence techniques in foreign countries must also be subject to controls, the operations of a democratic government that spies on the very citizens from which it derives its legitimacy poses special concerns for civil liberties. Secret domestic surveillance and operations directed at political, religious or ideological groups can, if they are not cabined by a focus on individuals and organizations involved in serious criminal activities, easily be misused to serve the interests of the party in power against its political opponents and critics.

The 9/11 Commission proposes that the NID hires both the FBI’s Director of Intelligence and the intelligence chief of the Department of Homeland Security, either of whom may serve as the deputy NID for homeland intelligence. This proposal is very problematic. The Commission proposal puts the FBI’s intelligence capabilities in the hands of a super-spy who could involve in domestic spying officials of the CIA and other agencies that use the methods of agencies that operate overseas – such as break-ins, warrantless surveillance, or covert operations.

³ 50 U.S.C. § 403-3(d)(1).

⁴ See Curt Gentry, *J. Edgar Hoover: The Man and the Secrets* (2001).

Under Executive Order 12,333 (Dec. 4, 1981), which sets out the powers and responsibilities of the intelligence agencies, any domestic activities of foreign intelligence agencies, including the CIA, must be carried out in coordination with the FBI. These activities are subject to procedures approved by the Attorney General, and those procedures generally must prohibit the CIA and other foreign intelligence agencies from engaging in intrusive surveillance techniques, like wiretaps and physical searches. The Executive Order also makes clear that, because of the special sensitivity of domestic surveillance, the FBI and the Attorney General have the responsibility to coordinate and approve procedures to supervise domestic surveillance of any other intelligence agency.

While a NID could play a role in coordinating the activities of the Intelligence Community, the NID should not be given, as the Commission's proposal currently contemplates, what amounts to control over targets of intelligence collection within the United States. That should remain the responsibility of the FBI Director, under the supervision of the Attorney General.

Recommendation #3: To ensure the FBI retains control of domestic surveillance operations, the head of the FBI's intelligence operations must report to the FBI Director and the Attorney General, not to the National Intelligence Director or another intelligence official.

Domestic surveillance guidelines must bar political spying. The FBI's own mistakes and missteps show the dangers of a powerful government agency that uses its investigating authority without regard to whether the subjects of its investigations are involved in criminal activities. To a large degree, these abuses were the result of the FBI's unique lack of accountability to the courts, Congress and even the Attorney General under the direction of FBI Director J. Edgar Hoover.

Some will argue that the record of Hoover's FBI proves that entrusting the domestic intelligence mission to a law enforcement agency like the FBI is no guarantee of respect for civil liberties. They are right that any government agency charged with the collection of intelligence about national security threats may (and, inevitably, will) abuse its powers. They are wrong in arguing that the risk of abuse is no greater when the agency's intelligence mission is seen as a function altogether different than its law enforcement investigations and one that effectively operates outside the constraints of an agency that looks at specific cases of individuals and organizations involved in serious criminal behavior.

Today, as a result of the Church Committee reforms, the FBI operates under both internal and external controls that constrain its criminal and national security investigations. These controls are designed to ensure that its intrusive intelligence-gathering and criminal surveillance powers are directed at organizations involved in criminal activities and at the investigation of foreign agents and not at lawful political, religious and other First Amendment activities.

Putting the FBI's intelligence director under the control of an intelligence official could seriously erode civil liberties. Intelligence methods overseas do not following investigative guidelines, do not have to comply with constitutional rights, and provoke no controversy when they put foreign political and religious groups who are breaking no law under surveillance. The FBI is different – and it should remain so.

Guidelines for FBI investigations. For criminal investigations of organized crime or domestic terrorism, Attorney General guidelines restrict the use of most surveillance techniques – such as tracking mail, following suspects, and interviewing witnesses – to situations where there is at least some indication of criminal activity. These guidelines were weakened, following September 11, to allow FBI agents to visit, on a clandestine basis, political and religious meetings that are “open to the public” without any such indication. The ACLU and many members of the House and Senate judiciary committees opposed this change. Most other investigative techniques still do require at least some indication of crime

National security investigations are governed by separate guidelines, important parts of which are secret. The guidelines do not require probable cause of crime but are, in theory, designed to restrict national security investigations to circumstances in which there is some indication of hostile activity by an agent of a foreign power – such as a foreign government or international terrorist organization. The most intrusive national security investigations – those that involve physical searches or electronic eavesdropping – must also at least “involve” some possible criminal activity when the subject of the investigation is a United States citizen or permanent resident, although this falls far short of the constitutional standard of criminal probable cause.

Investigative guidelines, and the law enforcement and case-orientation of the Bureau, are vitally important to preserving civil liberties. The government argues that a number of highly intrusive intelligence gathering techniques – including collecting files on individuals and groups, physical surveillance in public places, and tracking the sender and recipient of mail, telephone and Internet communications – are not constitutional “searches” subject to the Fourth Amendment's probable cause standards. As a result, for investigations using such techniques, it is only the guidelines and case-oriented structure of the investigating agency that protects against widespread spying on lawful political and religious activities.

The Constitution and the exclusionary rule. For those intrusive techniques that the government concedes are searches – including electronic eavesdropping of the content of communications and searches of a person's home or office – the Fourth Amendment and federal statutes plainly require court approval based on probable cause. However, the Fourth Amendment's principal remedy, the exclusionary rule that provides illegally-obtained evidence may not be used in court, does nothing to hinder illegal searches and wiretaps if the government does not plan to use the information in a prosecution.

The exclusionary rule could cease to have any real force as a protection against clear violations of constitutional rights – including the Fourth Amendment, and the Fifth

Amendment's restrictions on torture or other coercive interrogation methods – under the President's claim of authority to detain suspected terrorists as "enemy combatants." If the FBI or other agencies are encouraged to use CIA methods including break-ins, warrantless wiretaps, or interrogations that violate the Constitution on American soil, it could simply use the information to decide who might be indefinitely detained without trial as an enemy in the war on terrorism.

The danger is certainly exacerbated by putting the FBI's intelligence operations in the hands of the government's "top spy" instead of its "top cop." The FBI Director could, of course, direct abuses on the theory that the information is to be used for intelligence purposes rather than criminal prosecution and so need not be gathered legally. The danger would be far greater, however, if the FBI's national security operations are under the effective control of intelligence officials who are used to operating entirely outside the constraints of the exclusionary rule.

Criticism of the FBI's case-oriented approach. Critics of placing the FBI in charge of domestic national security surveillance argue that the case-oriented mindset of a law enforcement agency cannot be reconciled with quality intelligence analysis. While the FBI concerns itself with gathering information of relevance to particular cases, they argue, intelligence analysts must be looking more broadly to see how specific data fits into the "big picture" of a national security threat.

This critique sweeps too broadly because it fails to recognize the difference between two very different kinds of cases. The FBI not only investigates particular crimes – generally, crimes that have already occurred and must be "solved" – it also opens "enterprise" investigations of organized crime and terrorism. Enterprise investigations put an entire criminal organization, such as the Mafia, a major drug gang, or a terrorist organization such as Al Qaeda or Hamas, under investigation. FBI investigators are not limited to the investigation of specific crimes committed by the organization, but are instructed to gather intelligence information and analyze it to find out the "big picture" of how the organization works in order to prevent future crimes.

For example, in investigating a domestic funding network for Al Qaeda as a possible criminal enterprise, the FBI is not limited to investigating whether the organization was involved in funding specific terrorist bombings or other attacks, such as the 1998 embassy bombings in Africa, the 1999 bombing of the U.S.S. Cole, or the September 11 attacks. Rather, the FBI has authority to investigate the organization as an enterprise, and to fit together bits of information that help prevent future terrorist attacks, not just gather information about past crimes. The FBI's failures in analyzing information about Al Qaeda's domestic activities are not a result of flaws in the basic concept of an enterprise investigation; rather, they appear to be the result of a combination of other failures that must be addressed on their own terms.

Of course, even an enterprise investigation has – and should have – limits. The rules for enterprise investigations reflect the reality that such investigations pose greater risks for civil liberties because they are not linked to particular crimes. Under the rules, an

enterprise investigation of a specific group suspected of aiding Al Qaeda cannot – and should not – morph into a broad intelligence gathering exercise directed at mosques or Islamic community centers where there is no indication of any criminal activity or involvement of an agent of a foreign power. To this extent, however, the FBI’s case-oriented approach (understood to include “enterprise investigations”) is precisely what prevents an enterprise investigation from becoming a massive effort to spy on lawful political, religious or other First Amendment activities. Abolishing that approach would be a serious mistake.

Recommendation #4: The FBI Director and the Attorney General should have the responsibility to ensure that the guidelines and rules that govern domestic surveillance in both criminal and national security investigations are followed. The guidelines must be strengthened. While they may continue to allow “enterprise investigations” of criminal organizations including foreign and domestic terrorist organizations, they should clearly prohibit domestic spying on First Amendment-protected activity.

Intelligence chief should not have control of targets of domestic surveillance. The Commission proposes a powerful new National Counter-Terrorism Center under the authority of the NID. The Center, while not a domestic collection agency, would be structured like the CIA. The Center would have separate divisions for “intelligence” and “operations.” It would have the authority to “task collection requirements” and to “assign operational responsibilities” for all intelligence agencies – including the FBI – and to follow-up to ensure its mandates are implemented.

The Center’s power over both intelligence collection and operations throughout the intelligence community could pose grave risks of encouraging espionage and covert operations techniques on American soil. The Center’s tasking and strategic planning functions would extend not only to the FBI’s national security investigations, but also to other domestic agencies, including the Department of Homeland Security, with immigration, border control and transportation security functions.

Likewise, the some of the powers of the NID and the Center over the intelligence agencies of the Department of Defense – the largest agencies, consuming the large majority of the intelligence community’s budget – could have domestic implications. The Department of Defense, after September 11, established a powerful regional Northern Command (NORTHCOM), led by a four-star general, with responsibility for the domestic United States (together with Mexico and Canada).

NORTHCOM already has a military intelligence unit, which raises serious questions under the Posse Comitatus Act – the law that limits military involvement in domestic affairs. Under the proposed structure, the NID and the Center could have what amounts to control of the domestic intelligence operations of civilian federal law enforcement and of the NORTHCOM intelligence unit, creating a real risk of blurring the military and civilian functions.

The potential for a “CIA culture” to become embedded in domestic agencies is already present in a post-9/11 environment in which the FBI and CIA work closely together to monitor international terrorist organizations that may be present both abroad and within the United States. The risk has been further exacerbated by the USA PATRIOT Act, which removes important judicial controls on information-sharing between intelligence and law enforcement operations, and which already gives the DCI explicit authority to set intelligence collection requirements for the FBI’s use of FISA authorities. *See* 50 U.S.C. § 403-3(c)(6).

The establishment of the Terrorist Threat Integration Center (TTIC), which brings together FBI and CIA analysts within the Office of the DCI, also increases the risk of the CIA’s effectively running the domestic intelligence show. However, the Center’s responsibilities go far beyond the analysis function of TTIC to explicitly include tasking, planning, and operational functions.

Recommendation #5: The powers of the NID and the National Counter-Terrorism Center should be specified by a statutory charter that prohibits powers not authorized and requires the NID to observe guidelines to protect against domestic spying on First Amendment activity. Explicit, enforceable statutory language should make clear that the NID does not have what amounts to operational control of targets of domestic surveillance, whether directly or through the NCTC.

No domestic intelligence “operations” should be allowed outside legal system. Perhaps the most far reaching power of the National Counter-Terrorism Center is its authority to plan and direct intelligence “operations” throughout the intelligence community. If the NID and the NCTC are created, it must be made clear that information derived from domestic surveillance is only to be used within the bounds of the legal system, and cannot be used for domestic “operations” outside that system. Political or religious organizations or community leaders suspected of involvement in terrorism or other serious crime should be prosecuted, not left to languish in indefinite detention as “enemy combatants” stripped of their constitutional rights or “neutralized” through intelligence disruption campaigns.

The most serious abuses of the FBI’s intelligence gathering powers were a direct result of a culture, dominated to a remarkable degree by the extraordinary decades-long tenure of FBI Director J. Edgar Hoover, that gathered and used information outside the legal system to disrupt the lives of organizations and individuals. Hoover’s legendary files, amassed using FBI surveillance resources, included deeply personal, derogatory information about members of Congress, high Executive Branch officials, and other prominent persons.

Hoover successfully used the threat of revealing such information, when necessary, to render himself and the FBI largely immune from scrutiny by Congress and the press, and even from effective control by the Attorney General. Under Hoover, the FBI became dangerously indifferent to the need to focus its criminal investigations on criminal

activity and to focus its national security investigations on real, rather than imagined or ephemeral, agents of hostile foreign powers.

The FBI's COINTELPRO operations – “counterintelligence” programs that both gathered intelligence and used that intelligence to disrupt perceived national security threats – led to extremely serious abuses of power. These abuses included the illegal wiretapping of Martin Luther King, Jr. and the infiltration of scores of social, political and religious groups that opposed government policy, as well as “dirty tricks” campaigns to exploit damaging information without exposing the FBI's sources and methods in a criminal prosecution. Probably the most indefensible of the “dirty tricks” was the anonymous note sent by FBI agents to Dr. King threatening the exposure of his personal life and urging him to commit suicide to avoid it. While the wiretapping of Dr. King is admittedly an extreme example, similar “dirty tricks” were used in other FBI operations directed at a host of organizations on both the right and the left that Hoover regarded as subversive.

The COINTELPRO programs were initially rationalized as attempts to counter what Hoover perceived as the influence, or possible influence, of the Soviet Union on the civil rights and anti-war movements. However, a lack of internal or external controls – and the FBI's failure to observe a case-oriented mindset – led to the continuation of these highly intrusive operations without any real evidence of involvement of a genuine agent of a foreign government or organization and without an indication of criminal activity. In other words, the FBI's most serious abuses of civil liberties occurred precisely when its top leadership forgot it was a law enforcement agency operating to enforce and uphold the law – not a freestanding security or spy agency designed to counter those individuals and groups whose views seemed, to the government officials, to be dangerous or un-American.

Recommendation #6: The National Intelligence Director and the National Counter-Terrorism Center should not be permitted to direct or plan intelligence “operations” within the United States. Domestic use of intelligence information must remain bound by the legal system.

Make the Intelligence Community Open and Accountable

As the 9/11 Commission observes, structural reform of the intelligence community will not by itself solve basic intelligence deficiencies that contributed to recent intelligence failures. Substantive reforms – including strong internal watchdogs and a civil liberties board, a reduction in excessive secrecy, an increase in real public and Congressional oversight, and stronger efforts to incorporate dissenting views into analysis – must be adopted to prevent future intelligence breakdowns.

The investigations into pre 9/11 intelligence failures, and the failure to find WMD in Iraq, have shown that poor analysis and information sharing, not a lack of collection that resulted from excessive judicial review or other civil liberties protections, was at the heart of recent intelligence failures. Moving around boxes on the organizational chart will not

solve intelligence problems without a major effort to improve oversight and accountability.

Strong internal watchdogs. Proposals to reform the intelligence community have included the creation of an Inspector General for the intelligence community. The Inspector General would have significant investigative powers, including subpoena power, that would aid internal investigations. An Inspector General for the intelligence community would report directly to the National Intelligence Director and, as a result, could be a more powerful, and more independent, watchdog than the inspectors general that currently have jurisdiction over each of the fifteen intelligence agencies.

A strong Inspector General should conduct investigations into waste, fraud and abuse, and also can investigate civil liberties abuses that violate law or policy. For example, after the round-up of hundreds of men, of Muslim and Arab background, on immigration charges following September 11, the Department of Justice Inspector General conducted a thorough inquiry that uncovered serious abuses of civil liberties. The IG's report also recommended reforms to prevent such abuses from occurring again.

Civil liberties protection board. The 9/11 Commission should be commended for recognizing the need to protect civil liberties and endorsing an independent watchdog board to strengthen oversight throughout the government. While various entities and offices within the Executive Branch, such as inspectors general, officers for civil rights and privacy, and oversight boards, are charged with policing certain departments, agencies or programs, no one board has the responsibility for ensuring that civil liberties are not compromised by the need for enhanced security.

The need for such an independent, nonpartisan voice is clear. The Commission recommends putting the burden of proof on the government to show the need for new security powers, such as those enacted by the USA PATRIOT Act, but there is no reliable, independent agency that performs this function. The Commission did not, however, set forth any specific proposals with respect to what a civil liberties board could do.

Critical questions need to be answered thoughtfully if a civil liberties board is to have real authority. Without real authority to investigate abuses and propose specific corrections, the board will be worse than useless. The board will simply be window dressing designed to sooth fears over civil liberties without providing any real protection.

Questions that must be answered include the following:

1. How are the members of the Board chosen? Will experience in civil rights and civil liberties, government oversight, and constitutional law be a requirement?
2. What will the Board's powers be? Will they include subpoena power, and the power to examine sensitive government documents, including highly classified information?

3. Will the Board investigate individual cases, or only systematic failures, programs or matters of policy?
4. What will be the Board's relationship to other internal watchdogs, such as inspectors general, civil rights offices, and other oversight boards?
5. What will be the Board's relationship to the courts?
6. Will the Board have the power to question national policies, like a policy of fingerprinting all foreign visitors, or will it be limited to examining how policies are implemented?
7. Will the Board have the power to make criminal referrals? Will it have the power to recommend a special or independent counsel?

These questions must be thoroughly addressed and incorporated into legislation that creates a strong civil liberties protection board. The Board should be seen as an integral part of the 9/11 Commission's recommendations.

Recommendation # 7: The Commission recognized its recommendations could increase government intrusion on civil liberties and urged strong oversight. Congress should not act to reorganize the intelligence community without also implementing the Commission's proposals for strong internal watchdogs and an effective civil liberties protection board.

Scale back excessive secrecy. As the 9/11 Commission report recognized, excessive classification – not civil liberties protections – almost certainly represents the greatest barrier to effective information sharing. As the report states, too often the attitude has been that “[n]o one has to pay the long-term costs of over-classifying information, though these costs . . . are substantial.” The report laments an outdated, Cold War-era “need to know” paradigm that presumes it is possible to know, in advance, who requires access to critical information. Instead, it recommends a “‘need-to-share’ culture of integration.”

The 9/11 Commission joins its predecessor, the Congressional Joint 9/11 Inquiry, in recognizing serious costs to national security of an obsession with official secrecy. This is a welcome shift, because prior to September 11, oversight of excessive classification was largely regarded as an issue of interest for civil libertarians, historians and archivists. As the 9/11 Commission points out, the CIA's overly aggressive hoarding of information was a contributing factor to the intelligence failures that lead to September 11. The Commission's criticism of excessive secrecy is certainly on the mark.

“Groupthink” led to some in the government discounting the possibility that Al Qaeda terrorism was directed at the United States, rather than overseas. According to the Senate Select Committee on Intelligence, groupthink was also the major culprit behind the intelligence failures regarding Iraq's WMD programs. Groupthink cannot be challenged in secret. Public pressure – including the media and public interest groups – can challenge government agencies to reassess their assumptions.

Unfortunately, the Bush Administration has moved in the opposite direction – towards greater secrecy. President Bush's Executive Order on classification, issued after

September 11, not only extended a deadline for automatic declassification of old documents, it actually reversed a presumption against classification without good reason that was put into place by President Clinton in 1995 as a signal to agencies that their classification decisions should have stronger justification.⁵

Recommendation #8: A presumption against classification without good reason was contained in Executive Order 12958 but has been rescinded. As a first step in reforming an outmoded system of secrecy designed for the Cold War, the presumption should be reinstated.

Protect public access to information. “Need-to-share” cannot be limited to agencies within the government or defense and homeland security contractors, but also must include, to the greatest extent possible, sharing relevant information with the public. Congress and the Administration have created, through the Homeland Security Act, an entirely new category of information that is withheld from public view – sensitive but unclassified (SBU) information. While the 9/11 Commission criticizes excessive secrecy, it also endorses establishing a “trusted information network” for sharing of unclassified, but still nonpublic, homeland security information.

The Commission’s calls for greater openness and sharing of information will not be effective if it succeeds only in adding another set of complex secrecy rules designed to limit public access to “homeland security information” on top of the existing classification regime. New categories of secret information – including “sensitive but unclassified,” homeland security information, or information in a new “trusted information network” – may succeed only in replacing one unwieldy secrecy regime with another.

Government and industry have succeeded in adding exemption after exemption to the Freedom of Information Act and its state counterparts, often on the basis of dubious claims that keeping security flaws secret will aid homeland security. In fact, keeping these flaws secret has often had the opposite effect, by shielding government and industry from the public pressure that would prompt action to fix security flaws.

The need for government and industry to keep critical infrastructure information from the public must be balanced against the public interest in access to critical oversight information. Oversight is rarely successful if it is not accompanied by substantial public pressure for action. Early and active oversight can also correct civil liberties abuses, such as mistreatment of detainees, before they grow into major scandals that damage America’s credibility in the world.

Recommendation #9: The Freedom of Information Act should be amended to require courts to balance the public’s need to have access to information that is critical for oversight of government – such as serious security flaws, or civil liberties

⁵ Further Amendment to E.O. 12958 (March 25, 2003); See Adam Clymer, *U.S. Ready to Rescind Clinton Order on Government Secrets*, N.Y. Times, March 21, 2003.

abuses such as the mistreatment of detainees – against government claims that the information is exempt from disclosure.

More information on domestic surveillance. The Commission calls for a debate on the USA PATRIOT Act, putting the burden on the government to show why a given power is needed. However, the government still takes the position that its use of surveillance authorities under the Foreign Intelligence Surveillance Act (FISA) is classified, and that the public's right to know only extends to the total number of surveillance applications made and the total number of orders granted. There can be no meaningful debate on the government's use of the USA PATRIOT Act, which expanded FISA surveillance powers, without any publicly-available objective data on such basic matters as how many surveillance orders are directed at United States persons, how many orders are for electronic surveillance, how many are for secret searches of personal records, and so on.

Senators Leahy, Specter and Grassley have introduced legislation that would provide more public information about the use of FISA, and would ensure that significant interpretations of law by the FISA court are released in public form. Rep. Joe Hoeffel has introduced a similar measure, H.R. 2429, the Surveillance Oversight and Disclosure Act of 2003.

Recommendation #10: Congress should enact S. 436, the Domestic Surveillance Oversight Act, or H.R. 2429, the Surveillance Oversight and Disclosure Act, as a first step towards making more information about the use of FISA available to the public.

Bipartisan panel to overhaul classification system, referee disputes. Finally, the Congress should enact S. 2672, introduced by Senators Trent Lott (R-MS) and Ron Wyden (D-WA), the "Independent National Security Classification Board Act of 2004." An identical bill, H.R. 4855, has been introduced in the House.

The bill would create a bipartisan board, appointed by the President and members of Congress, to review and reform classification rules. The board should consider whether a complex system of government secrets that has grown to include layers upon layers of bureaucratic rules is the best way to safeguard the national security, and recommend real reforms.

The board would also have the power to recommend declassification of documents over an agency's objection, either on its own initiative or when requested to do so by an inspector general or by certain members of Congress. The board would be a neutral arbiter that could resolve disagreements between the executive and legislative branches. For example, the board could have considered whether information about the involvement of prominent Saudis in the funding of the September 11 attacks should have been deleted from the public version of the final report of the Joint Inquiry of the House and Senate Intelligence Committees into the September 11 attacks.

Under the legislation, the President would retain the final authority to decide whether to release such information, effectively wielding a veto over the bipartisan board. Congress should consider giving the board greater authority. In addition, the Senate Select Committee on Intelligence should consider using its power, under the Senate rules, to ask the Senate for a vote to force the release of classified information. This power, which has never been used, could be an effective check if the President does not take seriously the recommendations of the bipartisan board.

Recommendation #11: Congress should enact S. 2672, the Lott-Wyden bill establishing a bipartisan classification review board, or its House counterpart, H.R. 4855. Congress should consider enhancing the board’s power to release improperly classified documents. The Senate Select Committee on Intelligence should also make clear it will wield its existing power under the Senate rules as an effective check against intransigence by the President in releasing classified information that the board recommends to be released.

Improve congressional oversight. The 9/11 Commission called for Congressional oversight to be greatly improved, calling the current structure “dysfunctional.” As the Commission made clear, the establishment of a Senate and House committee devoted to intelligence matters does not provide effective oversight when hearings – even hearings on legislative matters – are almost always closed to the public. Committee staff are often drawn from the intelligence community. Members of Congress face competing demands for their time and attention and strengthening oversight is as essential as the restructuring itself.

Recommendation #12: The intelligence committees should hold far more open hearings. The annual hearings on legislation authorizing the intelligence community – as well as other legislative hearings – should be open to the public.

Make intelligence budget public. Perhaps the most inexplicable example of excessive secrecy that frustrates real accountability is the continued insistence by the intelligence community on keeping basic information – even information that is widely known or guessed – classified. Even the overall amount of money budgeted for intelligence activities, which is widely reported as being approximately \$40 billion, is classified as is the amount of money budgeted for components of the intelligence community. At least these numbers, and other information that would help the public know how its dollars are being spent, should be made available.

As a general rule of responsible governing, taxpayers have a right to know what their tax dollars support. The Constitution provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures shall be published from time to time.” One way to promote accountability, and to help properly define the role of the intelligence agencies through public debate, is to let the public know what surveillance and other programs cost.

Recommendation #13: The intelligence budget should be made public as the Commission recommends.

Retain judiciary committee jurisdiction. The Commission's other recommendations include investing the intelligence committees, or a joint committee of both Houses of Congress, with authorizing and appropriations powers over the intelligence communities. This proposal should be approached with caution. Limiting the number of committees with jurisdiction over the intelligence community may frustrate oversight instead of enhancing it. If the single committee with jurisdiction over intelligence does not ask probing questions concerning a given program or policy, there will no longer be the potential for another committee to fill the void.

Most importantly, the judiciary committees of the House and Senate must retain concurrent jurisdiction over intelligence matters affecting legal and constitutional rights. A more powerful intelligence committee should *not* have the exclusive or final say on amendments to the Foreign Intelligence Surveillance Act or other sensitive surveillance statutes, for example. The same need for some concurrent jurisdiction in the judiciary committees arises if Congress adopts the Commission's proposal for permanent committees to oversee the Department of Homeland Security.

Recommendation #14: While Congress should consider ways to consolidate and strengthen oversight of the intelligence community, the intelligence community should not be shielded from the oversight of relevant committees. Most importantly, the House and Senate judiciary committees must retain jurisdiction that is concurrent with the intelligence and homeland security committees over domestic surveillance, access to the courts and other government actions that affect legal and constitutional rights.

Protect dissenting views and whistleblowers. Finally, a thorough and comprehensive review of the treatment of national security whistleblowers must be part of any reform of the intelligence community. The role of whistleblowers in assisting our understanding of pre 9/11 intelligence failures has been essential. For example, Colleen Rowley, an FBI counsel in the Minneapolis field office, focused national attention on FBI mistakes in the handling of the investigation of Zacarias Moussaoui and questioned the effectiveness of the FBI's roundup of hundreds of Middle Eastern men on immigration violations after the September 11 attacks.

National security whistleblowers face unique obstacles. Many intelligence and national security jobs are exempt from the civil service protections, including whistleblower protections, enjoyed by most government employees. National security whistleblowers also face additional hurdles, such as the loss of a security clearance or possible criminal charges for allegedly disclosing classified information, that are not faced by most government whistleblowers.

The 9/11 Commission's calls for reform of the intelligence community that would challenge conventional wisdom should include specific procedures that would encourage

whistleblowers. Additional safeguards, consistent with national security, must be enacted to encourage employees who see distorted and sloppy analysis or other serious shortcomings to come forward without fear of losing their jobs, security clearances, or going to prison.

S. 2628, the “Federal Employee Protection of Disclosures Act,” sponsored by Senators Akaka (D-HI), Grassley (R-IA), Collins (R-ME) and other Republican and Democratic Senators, would provide important protections for national security whistleblowers. A similar bill, H.R. 3281, the “Whistleblower Protection Enhancement Act,” has been introduced by Rep. Todd Platts (R-PA) and has attracted an impressive bipartisan list of co-sponsors, including Rep. Ray LaHood (R-IL), Frank Wolf (R-VA), Henry Waxman (D-CA) and Dennis Kucinich (D-OH).

Government reform groups that have represented national security whistleblowers, such as the Government Accountability Project, strongly support S. 2628 and H.R. 3281. The legislation would strengthen existing whistleblower protection law by making the revocation of a security clearance in retaliation for whistleblowing a “prohibited personnel practice” and by forbidding the president from using the power to exempt an agency from whistleblower protection laws retroactively to strip whistleblowers of their protections. S. 2628 and H.R. 3281 also strengthen whistleblower protection law generally.

Recommendation #15: Congress should enact S. 2628, the Akaka-Grassley bill, or its House counterpart, H.R. 3281, the Platts bill, providing special protections for national security whistleblowers.

The Welcome Demise of a Proposal for New Agency For Domestic Collection of Intelligence on Terrorism

Finally, the 9/11 Commission should be commended for rejecting a truly bad idea – the creation of a domestic security service or intelligence agency separate from the FBI. The Joint Inquiry of the Congressional intelligence committees had urged further study of the idea in its report. The 9/11 Commission heard from numerous witnesses and experts, the vast majority of whom did not support the proposal.

The closest models for such an agency are the domestic intelligence and security services in other countries, such as the United Kingdom’s Security Service or MI-5. Proposals have varied, from an entirely separate Homeland Intelligence Agency, as proposed by Senator John Edwards (D-NC), to a quasi-independent agency that is still nominally part of the Department of Justice or the FBI, as urged by Richard Clarke, former counterterrorism adviser to Presidents Clinton and Bush.

FBI Director Mueller and the Bush Administration have opposed the creation of a separate domestic intelligence agency. They argue the FBI is capable of performing the intelligence function. While they admit that intelligence analysis, information sharing, and other serious problems plagued the FBI, particularly before September 11, they note

reforms of the FBI's national security operations, including new resources for linguists, intelligence analysts, and agents devoted to counter-terrorism investigations.

While supporters of a separate agency have sometimes claimed that a new spy agency would not threaten civil liberties – or might even provide civil liberties benefits – no major civil liberties organization shares this view. The ACLU is joined in its opposition to a domestic intelligence agency by a diverse array of organizations, including the Free Congress Foundation, Gun Owners of America and People for the American Way. Advocates for civil liberties were joined in their opposition to this proposal by former security and law enforcement officials of both parties. These included former DCI George Tenet, former FBI Director Louis J. Freeh, and former Attorney General Janet Reno.

The establishment of a domestic security agency with domestic intelligence collection capabilities would inevitably spy on Americans who are not violating the law and would be a serious blow to basic civil liberties. The record of the UK's MI-5, and the past history of the FBI, make clear that civil liberties safeguards would not be enough to keep such an agency in check. A new agency could also exacerbate, rather than solve, the problems of information sharing that may have contributed to September 11. The proposal is the wrong answer to pre-9/11 intelligence failures and the 9/11 Commission was right to reject it.

Conclusion

Increased threats of terrorism after September 11, 2001, lightning-fast technological innovation, and the erosion of key privacy protections under the law threaten to alter the American way of life in fundamental ways. Terrorism threatens – and is calculated to threaten – not only our sense of safety, but also our freedom and way of life. Terrorists intend to frighten us into changing our basic laws and values and to take actions that are not in our long-term interests.

Proposals for fundamental reforms of the intelligence community are particularly sensitive because of the fundamental tension between intelligence gathering and civil liberties. Where government is focused on gathering intelligence information not connected to specific criminal activity, there is a substantial risk of chilling lawful dissent. Such inquiries plainly have a chilling effect on constitutional rights.

Any proposed National Intelligence Director (NID) would have to be structured with great caution and responsible limits to ensure against a “CIA culture” being imposed on the FBI's national security investigations. Under the structure as outlined by the Commission, that danger is exacerbated by the powers over domestic collection and “operations” that the NID would have.

The answer is not to reject intelligence reform. The answer, instead, is to adopt specific safeguards for domestic collection of intelligence information that preserve the role of the

FBI while ensuring against the use of spy tactics against Americans through strengthened guidelines and other checks to bar political spying.

Finally, none of the structural proposals for reform of the intelligence community are likely to improve intelligence analysis without fundamental substantive reforms. Greater openness, real accountability to both Congress and the public, and protection of whistleblowers is vitally necessary to challenge old assumptions and ensure better analysis and performance. These goals would also help to lessen the risk that a reformed, restructured and bolder intelligence community, perhaps empowered under a new NID, does not return to the “bad old days” and threaten fundamental liberties.

The challenge to our intelligence community is the same as the challenge for the nation as a whole. Securing the nation’s freedom depends not on making a choice between security and liberty, but in designing and implementing policies that allow the American people to be both safe and free.

APPENDIX

9/11 Commission Recommendations on Intelligence Reform Summary of Civil Liberties Safeguards

National Intelligence Director, Counter-Terrorism Center must be accountable, not political

1. Intelligence director should not be White House official, but should be independent office, counter-terrorism center should not be in White House, and head of CIA should not be given more powers over domestic surveillance.
2. Intelligence director should be subject to Senate confirmation and should have a fixed term, like FBI Director and new Director of the CIA; President can fire for cause.

Make sure a “top cop,” not a “top spy” remains in charge of domestic surveillance

3. Head of FBI intelligence operations must report to FBI Director and Attorney General, not intelligence chief;
4. FBI Director and Attorney General should be required to make and enforce guidelines prohibiting spying on First Amendment protected activity;
5. Powers of intelligence director and counter-terrorism center should be specified by statute, and other activities barred. Explicit, enforceable language should make clear intelligence director does not have effective control of domestic surveillance, whether directly or through counter terrorism-center.
6. No “covert operations” on American soil – use of domestic intelligence must be bound by legal system;

Reduce excessive secrecy, improve accountability

7. Create strong Inspector General and other internal watchdogs for intelligence community; create Civil Liberties Protection Board with real power to investigate abuses and prompt corrective action;
8. Restore presumption against classification for no good reason in prior Executive Order;
9. Amend Freedom of Information Act to provide that exemptions for new categories of unclassified, but nonpublic, information must be balanced against public interest in disclosure;

10. Enact legislation (e.g., S. 436/H.R. 2429) increasing public reporting on use of Foreign Intelligence Surveillance Act (FISA) that governs FBI national security wiretaps, secret searches, and records demands within United States;
11. Enact Lott-Wyden bill (S. 2672/H.R. 4855) establishing bipartisan classification review board, and make clear Senate is prepared to release information on board's recommendation if President is intransigent;
12. Intelligence committees must hold more open hearings, and open all legislative hearings;
13. Make intelligence budget public;
14. New and stronger committees to oversee intelligence community and Department of Homeland Security must allow for oversight by other relevant committees. Judiciary committees must have concurrent jurisdiction over domestic spying and other actions affecting constitutional rights.

Enact legislation (e.g., S. 2628/H.R. 3281) to provide specific protections for national security whistleblowers.