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9/11 Commission Recommendations: A Civil Liberties Oversight Board

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Summary

Among the recommendations made by the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) in its final report is the creation of a board within the executive branch to oversee adherence to guidelines on, and the commitment to defend, civil liberties by the federal government. This report examines this recommendation and its implications, and will be updated as events warrant.

The final report of the 9/11 Commission recommended that “there should be a board within the executive branch to oversee adherence to the guidelines we recommend and the commitment the government makes to defend our civil liberties.”¹ This recommendation is the third and final one made in a section of the report captioned “The Protection of Civil Liberties.” In the other two, the commission recommended that (1) the President, in the course of determining the guidelines for information sharing among government agencies and by them with the private sector, “should safeguard the privacy of individuals about whom information is shared”; and (2) the “burden of proof for retaining a particular governmental power should be on the executive, to explain (a) that the power actually materially enhances security and (b) that there is adequate supervision of the executive’s use of the powers to ensure protection of civil liberties. If the power is granted,” the report added, “there must be adequate guidelines and oversight to properly confine its use.”² Read together, these recommendations call for a board to oversee adherence to presidential guidelines on information sharing that safeguard the privacy of individuals about whom information is shared, and adherence to guidelines on the executive’s continued use of powers that materially enhance security. The report offered no additional commentary on the composition, structure, or operations of the recommended board. Such a board, however, had been proposed in December 2003 in the fifth and final report of the Advisory Panel to Assess Domestic Response Capabilities

¹ U.S. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (Washington: GPO, 2004), p. 395.

² *Ibid.*, pp. 394-395.

for Terrorism Involving Weapons of Mass Destruction, chaired by former Virginia Governor James S. Gilmore III.³

Background

Traditionally, in the American governmental experience, the preservation of civil liberties — those rights and privileges specified in, or thought to be implied by, the Constitution — has been pursued in, and determined by, largely the federal courts. Prototypes of the civil liberties oversight board recommended by the 9/11 Commission might be found in the civil rights policy area. During World War II, for example, the Committee on Fair Employment Practice was created as a subunit of the Office for Emergency Management within the Executive Office of the President. Established by E.O. 9346 of May 27, 1943, the panel investigated complaints of alleged discrimination involving race, creed, color, or national origin, in federal agencies, industries performing federal contracts or otherwise essential to the war effort, and unions of employees in such industries.⁴ The committee's jurisdiction did not, however, extend to the armed forces. It also had some fact-finding and policy responsibilities. It was composed of six members representing labor and management. Weakened by a 1943 determination of the Comptroller General that antidiscrimination orders in government contracts could be ignored, the committee came under strong criticism from some quarters of Congress as the war came to a close. It was eventually terminated by the National War Agency Appropriation Act of 1946.⁵

Another prototype might be the eight-member United States Commission on Civil Rights, an independent agency within the executive branch that makes findings of fact, but has no enforcement authority. The commission's findings and recommendations are submitted to the President and Congress for consideration and appropriate action. The panel collects and studies information on discrimination or denials of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin; or in the administration of justice in such areas as voting rights, enforcement of federal civil rights laws, and equal opportunity in education, employment, and housing.⁶

A third prototype might be found in the Defense Privacy Board, established on April 8, 1975, by the Secretary of Defense to coordinate and direct all Department of Defense (DOD) privacy activities. The board was originally assigned the responsibilities to oversee and direct DOD's initial implementation of the newly enacted Privacy Act of 1974.⁷ It did not, however, actually carry out any operational requirements of the Privacy Act, but, instead, set policy, reviewed regulations, provided assistance, and oversaw

³ U.S. Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction, *V. Forging America's New Normalcy: Securing Our Homeland, Preserving Our Liberty* (Arlington, VA: Rand Corporation, 2003), pp. 22-23

⁴ 3 C.F.R., 1943-1948 Comp., pp 1280-1281.

⁵ 59 Stat. 473.

⁶ See 42 U.S.C. § 1975-1975a; for a recent evaluation of the Commission, see *U.S. General Accounting Office, U.S. Commission on Civil Rights: More Operational and Financial Oversight Needed*, GAO Report GAO-04-18 (Washington: October 2003).

⁷ 5 U.S.C. § 552a.

implementation by DOD components. Currently, the board has responsibility for oversight of the DOD privacy program, and ensures that the policies, practices, and procedures of that program are premised on the requirements of the Privacy Act and other pertinent authority. It also serves as the primary DOD policy forum for matters involving the DOD privacy program, meeting as necessary to address issues of common concern so as to ensure that uniform and consistent policy is adopted and followed by DOD components. Chaired by the Director of Administration and Management, Office of the Secretary of Defense, the board counts six other DOD officials as members, along with representatives so designated by the secretaries of the military departments.⁸

Finally, a model identified by the 9/11 Commission in its report is the Intelligence Oversight Board (IOB) of the President's Foreign Intelligence Advisory Board (PFIAB), which, it was noted, "in the past, had the job of overseeing certain activities of the intelligence community."⁹ Established by E.O. 12334 of December 4, 1981, the three-member IOB was responsible for informing the President of any intelligence activities that any board member believed to be in violation of the Constitution, statutory law, or presidential orders or directives; and forwarding to the Attorney General reports received concerning intelligence activities that the board believed might be unlawful. The board was authorized to conduct such investigations as it deemed necessary to carry out its functions.¹⁰ In 1993, with the reestablishment of PFIAB by E.O. 12863, the IOB was reconstituted as a committee of the board.¹¹

Charter

When recommending the creation of a civil liberties oversight board, the 9/11 Commission offered no details on how this chartering would occur, or on the composition or structure of the panel. Options for establishing the board include a statute legislated by Congress, an executive order issued by the President, or an administrative directive by an appropriate executive branch official other than the President. The chartering instrument would specify the composition of the board, the manner in which its members are selected and approved, and the basic administrative structure and procedures of the board, as well as personnel and budget arrangements.

To provide the board with operational independence within the executive branch, provision might be made in its charter that its membership is to be balanced in terms of political interests, to be drawn from certain professions, and to serve staggered terms of set duration. The budget request of the board might be submitted concurrently to the Office of Management and Budget for inclusion in the President's budget and to Congress for its information. The board might be obligated to provide the President and Congress with an annual report on its operations, and its leadership otherwise required — by

⁸ U.S. Department of Defense, "DOD Privacy Program," Directive 5400.11 (Dec. 13, 1999), available at [http://www.fas.org/irp/doddir/dod/d5400_11.htm].

⁹ U.S. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, p. 395.

¹⁰ 3 C.F.R., 1981 Comp., pp. 216-217.

¹¹ 3 C.F.R., 1993 Comp., pp. 632-634.

specification in the charter or through the appointment approval process — to keep Congress informed of board activities.

Mission

According to the report of the 9/11 Commission, the recommended civil liberties oversight board would “oversee” department and agency adherence to (1) presidential guidelines for information sharing, which “should safeguard the privacy of individuals about whom information is shared”; and (2) guidelines confining the use of a government power which “actually materially enhances security.” The board would also monitor “the commitment the government makes to defend our civil liberties.”¹² While Section 892 of the Homeland Security Act requires the President to prescribe homeland security information sharing procedures, it is not clear if the commission’s reference to “presidential guidelines” for information sharing pertains to the procedures mandated by this section.¹³ Furthermore, the source of the guidelines confining the use of a government power is not evident. Also, when such an oversight board is created, its charter may include other specific or general oversight responsibilities in addition to those provided by the 9/11 Commission.

How might the recommended civil liberties oversight board carry out its mission? The following description of the activities of the United States Commission on Civil Rights, with a staff of little over 70 personnel and a budget of about \$9 million, may provide a somewhat illustrative response to this question.

The Commission engages in studies concerning areas in which there may be denials of civil rights and reports on these matters to the President and the Congress. Hearings by the Commissioners are held to investigate and obtain information about denials of civil rights. Conferences and open meetings are held by staff and State Advisory Committees to gather data and issue reports providing information about civil rights problems. In addition, the Commission appraises and reports on Federal agencies’ enforcement of civil rights laws. Complaints alleging discrimination are referred to the proper Federal agencies.

The Commission provides liaison with private groups, public groups, and the media to provide civil rights information to Government officials, organizations, and the public. The Commission issues publications and public service announcements to discourage discrimination and denial of equal protection of the laws. The Commission also provides a library resource to support civil rights research, studies, hearings, and other Commission activities, and makes this information available to the general public.¹⁴

¹² U.S. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, pp. 394-395.

¹³ See 116 Stat. 2253.

¹⁴ U.S. Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2005: Appendix* (Washington: GPO, 2004), p. 1093.

Implementation

Legislation to implement the 9/11 Commission's recommendation for a civil liberties oversight board has not yet been introduced during the 108th Congress.