

CONGRESSIONAL OVERSIGHT OF COUNTERTERRORISM AND ITS REFORM

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I. INTRODUCTION AND OVERVIEW.

A. *America the Vulnerable.*

As Jonathan Raban writes in a 2005 essay in the *New York Review of*

Books:

In its present form, the [American] War on Terror is a crippling, expensive, meagerly productive effort to locate, catch, and kill bad guys around the globe. *Its successes are hardly less random, or more effective in the long-term, than those that might be achieved by a platoon of men armed with flyswatters entering a slaughterhouse whose refrigeration has been off for a week.*¹

Sobering facts support Raban's flyswatters-in-a-slaughterhouse metaphor.

Stephen Flynn—a former Coast Guard commander and director of global issues on the National Security Council staff under President Clinton—has written an entire book, published in 2004, on the subject: *America the Vulnerable: How Our Government is Failing to Protect Us From Terrorism.*² Flynn argues that “[p]aradoxically, the United States has no rival when it comes to projecting its military, economic, and cultural power around the world”, yet “we are *practically defenseless at home.*”³ In sobering tones—linking our national unpreparedness for 9/11 to our homeland security at present—Flynn summarizes our current state of national vulnerability to terrorism in an extract worthy of complete quotation:

If September 11, 2001, was a wake-up call, clearly America has fallen back asleep. Our return to complacency could not be more foolhardy. The 9/11 attacks were not aberration. The same forces that helped to produce the horror that befell the nation on that day continue to gather

strength. Yet we appear to be unwilling to do what must be done to make our society less of a target. Instead, we are sailing into a national security version of the Perfect Storm.

Homeland security has entered our post-9/11 lexicon, but homeland insecurity remains the abiding reality. With the exception of airports, much of what is critical to our way of life remains unprotected.

* * *

From water and food supplies; refineries, energy grids, and pipelines; bridges, tunnels, trains, trucks and cargo containers; to the cyber backbone that underpins the information age in which we live, the measures we have been cobbling together are hardly fit to deter amateur thieves, vandals, and hackers, never mind determined terrorists. Worse still, small improvements are often oversold as giant steps forward, lowering the guard of average citizens as they carry on their daily routine with an unwarranted sense of confidence.⁴

In the American constitutional system, of course, matters of foreign policy and national security are delegated by the People principally to the President and executive agencies under his purview—like the Central Intelligence Agency (CIA), Federal Bureau of Investigation (FBI), and the armed forces of the United States.⁵ The Congress, however, has from the founding days of the Republic exercised “[a]ll legislative powers”—and related specific powers—forming a tradition of vigorous oversight of executive branch activities, in general, and of foreign policy oversight and national security policy oversight, in particular.⁶ Yet, how has Congress performed its oversight responsibilities in the wake of 9/11? And, how is it equipped to handle oversight of national counterterrorism policy and its implementation in the remainder of the first decade of the twenty-first century? Trying to provide some

tentative answers to the aforementioned two questions will be the overarching purposes of this Article.

B. *Congressional Oversight of 9/11 and its Failure.*

Just when the Nation needed adroit and resolute oversight of the causes and meaning of 9/11, the United States Congress botched the job. Bigtime.

Although the Congress went through the motions of overseeing how and why the executive branch—through such agencies as the CIA and FBI—neglected to anticipate and prevent the attack on America on September 11, 2001, for reasons which I seek to explain in this Article, the congressional exercise was a charade, and the publication of its two and one-half inch thick, royal blue-covered report entitled *Joint Inquiry Into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001* (hereinafter *Joint Inquiry Report* or *JIR*)⁷ a dismal failure.

As I will demonstrate, the 9/11 oversight failure of Congress was due to a deficiency of institutional competence in matching and reigning in the executive branch's effort to stonewall and obfuscate. While Congress tried to save face for its oversight failure by acquiescing to the creation of the National Commission on Terrorist Attacks Upon the United States (the "9/11 Commission")⁸, this maneuver was not constitutionally contemplated congressional oversight but congressional abdication to executive branch manipulation. The central thesis of my Article, then, is that Congress must resuscitate its institutional competence for overseeing

American counterterrorism policy and its implementation. As I will explain, Congress can accomplish renewed competence for oversight of national counterterrorism through three specific actions: (1) consolidating intelligence functions, (2) fostering intelligence expertise among its members, and (3) experimenting with more decentralized and indirect forms of intervention with Executive branch counterterrorism agencies. Yet, since what is past is prologue to purposeful reform, a substantial part of my Article is devoted to unpacking and analyzing what Congress did and did not do leading up to its issuance of the *Joint Inquiry Report*. Indeed, the meaning of the *Joint Inquiry Report* can best be understood as multi-flawed legal process. Indeed, one of the purposes of this Article is to analyze the *Joint Inquiry Report* from three process perspectives: (1) the process of congressional oversight of executive intelligence gathering activities in order to interpret the meaning of the terrorist attacks of 9/11; (2) the attempt to interpret the process failures of America's intelligence agencies leading up to 9/11, and (3) the attempt to recommend new government processes of national intelligence and security.

The remainder of the Article is divided into five parts. Part II describes the origins, purposes and structure of the *JIR*—an undertaking by two permanent committees of Congress, one from the House of Representatives and one from the Senate.⁹ Part III discusses and interprets the findings and conclusions of the *Joint Inquiry Report*¹⁰. Part IV examines the recommendations contained in the congressional document.¹¹ Part V focuses on the additional views (in the nature of

dissenting and concurring opinions) of members of the Joint Inquiry.¹² Part VI discusses Congress' constitutional responsibility for vigorous oversight of the executive branch, the lost art of congressional oversight, and some ideas for improving oversight of counterterrorism.¹³

II. THE ORIGINS, PURPOSES AND STRUCTURE OF THE JOINT INQUIRY

A. *Origins and Purposes.*

In the words of the *Joint Inquiry Report*, “[i]n February 2002 the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence agreed to conduct a joint Inquiry into the activities of the U.S. Intelligence Community in connection with the terrorist attacks perpetrated against our nation on September 11, 2001.”¹⁴ According to the *JIR*, “[r]eflecting the magnitude of the events of that day, the Committees’ decision was unprecedented in Congressional history: for the first time, two permanent committees, one from the House and one from the Senate, would join together to conduct a single, unified inquiry.”¹⁵ The three key purposes of the Joint Inquiry were to: (1) “conduct a factual review of what the Intelligence Community knew or should have known prior to September 11, 2001, regarding the international terrorist threat to the United States, to include the scope and nature of any possible international terrorist attacks against the United States and its interests”;¹⁶ (2) “identify and examine any systematic problems that may have impeded the Intelligence Community in learning of or preventing these attacks in advance;”¹⁷ and (3) “make recommendations to

improve the Intelligence Community's ability to identify and prevent future international terrorist attacks."¹⁸

The *Joint Inquiry Report* highlights the congressional oversight process which was pursued (in terms of documents considered, witnesses interrogated, and the like) to create a deceptive impression of thoroughness and completeness. In this regard, the *JIR* states:

During the course of this Inquiry, these Committees have held nine public hearings as well as thirteen closed sessions in which classified information has been considered. In addition, the Joint Inquiry Staff has reviewed almost 500,000 pages of relevant documents from the Intelligence Community agencies and other sources, of which about 100,000 pages have been selected for incorporation into the Joint Inquiry's records. The Staff also conducted approximately 300 interviews and has participated in numerous briefings and panel discussions, that have involved almost 600 individuals from the Intelligence Community agencies, other U.S. Government organizations, state and local entities, and representatives of the private sector and foreign governments.¹⁹

B. *The Structure of the Joint Inquiry Report.*

The principal *JIR* consists of 435 pages (in addition to cover letters²⁰, a foreword²¹, a summary table of contents²², a detailed table of contents,²³ committee membership and staff rosters²⁴, nine separate pages of "[a]bridged [f]indings [a]nd [c]onclusions"²⁵ incorporated into the document, as well as a 17 page errata set of recommendations).²⁶

Part Two-Narrative-The Attacks of September 11, 2001 consists of nine principal headings:

- I. The Plot Unfolds for the Attacks of September 11, 2001.²⁷
- II. Pentagon Flight Hijackers Khalid al-Muhdhar, Nawaf al-Hazami and Salim al-Hazmi.²⁸
- III. NASA Communication Intercepts Related to Khalid al-Midhar, Nawaf and Salim al-Hazmi.²⁹
- IV. Nawaf al-Hazmi and Khalid al-Midhar Had Numerous Contacts With an Active FBI Informant.³⁰
- V. Associates of the September 11 Terrorists in the United States.³¹
- VI. Germany-Investigation of the Hamburg Cell.³²
- VII. The Hijackers' Visas.³³
- VIII. The Rising Threat and Context of the September 11 attacks.³⁴
- IX. The Development of U.S. Counterterrorism Policy Before September 11.³⁵

Part Three—Topics—The Attacks of September 11, 2001 consists of fourteen

principal headings:

- I. Counterterrorism Resources.³⁶
- II. Foreign Liason.³⁷
- III. Covert Action and Military Operation Against Bin Ladin.³⁸
- IV. Strategy to Disrupt Terrorist Funding.³⁹
- V. Khalid Shaykh Mohammed (KSM): The Mastermind of September 11.⁴⁰
- VI. The FBI's Investigation of Zacarias Moussaoui Before September 11.⁴¹
- VII. The Phonemix Electronic Communication (EC).⁴²
- VIII. Strategic Analyses.⁴³
- IX. Views of Outside Experts on the Intelligence Community.⁴⁴
- X. Information Sharing.⁴⁵
- XI. Technology Gaps.⁴⁶
- XII. Technical Collection of Terrorist Communicators.⁴⁷
- XIII. Human Intelligence (HUMINT) Collection.⁴⁸
- XIV. Summary of Joint Inquiry Review of Anthrax Attacks.⁴⁹

The final part of the *JIR* in chief, *Part Four—Finding, Discussion and Narrative Regarding Certain Sensitive National Security Matters*, is, perhaps, the most remarkable part of the *Joint Inquiry Report*. The simple reason for its remarkability

is that, with the exception of a bracketed finding and bracketed discussion (indicating the alternative language of the original *JIR* language cleared by the Intelligence Community)⁵⁰, *virtually the entire 27 pages of this part are deleted!*

Following the *JIR* in chief is a “Glossary of Terms and Acronyms”⁵¹, a table of “Key Names”⁵², a table of “September 11, 2001 Hijackers”⁵³, “Additional Views of Members of the Joint Inquiry”⁵⁴, and a number of appendices attached at the end of the *JIR*.⁵⁵

III. THE *JIRs* FINDINGS AND CONCLUSIONS

The *Joint Inquiry Report* contains five key factual findings and conclusions about the events leading up to the terrorist attacks on September 11, sixteen “systemic findings” and conclusions about the American Intelligence Community’s deficient counterterrorist efforts before September 11th, and four “related findings” and conclusions involving broader policy questions beyond the American Intelligence Community. The discussion that follows attempts to deconstruct this “bureaucrat-speak” and to reconceptualize these twenty-five congressional oversight findings and conclusions into nine generic process failures of the American Intelligence Community. These nine process failures are as follows: (a) the forest versus the trees problem; (b) the right hand versus the left hand problem; (c) the Chicken Little problem; (d) the “who’s on first” problem; (e) the show me the money problem; (f) the dueling banjoes problem; (g) the through the glass dark problem; (h) the good cop/bad cop problem and (i) the Catch-22 problem. As will be discussed in greater

detail, below, these nine generic process failures of the American Intelligence Community are interrelated and intergovernmental (horizontal as well as vertical) in nature.

A. *The Forest from the Trees Problem.*

The bulk of the factual findings and conclusions of the *JIR* can be better understood as a problem of perspective: while the American Intelligence Community was obsessed with gathering discrete details, the process of intelligence lacked a strategic capability to put individual pieces of the terrorism puzzle into a coherent and holistic picture. Thus, the factual findings concerning intelligence on the threats posed by Osama Bin Ladin⁵⁶, the spring and summer of 2001 information on Al Qaeda⁵⁷, 1998-2001 intelligence⁵⁸, aircrafts as weapons data⁵⁹, and “collective significance” myopia⁶⁰ essentially describe a failure of the American Intelligence Community to appreciate the “forest” that its “trees” of intelligence suggested. Moreover, two of the four “related findings” in the *Joint Inquiry Report* are in the nature of a forest from the trees process failure of the American Intelligence Community: the failure of the U.S. Government to “undertake a comprehensive effort to implement defensive measures in the United States,” despite intelligence information spanning the time of “1998 through the summer of 2001 indicating that Usama Bin Ladin’s terrorist network intended to strike inside the United States”⁶¹, and the failure of the U.S. Government to benefit from “an alert, mobilized and committed American public” stemming from a lack of notice “to alert the American

public to the reality and gravity of the threat” of terrorist attacks before September 11, 2001.⁶² Indeed, the general conclusion to the *JIR* factual findings consists of a lamentation over *perspective failure* before 9/11:

In short, for a variety of reasons, the Intelligence Community failed to capitalize on both the individual and collective significance of available information that appears relevant to the events of September 11. As a result, the Community missed opportunities to disrupt the September 11th plot by denying entry to or detaining would-be hijackers; to at least try to unravel the plot through surveillance and other investigative work within the United States; and, finally, to generate a heightened state of alert and thus harden the homeland against attack.

No one will ever know what might have happened had more connections been drawn between these disparate pieces of information. We will never definitively know to what extent the Community would have been able and willing to exploit fully all the opportunities that may have emerged. *The important point is that the Intelligence Community, for a variety of reasons, did not bring together and fully appreciate a range of information that could have greatly enhanced the chances of uncovering and preventing Osama Bin Ladin’s plan to attack these United States on September 11, 2001.*⁶³

Importantly, the first systematic finding also speaks of the fundamental failure of the American Intelligence Community to perceive the forest from the trees, noting that “[p]rior to September 11, the Intelligence Community was neither well organized nor equipped, and did not adequately adapt, to meet the challenge posed by global terrorists focused on targets within the domestic United States” because of “[s]erious gaps [that] existed between the collection coverage provided by U.S. foreign and U.S. domestic intelligence capabilities” stemming from “inadequate attention” by the CIA “to the potential for a domestic attack” and the inability of the FBI “to identify and

monitor effectively the extent of activity by al-Qa'ida and other international terrorist groups operating in the United States.”⁶⁴

B. *The Right Hand vs. the Left Hand Problem.*

A central feature of the factual findings and conclusions of the *Joint Inquiry Report* is professed amazement by Congress at the two distinct cultures of the CIA, on the one hand, and the FBI, on the other hand. As one of the *JIR* factual findings expresses the problem, the right hand of the American Intelligence Community did not know what the left hand was up to in dealing with known terrorists in the United States before September 11:

[Two key hijackers had] numerous contacts with a long time FBI counterterrorism informant in California and ... a third future hijacker ... apparently had more limited contact with the informant. In mid-to-late-2000, the CIA already had information indicating that [two of the hijackers] had [been in the United States] but the two had not been watchlisted and information suggesting that two suspected terrorists could well be in the United States had not yet been given to the FBI. The San Diego FBI field office that handled the informant in question, did not receive that information [from the CIA] or any of the other intelligence information pertaining to [two terrorists in the country] prior to September 11, 2001. As a result, the FBI missed the opportunity to task a uniquely well-positioned informant—who denies having any advance knowledge of the plot—to collect information about the hijackers and their plans within the United States.⁶⁵

One systemic finding of the *Joint Inquiry Report* speaks of the two cultures divide between the CIA and the FBI and the attendant lack of information sharing between these agencies before September 11.⁶⁶ A related right hand/left hand

systemic finding addresses the divide between the American Intelligence Community versus the non-Intelligence Community.⁶⁷

C. *The Chicken Little Problem.*

The well-known children's story about Chicken Little is a cautionary tale about the dangers of over-reaction.⁶⁸ The deeper social problem, however, illustrated by the Chicken Little parable, is when real dangers are underappreciated and under-deterred. Part of this problem might stem from past exaggerations. Part of the problem, in the alternative, might arise from too many tasks and not enough resources. In either case, it is apparent that the congressional investigation discerned a kind of problem where FBI superiors underappreciated real dangers of domestic terrorist attacks from domestically trained terrorist-pilots. According to an eerie *JIR* factual finding:

On July 10, 2001, an FBI Phoenix field office agent sent an "Electronic Communication" to 4 individuals in the Radical Fundamentalist Unit (RFU) and two people in the Usama Bin Ladin Unit (UBLU) at FBI headquarters, and to two agents on International Terrorist squads in the New York Field office. In the communication, the agent expressed his concerns, based on his first-hand knowledge, that there was a coordinated effort underway by Bin Ladin to send students to the United States for civil aviation-related training. He noted that there was an "inordinate number of individuals of investigative interest" in this type of training in Arizona and expressed his suspicion that this was an effort to establish a cadre of individuals in civil aviation who would conduct future terrorist activity. The Phoenix [electronic communication] requested that FBI Headquarters consider implementing four recommendations:

- accumulate a list of civil aviation university/colleges around the country;
- establish liaison with these schools;

- discuss the theories contained in the Phoenix [electronic communication] with the Intelligence Community; and
- consider seeking authority to obtain visa information concerning individuals seeking to attend flight schools.

However, the FBI headquarters personnel did not take the action requested by the Phoenix agent prior to September 11, 2001. The communication generated little or no interest at either FBI Headquarters or the FBI's New York field office.⁶⁹

D. *The "Who's On First?" Problem.*

While the late comedic team of Abbott and Costello achieved regular laughs in performing their play on words involving different baseball runners with pronouns for names⁷⁰, one way of interpreting their routine is as a moral tale of the organizational risks of widespread incompetence. Numerous findings of the *Joint Inquiry Report* portray an incompetent American Intelligence Community (an oxymoron of sorts) in disarray. In the first place, three *JIR* factual sub-findings relate to specific instances of organizational incompetence leading up to September 11. One sub-finding addresses the legal mistake of FBI officials investigating suspected confederates in the 9/11 hijackings⁷¹; another sub-finding focuses on the maladroit manner American officials handled the mastermind of the September 11 attacks while he was awaiting a trial for an earlier act of terrorism⁷²; and a third sub-finding deals with the bungling by NSA, the National Security Agency, in neglecting to translate and disseminate intercepted communications that indicated that the threat of imminent terrorist attacks in September of 2001.⁷³

In the second place, six systemic findings in the *Joint Inquiry Report* are properly categorized as “who’s on first?” problems. First, systemic finding 2 states:

Prior to September 11, 2001, neither the U.S. Government as a whole nor the Intelligence Community had a comprehensive counterterrorist strategy for combating the threat posed by Usama Bin Ladin. Furthermore, the Director of Central Intelligence (DCI) was either unwilling or unable to marshal the full range of Intelligence Community resources necessary to combat the growing threat to the United States.⁷⁴

Interestingly, the *JIR* discussion supporting this systemic finding notes that “[t]he Intelligence Community is a large distributed organism. It encompasses 14 agencies and tens of thousands of employees” and “[t]he number of people employed exclusively in the effort against Usama Bin Ladin and Al-Qaeda was relatively small.”⁷⁵ Yet, revealingly, Congress found that “these people were operating in geographically dispersed locations, often not connected by secure information technologies, and within established bureaucracies that were not culturally or organizationally attuned to one another’s requirements,” while “[m]any of them had limited experience against the target and did not know one another”; but, “[t]o achieve success in such an environment, leadership is a critical factor” and “the Intelligence Community’s structure made leadership difficult.”⁷⁶ Moreover, in a searing indictment of the Director of Central Intelligence (DCI), the *Joint Inquiry Report* discussion concludes that the record “indicates that the DCI *did not* marshal resources effectively even within CIA against the threat posed by al-Qa’ida” and “[d]espite the DCI’s declaration to CIA officials that the Agency was at war with Bin

Ladin ... the DCI's Counterterrorist Center needed additional personnel prior to September 11, and the lack of resources had a substantial impact on its ability to detect and monitor al-Qa'ida's activities."⁷⁷

Second, systematic finding 5 at its heart, rails against the rampant incompetence of the American Intelligence officials, stating:

Prior to September 11, the Intelligence Community's understanding of al Qa'ida was hampered by insufficient analytic focus and quality, particularly in terms of strategic analysis. Analysis and analysts were not always used effectively because of the perception in some quarters of the Intelligence Community that they were less important to agency counterterrorism missions than were operations/personnel. The quality of counterterrorism analysis was inconsistent, and many analysts were inexperienced, unqualified, under-trained, and without access to critical information. As a result, there was a dearth of creative, aggressive analysis targeting Bin Ladin and a persistent inability to comprehend the collective significance of individual pieces of intelligence. These analytic deficiencies seriously undercut the ability of U.S. policymakers to understand the full nature of the threat, and to make fully informed decisions.⁷⁸

The *JIR* discussion in support of this systematic finding pointed up the absence of dissenting opinions in the Intelligence Community analysis provided to government policymakers, quoting the testimony of Deputy Secretary of State, Richard Armitage, who observed:

I am the consumer. It's very rare that we get the one off voice or the dissent voice For a policy maker, the dissent voice is very helpful to either confirm what you think or really open up a new area, and this is not generally done. If I had to say the one biggest weakness in the analysis area, I would say that's it. Second, it's the way analysis in the Intelligence Community is generally put forth, and it's related, and that is consensus ... I really would just enforce this observation about the need to get alternative views up, because most everything that's important here is shrouded in ambiguity and uncertainty. There is a

tendency to want to get things scrubbed out to get the differences eliminated.⁷⁹

Third, systemic finding 8 addresses a “who’s on first?” problem: “the continuing erosion of NSA’s [National Security Agency’s] program management expertise and experience has hindered its contribution to the fight against terrorism. NSA continues to have mixed results in providing timely technical solutions to modern intelligence collection, analysis, and information sharing problems.”⁸⁰

Fourth, systemic finding 11 focuses on ineptness, stating:

Prior to September 11, 2001, the Intelligence Community did not effectively develop and use human sources to penetrate the al-Qa’ida inner circle. This lack of reliable and knowledgeable human sources significantly limited the Community’s ability to acquire intelligence that could be acted upon before the September 11 attacks. In part, at least, the lack of unilateral (i.e., U.S.-recruited) counterterrorism sources was a product of an excessive reliance on foreign liaison services.⁸¹

Fifth, systemic finding 15 is related to the aforementioned systemic finding 11.⁸² According to systemic finding 15, the American Intelligence Community “depended [too] heavily on foreign intelligence and law enforcement services for the collection of counterterrorism intelligence and the conduct of counterterrorism activities,” while “fail[ing] to coordinate their relationships with foreign services adequately.”⁸³

Finally, systemic finding 16 also reminds one of Abbott and Costello’s famous routine. It states, in a sanitized version that had to be rewritten by congressional staffers to satisfy national security reviewers:

The activities of the September 11 hijackers in the United States appear to have been financed, in large part, from monies sent to them from abroad and also brought on their persons. Prior to September 11, there was no coordinated U.S. Government-wide strategy to track terrorist funding and close down their financial support networks. There was also a reluctance in some parts of the U.S. Government to track terrorist funding and close down their financial support networks. As a result, the U.S. Government was unable to disrupt financial support for Usama Bin Ladin's terrorist activities effectively.⁸⁴

E. *The "Show Me the Money" Problem.*

The phrase "show me the money" was made popular in the film *Jerry McGuire* when co-star Cuba Gooding Jr. as Rod Tidwell, the pro football player/client sticks by his sports agent Jerry McGuire and insists that McGuire "show me the money."⁸⁵ It is an apt phrase to remind us of the importance of money—and the converse situation of a lack of money—in carrying out the pre-September 11 counterterrorism responsibilities of the United States Intelligence Community. Two systemic findings in the *Joint Inquiry Report* address "show me the money" problems: systemic findings 3 and 6.

Systemic finding 3 essentially blames inefficiencies in funding processes—involving both Congress and the Intelligence Community—coupled with a multiplicity of appropriation requirements and priorities in hindering an effective anti-terrorism policy in the United States before 9/11.⁸⁶ As explained, in cleaned-up-for-national-security-language in support of this systemic finding: "throughout the Joint Inquiry, numerous officials ... testified that the greatest constraint in their effort against al-Qa'ida was the availability of too few resources, compounded by too many

requirements and priorities.”⁸⁷

Systemic finding 6 focuses on the lack of resources in translating foreign language terrorist information.⁸⁸ The *JIR* discussion on this point simply observed:

The language problem has been one of the Intelligence Community’s perennial shortfalls. Prior to September 11, the shortages of language specialists who would be qualified to process large amounts of foreign language data in general, and Arabic in particular, was one of the most serious issues limiting the Intelligence Community’s ability to analyze, discern, and report on terrorist activities in a timely fashion.⁸⁹

F. *The “Dueling Banjos” Problem.*

The 1973 film, *Deliverance*, introduced the “dueling banjos” scene and subsequent hit song, featuring two banjo players trying to out perform and compete with one another.⁹⁰ While this analogy to the American Intelligence Community and military is imperfect (in the film a certain synergy developed from the competition while the pre-9/11 era American governmental action were discordant), the analogy is of use in depicting the degree of competitiveness between segments of the federal government in fighting terrorism. Two systemic findings in the *Joint Inquiry Report* deal with “dueling banjos” issues: systemic findings 7 and 14.

Systemic finding 7 highlights the friction between three key government intelligence agencies: the FBI, the CIA and the NSA.⁹¹ One type of ongoing conflict was between the NSA and the FBI over which agency should collect potentially terroristic communications between individuals within the United States. This created what the *JIR* called a “gap ... between the level of communications between

the United States and foreign countries that was technically and legally available to the Intelligence Community and the actual use of that surveillance capability.”⁹²

Another type of perennial friction was between the NSA and the CIA over “which agency was in charge of developing and using technology when human intelligence and signals intelligence targets overlapped.”⁹³ Specifically, the “CIA perceived NSA as wanting to control technology deployment and development, while NSA was concerned that CIA was conducting NSA-type operations.”⁹⁴

Systemic finding 14 addressed the distrust and tension between the American military and the CIA in failing to better coordinate operations against Al Qaeda before September 11th.⁹⁵ From the CIA’s perspective, “the U.S. military often levied so many requirements for highly detailed, actionable intelligence prior to conducting an operation—far beyond what the Intelligence Community was ever likely to obtain—that the U.S. military units were effectively precluded from conducting operations against Bin Ladin’s organization” in south central Asia prior to September 11th.⁹⁶ According to a former Chairman of the Joint Chiefs of Staff, however, he believed that it was not the military’s key mission to go after Bin Ladin but, rather, he thought “that the CIA and FBI should have the lead roles in countering terrorism, and that military tools should be viewed as an extension and supplement to the leading roles played by the CIA and FBI.”⁹⁷ Moreover, the former Chairman was of the view that “actionable intelligence” was too weak to outweigh the risks of military operations that would attempt to “swoop[]” and pursue terrorists in an undeclared war in

another country.⁹⁸ Despite these conflicting positions from top government officials, the *JIR* indicates that some cooperation between the CIA and the military directed at Bin Ladin did ensue prior to 9/11.⁹⁹

G. The “Through the Glass Darkly” Problem.

According to scripture, some things we see “face to face” and completely; other things are seen “through a glass darkly” and known only in part.¹⁰⁰ In other words, it is difficult to see through a turgid medium—even under the best of circumstances. Systemic finding 12 of the *Joint Inquiry Report* concentrates on the “through the glass darkly” problem in stating:

During the summer of 2001, when the Intelligence Community was bracing for an imminent al-Qa’ida attack, difficulties with FBI applications for Foreign Intelligence Surveillance Act (FISA) surveillance and the FISA process led to a diminished level of coverage of suspected al-Qa’ida operatives in the United States. The effect of these difficulties was compounded by the perception that spread among FBI personnel at Headquarters and the field offices that the FISA process was lengthy and fraught with peril.¹⁰¹

The turgidness was one of law and the perception of law. Judicial interpretations of the Foreign Intelligence Surveillance Act (FISA), supposedly led to a chilling effect on FBI agents who stopped applying for electronic surveillance orders directed at Al Qaeda suspects.¹⁰²

H. The “Good Cop/Bad Cop” Problem.

The “good cop/bad cop” paradigm is useful in describing scenarios where, on the one hand, rules and processes are scrupulously observed, and, on the other hand,

these rules and processes are ruthlessly ignored.¹⁰³ Systemic finding 18 of the *Joint Inquiry Report* can be understood as presenting a good cop/bad cop dichotomy. It states:

Between 1996 and September 2001, the counterterrorism strategy adopted by the U.S. Government did not succeed in eliminating Afghanistan as a sanctuary and training ground for Usama Bin Ladin's terrorist network. A range of instruments were used to counter al-Qa'ida, with law enforcement often emerging as a leading tool because other means were deemed not to be feasible or failed to produce results. While generating numerous successful prosecutions, law enforcement efforts were not adequate by themselves to target or eliminate Bin Ladin's sanctuary. *The United States persisted in observing the rule of law and accepted norms of international behavior, but Bin Ladin and al-Qa'ida recognized no rules and thrived in the safe haven provided by Afghanistan.*¹⁰⁴

The *JIR* expounded on this finding by pointing out the incredible naiveté, at best, or recklessness at worst, of the executive branch of the United States government during the period between 1996 and 9/11. According to the report's discussion, "[s]ome CIA analysts and operators ... recognized as early as 1997 or 1998 that, as long as the Taliban continued to grant Bin Ladin's terrorist organization sanctuary in Afghanistan, it would continue to train a large cadre of Islamic extremists and generate numerous terrorist operations."¹⁰⁵ Yet there was no systematic executive branch effort to use all available means to root out and disable Bin Ladin. As noted in the *JIR*: "Despite the Intelligence Community's growing recognition that Afghanistan was churning out thousands of radicals, the U.S. government did not integrate all the instruments of national power and policy—

diplomatic, intelligence, economic, and military—to address this problem.”¹⁰⁶

Moreover, the analysis goes on to state that “[p]ermitting the sanctuary in Afghanistan to exist for as long as it did allowed Bin Ladin’s key operatives to meet, plan operations, train recruits, identify particularly capable recruits or those with specialized skills, and ensure that al-Qa’ida’s masterminds remained beyond the reach of international justice.”¹⁰⁷

The *JIR*’s most incisive support for its “good cop/bad cop” systemic finding culminates discussion:

The reliance on law enforcement when individuals can operate from a hostile country such as the Taliban’s Afghanistan appears particularly ineffective, as the masterminds are often beyond the reach of justice. One FBI agent, in a Joint [I]nquiry interview, scorned the idea of using the [FBI] to take the lead in countering al-Qa’ida. He noted that the FBI can only arrest and support prosecution and cannot shut down training camps in hostile countries. He added that, “it is like telling the FBI after Pearl Harbor, go to Tokyo and arrest the Emperor.” In his opinion, a military solution was necessary because, “the Southern District of New York doesn’t have any cruise missiles.”¹⁰⁸

I. *The “Catch-22” Problem.*

This “Catch-22” problem, of course, is inspired by Joseph Heller’s famous post-World War II novel¹⁰⁹ which describes an American military rule allowing airmen to contend that they were mentally unfit, and thereby unable to fly more missions, with a cognate rule that such a claim conclusively indicated that the complaining airmen was not crazy and would, therefore, have to fly more missions.¹¹⁰ As I use this phrase, it seeks to convey the absurdity of having the United States Congress, seeking

to publicly assess and critique the executive branch's intelligence failures in the years leading up to September 11, 2001, hamstrung by national security censors in the executive branch so that certain intelligence failures are *unknowable* by virtue of their deletion in the *Joint Inquiry Report*.

The Catch-22 problem is most prominently portrayed in *JIR* systemic finding 13 which consists of ten lines of bracketed and deleted text; *not one word* remains in the *Joint Inquiry Report* of systemic finding 13!¹¹¹ We are given tantalizing hints of the content of systemic finding 13 in the discussion portion of the report. First, the *JIR*, in sanitized prose, indicates that “[d]uring his tenure, President Clinton signed documents authorizing CIA covert action against Osama Bin Ladin and his principal lieutenants.”¹¹² This analysis is followed by twenty lines of deleted text (including two bulleted items amid this text). What are we to make of this? Like an archaeologist, who finds a shard of pottery at an excavation site, we have little to go on—other than the seeming relevance of presidentially-authorized CIA covert action to systemic finding 13. Second, we get another clue, however, in the sanitized text which follows these deletions:

Former National Security Advisor Sandy Berger testified to the Joint Inquiry ... that, from the time of the East Africa U.S. Embassy bombings in 1998, the U.S. Government was:

... embarked on an [sic] very intense effort to get Bin Ladin, to get his lieutenants, thorough overt and covert means We were involved—at that point, our intense focus was to get Bin Ladin, to get his key lieutenants. The President conferred a number of authorities on the Intelligence Community for that purpose [sic].

Senator Shelby: By “get him,” that means kill him if you had to, capture or kill him?

Mr. Berger: I don’t know what I can say in this hearing, but capture and kill There was no question that the cruise missiles were not trying to capture him. They were not law enforcement techniques¹¹³

Aha! If we were archeologists that clue might be likened to finding the rest of the pottery object such that we can now tell that the original shard came from a container which held precious potions. Systemic finding 13 must deal (we would surmise) with the CIA’s covert attempts to kill Bin Ladin and his henchmen!

A third clue to the probable substance of the *JIR* systemic finding 13 is an unsanitized quote: “As former National Security Advisor Berger noted in his Joint Inquiry interview, ‘we do not have a rogue CIA.’”¹¹⁴ A “rogue” CIA? Does this mean that Congress was onto some misbehavior of CIA operatives in trying to “get” Bin Ladin? We are quickly disabused of this inference, however, in the fourth scrap of discussion commentary in the *JIR* that ostensibly supports the phantom systemic finding 13, quoting from the briefing provided by national security official Richard Clarke:¹¹⁵

I think if you look at the 1980s and 1970s, the individuals who held the job of DDO, one after another of them was either fired or indicted or condemned by a Senate committee. I think under these circumstances, if you become Director of Operations, you would want to be a little careful not to launch off on covert operations that will get you personally in trouble and will also hurt the institution. The history of covert operations in the 1950s and 1960s and 1970s was not a happy one, and I think that lesson got over-learned by people ... I think that they institutionalized a sense of covert action is risky and is likely to blow up in your face. *And the wise guys at the White House who are pushing*

*you to do covert action will be nowhere to be found when the Senate Select Committee on Intelligence calls you up to explain the mess that the covert action became.*¹¹⁶

So, we suppose—but really cannot be sure—that the *JIR* concluded that the CIA did a lousy job of “getting” Bin Ladin because of a culture that had developed in the American Intelligence Community that disfavored and discouraged covert operations.

The “Catch-22” problem is also apparent in the sketchy, sanitized related finding 20¹¹⁷ and the breathtaking 27 pages of backup discussion that is redacted and deleted in the *Joint Inquiry Report!*¹¹⁸ We know by reading a sanitized version of finding 20 at the back of the *JIR* that it deals with “information suggesting specific sources of foreign support for some of the September 11 hijackers while they were in the United States”¹¹⁹ and information “concerning these potential sources of support.”¹²⁰ We also know that the *JIR* complained about the “gap in U.S. intelligence coverage” and admonished that “[t]he Intelligence Community needs to address this area of concern as aggressively and as quickly as possible.”¹²¹ That’s it! Was it secret support from Saudi Arabian sources that is hinted at in the sanitized language of the *Joint Inquiry Report?*¹²²

IV. THE *JIR* RECOMMENDATIONS

As a sign of the haste (and sloppiness?) with which the *Joint Inquiry Report* was put together, 19 specific recommendations were “inadvertently” left out of the *JIR* and should have been included following the findings and conclusions portion of the Congressional document.¹²³ A cynic would be tempted to conclude that Congress got

so accustomed to having scores of pages of the *JIR* deleted by executive branch national security censors that they thought it would be a good idea to omit the Congressional recommendations as well.

The congressional recommendations contained in the “errata print” addendum of the *Joint Inquiry Report* can be usefully divided into three overarching categories: (a) suggested statutory changes in national security laws, legislative budgetary changes and the like; (b) requested reports from executive branch agencies on national security topics; and (c) suggested executive branch actions on national security. Some numbered recommendations in the *JIR* errata print contain more than one category of suggested governmental changes; therefore, I will not bother to reference the recommendations by the number, but will simply cite to the relevant pages of the *JIR* errata print.

A. *Suggested Statutory or Budgetary Changes in National Security Laws.*

The first and most prominent recommendation for statutory or budgetary changes in national security laws is that Congress should “amend the National Security Act of 1947 to create and sufficiently staff a statutory Director of National Intelligence who shall be the President’s principal advisor on intelligence”¹²⁴ with the Director—a “Cabinet level position”¹²⁵—“hav[ing] the full range of management, budgetary and personnel responsibilities needed to make the entire U.S. Intelligence Community operate as a coherent whole.”¹²⁶ As part of the *JIR*’s recommendation, the Director of National Intelligence would have the legal authority, presumably set

by federal statute, for the: (1) “establishment and enforcement of consistent priorities for the collection, analysis, and dissemination of intelligence throughout the Intelligence Community”¹²⁷; (2) “setting of policy and the ability to move personnel between elements of the Intelligence Community”¹²⁸; (3) “review, approval, modification, and primary management and oversight of the execution of Intelligence Community budgets”¹²⁹; (4) “review, approval, modification, and primary management and oversight of the execution of Intelligence Community personnel and resource allocations”¹³⁰; (5) “review, approval, modification, and primary management and oversight of the execution of Intelligence Community research and development efforts”¹³¹; (6) “review, approval, and coordination of relationships between the Intelligence Community agencies and foreign intelligence and law enforcement services”¹³²; and (7) “exercise of statutory authority to insure that Intelligence Community agencies and components fully comply with community-wide policy, management, spending, and administrative guidance and priorities.”¹³³

The *JIR*, moreover, as part of the proposed establishment of this new super-coordinating and management czardom suggests that “[t]o insure focused and consistent Intelligence Community leadership, Congress shall require that no person may simultaneously serve as both the Director of National Intelligence and the Director of the Central Intelligence Agency, or as the director of any other specific intelligence agency.”¹³⁴

A second important proposal for statutory or budgetary changes, suggested by the *Joint Inquiry Report*, concerns a new national security institution. According to the *JIR*: “Congress and the Administration should ensure the development within the Department of Homeland Security of *an effective all-source terrorism information fusion center*”¹³⁵ (IFC) with the goal that this novel organizational innovation “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 Community.”¹³⁶ Despite its highfalutin name, the essential purpose of the “all-source terrorism information fusion center” appears to be the creation of a centralized intelligence agency (why, then, do we need both a CIA and an IFC?)¹³⁷

The *Joint Inquiry Report* offers a third suggested statutory or budgetary action, in the nature of oversight hearings. As the *JIR* states, in this regard:

The House and Senate Intelligence and Judiciary Committees should continue to examine the Foreign Intelligence Surveillance Act and its implementation ... particularly with respect to changes made as a result of the USA PATRIOT ACT and the subsequent decision of the United States Foreign Intelligence Court of Review, to determine whether its provisions adequately address present and emerging terrorist threats to the United States. Legislation should be proposed by those Committees to remedy any deficiencies identified as a result of that review.¹³⁸

As a fourth statutory or budgetary suggestion—following up on other proposals for centralization and coordination¹³⁹—the *JIR* suggests that “Congress should consider enacting legislation, modeled on the Goldwater-Nichols Act of 1986, to instill

the concept of ‘jointness’ throughout the Intelligence Community.”¹⁴⁰ As revealed in the supporting language of this recommendation, the *JIR* appears to be simply calling for more, good-old-fashion American teamwork:

By emphasizing such things as joint education, a joint career speciality, increased authority for regional commanders, and joint exercises [the Goldwater-Nichols Act of 1986] greatly enhanced the joint warfighting capabilities of the individual military services. Legislation to instill similar concepts throughout the Intelligence Community could help improve management of Community resources and priorities and insure a far more effective “team” effort by all the intelligence agencies.¹⁴¹

Fifth, the *Joint Inquiry Report* recommends expansion and improvement of “existing educational grant programs focused on intelligence-related fields, similar to military scholarship programs” as a statutory and budgetary measure.¹⁴² As a sixth statutory/budgetary suggestion, the *JIR* recommends that “Congress should ... review the statutes, policies and procedures that govern the national security classification of intelligence information and its protection from unauthorized disclosure.”¹⁴³ Interestingly, as part of this proposal, the *JIR* suggests that “[a]mong other matters, Congress should consider the degree to which excessive classification has been used in the past and the extent to which the emerging threat environment has greatly increased the need for real-time sharing of sensitive information.”¹⁴⁴ What does “real-time sharing” mean? The most plausible interpretation appears to be sharing of raw intelligence data as soon as it is reasonably made available. Another interpretation might be access to a web-based data source where new intelligence information is regularly updated and revised. Finally, the *Joint Inquiry Report*

indicates as a seventh statutory or budgetary modification in existing national intelligence and security laws: “as part of the confirmation process for Intelligence Community officials, Congress should require from those officials an affirmative commitment to the implementation and use of strong accountability mechanisms throughout the Intelligence Community.”¹⁴⁵ The language—“strong accountability mechanisms”—reminds one of Orwellian-speak in his book *1984*.¹⁴⁶ One draconian image that comes to mind is the kind of “accountability mechanism” practiced by Ian Fleming’s character, Goldfinger, when one of his agents failed him (immediate electrocution and disposal).¹⁴⁷ A less horrific “accountability mechanism” might simply be being fired from one’s job. But, as usual, the *JIR* utilizes congressional jargon to make its points.

B. *Requested Reports From Executive Branch Agencies:*

Numerous requests for reports are interwoven throughout the fabric of the *Joint Inquiry Report’s* recommendations. First, the *JIR* wants the President to “take action to ensure that clear, consistent, and current priorities are established and enforced throughout the Intelligence Community” and to make certain that “[o]nce established, these priorities” are “reviewed and updated” annually “to ensure that the allocation of Intelligence Community resources reflect and effectively address the continually evolving threat environment.”¹⁴⁸ Under separation of powers principles, of course, Congress cannot command the President to undertake his independent constitutional powers as commander-in-chief¹⁴⁹ or as leader of the nation’s conduct

of foreign affairs¹⁵⁰; but the *JIR* apparently contemplates that Congress could obtain access to the aforementioned intelligence priorities information through Congress' power of the purse¹⁵¹, by virtue of the following language contained in the recommendations: "the establishment of Intelligence Community priorities, should be reported to the House and Senate Intelligence Committees [by the President] on an annual basis."¹⁵² Second, the *Joint Inquiry Report* recommends a raft of reports from "the new Director of National Intelligence, the Attorney General, and the Secretary of the Department of Homeland Security" to be issued to both Congress and the President "on a date certain" containing four specific matters: (1) an account of "the FBI's progress since September 11, 2001 in implementing the reforms required to conduct an effective domestic intelligence program" including the "adequacy" of "domestic intelligence authorities" regarding the pursui[t] [of] counterterrorism at home and ensuring the protection of privacy and other rights guaranteed under the Constitution"¹⁵³; (2) an analysis of "the experience of other democratic nations in organizing the conduct of domestic intelligence,"¹⁵⁴ (3) an appraisal of "the specific manner in which a new domestic intelligence service could be established in the United States, recognizing the need to enhance national security while fully protecting civil liberties"¹⁵⁵; and the somewhat repetitive request for a set of recommendations on how to best fulfill the nation's need for an effective domestic intelligence capability, including necessary legislation."¹⁵⁶ Third, the *Joint Inquiry Report* turns its attention to the National Security Agency (NSA), presently lodged

within the Department of Defense (DOD), seeking a “detailed plan” by June 30, 2003 to the House and Senate Intelligence Committees as well as to certain executive branch officials¹⁵⁷ that addresses the following five matters:

- describes solutions for the technological changes for signals intelligence;
- requires a review, on a quarterly basis, of the goals, products to be delivered, funding levels and schedules for every technology development program;
- ensures ... accounting for program expenditures;
- within their jurisdiction as established by current law, makes NSA a full collaborating partner with the Central Intelligence Agency and the Federal Bureau of Investigation in the war on terrorism, including fully integrating the collection and analytic capabilities of NSA, CIA, and the FBI; and
- makes recommendations for legislation needed to facilitate these goals.¹⁵⁸

Fourth, the *Joint Inquiry Report* requests the State Department, “in consultation with the Department of Justice” to report to both the President and the Congress by June 30, 2003 “on the extent to which revisions in bilateral and multilateral agreements, including extradition and mutual assistance treaties, would strengthen U.S. counterterrorism efforts.”¹⁵⁹ Fifth, acknowledging the political reality of an independent investigative entity outside of the institutional structure of Congress, brought about by the demands of relatives of 9/11 victims¹⁶⁰, the *JIR* requests that this entity, “the National Commission on Terrorist Attacks Upon the United States” undertake “and make recommendations concerning how Congress may improve its oversight of the Intelligence Community”¹⁶¹ including the following five policy and legal issues: (1) “changes in the budgetary process”; (2) “changes in the rules

regarding membership on the [intelligence] oversight committees”; (3) “whether oversight responsibility should be vested in a joint House-Senate Committee or, as currently exists, in separate Committees in each house”; (4) “the extent to which classification decisions impair congressional oversight”; and (5) “how Congressional oversight can best contribute to the continuing need of the Intelligence Community to evolve and adapt to changes in the subject matter of intelligence and the needs of policymakers.”¹⁶² Sixth, concerned about what it perceived as the aggressive use of classified information by the executive branch during the course of its investigation—what Senator John McCain described as the administration having “slow-walked and stonewalled” the congressional inquiry¹⁶³—the *JIR* made the following remarkable request:

the Director of National Intelligence, in consultation with the Secretary of Defense, the Secretary of State, the Secretary of Homeland Security, and the Attorney General, should review and report to the House and Senate Intelligence Committees on proposals for a new and more realistic approach to the processes and structures that have governed the designation of sensitive and classified information. The report should include proposals to protect against the use of the classification process as a shield to protect agency self-interest.¹⁶⁴

Seventh, alarmed that the Intelligence Community had shrugged off responsibility for the terrorist attacks of September 11th, the *Joint Inquiry Report* sought a report from the CIA director “to the House and Senate Intelligence Committees no later than June 30, 2003” regarding “the steps taken to implement a system of accountability throughout the Intelligence Community, to include processes

for identifying poor performance and affixing responsibility for it, and for recognizing and rewarding excellence in performance.”¹⁶⁵ As an eighth, and final, mandate for executive branch reporting back to Congress, the *JIR* focused on the President:

The Administration should review and report to the House and Senate Intelligence Committees by June 30, 2003 regarding what progress has been made in reducing the inappropriate and obsolete barriers among intelligence and law enforcement agencies engaged in counterterrorism, what remains to be done to reduce those barriers, and what legislative actions may be advisable in that regard. In particular, this report should address what steps are being taken to insure that perceptions within the Intelligence Community about the scope and limits of current law and policy with respect to restrictions on collection and information sharing are, in fact, accurate and well-founded.¹⁶⁶

C. *Mandates for Executive Action.*

The final category of congressional recommendations in the *Joint Inquiry Report* concerns suggestions (or demands) on executive branch agencies. Ten calls for further executive action can be discerned in the *JIL*:

- A National Security Council-led and presidentially-approved “U.S. government-wide strategy for combating terrorism, both at home and abroad, including the growing terrorism threat posed by the proliferation of weapons of mass destruction and associated technologies” with components of the strategy to include “foreign policy, economic, military, intelligence, and law enforcement elements that are critical to a comprehensive blueprint for success in the war against terrorism.”¹⁶⁷
- The creation of the position of “National Intelligence Officer for Terrorism” within the “National Intelligence Council” who would be “a highly qualified individual appointed to prepare intelligence estimates on terrorism for the use of Congress” and executive branch policymakers.”¹⁶⁸
- The implementation, by the FBI, of multiple measures to improve the Bureau’s conducting of domestic intelligence by: better prioritization and enforcement of field office compliance, developing independent career tracks for counterterrorism, better training of strategic analysts,

establishing “a strong reports officer cadre at the FBI Headquarters” to ensure better dissemination of agents to analysts of key counterterrorism information, agent training for better use of strategic analysis, recruitment of agents with needed linguistic skills, increased penetration of terrorist organizations operating within the United States through “all available means of collection,” improved “national security law training” by FBI personnel, improved exchange of counterterrorism information between the FBI and other federal, state and local agencies, and remediation of “the FBI’s persistent and incapacitating information technology problems.”¹⁶⁹

- The accomplishment by the Attorney General and the Director of the FBI of expanded and improved intelligence data obtained by an aggressive use of the Foreign Intelligence Surveillance Act.¹⁷⁰
- Transformation by the Intelligence Community led by the Director of National Intelligence, of the “recruitment and development of a workforce with the intelligence skills and expertise needed for success in counterterrorist efforts.”¹⁷¹ Greatly enhanced training programs should be launched and carried out in the following areas: “information sharing among law enforcement and intelligence personnel; language capabilities; the use of the Foreign Intelligence Surveillance Act; and watchlisting[.]”¹⁷²
- Review and improvement under the direction of the President, of the budgeting process of implementing American counterterrorism policy including “consideration of a separate classified Intelligence Community budget,” flexible appropriations “subject to congressional oversight, to enable the Intelligence Community to rapidly respond to altered or unanticipated needs”; and contracting for a “rigorous cost-benefit analysis of the resources spent on intelligence.”¹⁷³
- Consideration by the President of possible amendments to “Executive Orders, policies and procedures that govern the national security classification of intelligence information” with an eye toward “expand[ing] access to relevant information for federal agencies outside the Intelligence Community, for state and local authorities, which are critical to the fight against terrorism, and for the American public”, while also reassessing existing presidential policy “to protect against the unauthorized disclosure of classified intelligence information”¹⁷⁴

- Reviews by the “Inspectors General at the Central Intelligence Agency, the Department of Defense, the Department of Justice, and the Department of State” of the factual findings of the *JIR*, coupled with further independent internal reviews, “to determine whether and to what extent personnel at all levels should be held accountable for any omission, commission, or failure to meet professional standards” dealing with “the identification, prevention, or disruption of terrorist attacks, including the events of September 11, 2001.”¹⁷⁵
- Development, under direction of the President, of “a national watch list center that will be responsible for integrating all terrorist-related watch list systems”, while “ensuring a consistent and comprehensive flow of terrorist names into the center from all relevant points of collection.”¹⁷⁶
- FBI and CIA coordination and “aggressive[e]” investigation of “the possibility that foreign governments are providing support to or are involved in terrorist activity targeting the United States and U.S. interests.”¹⁷⁷

V. ADDITIONAL VIEWS OF JOINT INQUIRY MEMBERS OF CONGRESS

A remarkable aspect of the *Joint Inquiry Report* is the inclusion of some 190 pages of “[a]dditional views.”¹⁷⁸ While the use of additional views in congressional committee reports is well known,¹⁷⁹ their significance is under-theorized. Are they in the nature of judicial dissenting or concurring opinions?¹⁸⁰ Are they mere grand-standing? A review of some of the eight separate additional views, filed by nine members¹⁸¹ of the Joint Inquiry will touch on these questions. In general, taken as a whole and considered together, these additional views highlighted the multi-flawed legal process of the Joint Inquiry.

A. *Sen. Richard C. Shelby.*

The most prominent of the additional views of members of the Joint Inquiry is the filing of Senator Richard C. Shelby (R-AL). The prominence of the Shelby

additional views is premised on two reasons: (1) he is Vice-Chairman of the Senate Select Committee on Intelligence¹⁸² and (2) his views are spread out over 135 pages.¹⁸³ Moreover, in a recent book, Shelby was quoted as saying this about the difficulty encountered in obtaining information during the Joint Inquiry: “You know, we were told that there would be cooperation in this investigation and I question that”, noting, “I think that most of the information that our staff has been able to get [from the executive branch] has had to be extracted piece by piece.”¹⁸⁴

Shelby’s additional views contained several acerbic nuggets. First, drawing a historical parallel between the terrorist attacks on September 11, 2001 and the “devastating surprise attack the United States suffered at Japanese hands at Pearl Harbor on December 7, 1941”—Shelby urged the case for fundamental reform, stating: “too much has happened for us to be able to conclude that the American people and our national security interests can be protected simply by throwing more resources at agencies still fundamentally wedded to the pre-September 11 *status quo*.”¹⁸⁵ Second, speaking of the structure and organization of the American Intelligence Community, Shelby lambasted the Director of Central Intelligence’s “at least partly rhetorical 1998 declaration of ‘war’ against Al Qaeda” and criticized “the centrifugal tendencies of bureaucratic politics” within the Intelligence Community with the upshot that the Community “responds too slowly and too disjointedly to shifting threats.”¹⁸⁶ In this regard, he urged “organizational flexibility”¹⁸⁷ and “a continual process of ‘creative destruction’ not unlike competitive corporate

approaches used in the private sector.”¹⁸⁸ Third, focusing on information-sharing concerns, Shelby went to considerable length in his additional views to critique the Intelligence Community’s failure to “connect the dots” before 9/11¹⁸⁹; to describe the systemic and continual problems of information within the Intelligence Community¹⁹⁰; and to enthusiastically encourage future breakthroughs in innovative techniques of information sharing.¹⁹¹ Highlighting the paramount intelligence sharing failures that he believed the Joint Inquiry’s investigation revealed, Shelby opined at length:

The CIA’s chronic failure, before September 11, to share with other agencies the names of known al-Qa’ida terrorists who it knew to be in the country allowed at least two such terrorists the opportunity to live, move, and prepare for the attacks without hindrance from the very federal officials whose job it is to find them. Sadly, the CIA seems to have concluded that the maintenance of its information monopoly was more important tha[n] stopping terrorists from entering or operating within the United States. Nor did the FBI fare much better, for even when notified in the so-called “Phoenix Memo” of the danger of al-Qa’ida flight school training, its agents failed to understand or act upon this information in the broader context of information the FBI already possessed about terrorist efforts to target or use U.S. civil aviation. The CIA watchlisting and FBI Phoenix stories illustrate both the potential of sophisticated information-sharing and good information-empowered analysis and the perils of failing to share information promptly and efficiently between (and within) organizations. They demonstrate the need to ensure that intelligence analysis is conducted on a truly “all-source” basis by experts permitted to access all relevant information—no matter where in the IC [Intelligence Community] it happens to reside.¹⁹²

Fourth, Senator Shelby’s additional views raise some useful points about intelligence-law enforcement coordination. “The September 11 story,” as he put it,

“illustrates the tremendous problems of coordination between U.S. law enforcement and intelligence entities that developed out of a long series of misunderstandings, timorous lawyering, and mistaken assumptions.”¹⁹³ Even after 9/11 and the passage of the USA PATRIOT ACT of 2001¹⁹⁴, which amended the Foreign Intelligence Surveillance Act (FISA)¹⁹⁵, Shelby expressed frustrations that “[i]t took over a year ... for the USA PATRIOT ACT changes to penetrate the U.S. Government’s entrenched ‘no coordination’ bureaucratic culture.”¹⁹⁶ Furthermore, in Shelby’s view, “[i]t was not until November 2002 that the FISA Court of Review—the never before-used appellate body created by the statute—issued an opinion” overruling the FISA trial court that “the law ... stands today where Congress *intended* it to stand” in passing the USA PATRIOT ACT in October 2001: “there is no restriction upon coordination between law enforcement and intelligence organs in connection with FISA surveillance or physical searches, and such activity can lawfully be undertaken even if *primarily* done with prosecutorial intent, provided that a ‘significant’ intelligence purpose remains.”¹⁹⁷ Fifth, in strong language of rebuke, Senator Shelby castigated the domestic intelligence failures of the FBI leading up to September 11, 2001, concluding that the FBI’s “organizational and institutional culture is terribly flawed” and that the FBI “is fundamentally incapable, in its present form, of providing Americans with the security they require against foreign terrorist and intelligence threats.”¹⁹⁸ Sixth, Shelby’s take on the CIA’s pre-9/11 human intelligence performance is caustic. As he sees it, the CIA “has been too reluctant to develop

non-traditional” forms of human-collected intelligence and “has stuck too much and for too long with the comparatively easy work of operating under diplomatic cover from U.S. embassies.”¹⁹⁹ Seventh, regarding the topic of covert action, Senator Shelby commented:

[G]iven the unpleasant history of covert action scandals that have affected the CIA, one should not be surprised to find that—ironically, perhaps—the covert action infrastructure is a relatively cautious one. Intelligence officers will often, and with good reason, hesitate to take operational risks or to push aggressively to accomplish their missions if they are operating under ambiguous or convoluted legal authorities and always suspect that they may be prosecuted or hauled before a hostile inquiry for any actual or perceived missteps.²⁰⁰

Finally, Shelby offered separate remarks to the *Joint Inquiry Report* on the subject of accountability, “respectfully disagree[ing]” in his words from the view, offered by some officials, that Congress “should postpone holding anyone accountable within the Intelligence Community until [the] war” against al-Qa’ida is completed.”²⁰¹ As Shelby put it: “Precisely *because* we face a grave and ongoing threat, we must begin reforming the [Intelligence] Community immediately.”²⁰² Speaking in a voice of agitated dissent, Shelby employed understated outrage in the failure of the Joint Inquiry to assess specific blame for the 9/11 disaster:

The metaphor of “war” is instructive, for wise generals do not hesitate to hold their subordinates accountable while the battle still rages, disciplining or cashiering those who fail to do their duty. So also do wise Presidents dispose of their faltering generals under fire. Indeed, failures in wartime are traditionally considered less excusable, and are punished more severely, than failures in times of peace.

Nor should we forget that accountability has two sides. It is also a core responsibility of all good leaders to reward those who perform well, and promote them to positions of ever greater responsibility.

* * *

For these reasons, it is disappointing to me that despite the Joint Inquiry's explicit mandate to "lay a basis for assessing the accountability of institutions and officials of government" and despite its extensive findings documenting recurring and widespread [Intelligence] Community shortcomings in the months and years leading up to September 11, the Joint Inquiry has not seen fit to identify *any* of the individuals whose decisions left us so unprepared. I urge President Bush to examine the Joint Inquiry's findings in order to determine the extent to which he has been well served by his "generals" in the Intelligence Community.²⁰³

B. *Rep. Mike Castle.*

Representative Mike Castle (R-DE) filed the functional equivalent of a short concurring opinion to the *Joint Inquiry Report* focusing on two issues that he sought to highlight: (1) the need for significant improvement in the performance of the National Security Agency (NSA) in obtaining better signal intelligence concerning global terrorism, and (2) the need for substantial, immediate reform "with respect to the management, coordination and oversight of our Nation's visa program."²⁰⁴

Castle's more telling comments concerned the matter of visa reform.

Alarming, as he explained:

The majority of the September 11th hijackers were wrongly admitted to the United States—in violation of U.S. immigration laws—as a result of decisions made and errors committed by responsible State Department and Justice Department officers. The fact that many of them entered and operated in true name, further emphasizes the extent to which the current system is broken.²⁰⁵

C. *Sen. Mike DeWine.*

Senator Mike DeWine (R-OH) crafted his separate remarks in the form of a partial concurring opinion and partial dissent from the *Joint Inquiry Report*.²⁰⁶ Even on those few points, where he seemed to be going against the grain of the *JIR*, DeWine's dissenting comments were collaborative in nature.²⁰⁷

DeWine made seven key arguments. First, he asserted that it was vital for the Intelligence Committees of Congress to “improve the quality and quantity of oversight” with regard to executive branch agencies seeking secret authorization, pursuant to FISA, to conduct domestic intelligence.²⁰⁸ Second, in an intriguing proposal, DeWine suggested the need for improving the FISA process by requiring the appointment, by the secret court administering the statute, of “advocates”, chosen from a group of “pre-cleared attorneys with prior FISA experience”²⁰⁹ who—while not contacting or informing “the subject of the potential surveillance”—would, instead, “act as officers of the [secret] court, representing the legal position in opposition to the Justice Department’s application for a FISA warrant.”²¹⁰

Third, Senator DeWine parted company with the *JIR*'s recommendation to create a separate position of Director of National Intelligence, untethered from the CIA, observing that a number of experts had concluded that this institutional isolation would be “counterproductive.”²¹¹ Fourth, he urged the need to emphasize that “the Intelligence Community needs to pay more attention to the collection and analysis of open-source information” derived from available unclassified information like a

report, written in 1999, by a Library of Congress analyst regarding the risk of Al Qaeda suicide bombers flying airplanes into places like the White House and the Pentagon.²¹² Fifth, DeWine opined that the “Senate and House Intelligence Committees are asking for too many unnecessary reports” from members of the Intelligence Community.²¹³ Sixth, he offered an innovative potential technique to enhance information-sharing among members of the sprawling and diverse American Intelligence Community.²¹⁴ According to DeWine:

A relatively simple way to address this would be through the use of a technology known as “multi-level security” capability. Basically, the use of multi-level security allows computers users with different levels of security classification to get different levels of access to information contained and stored in a comprehensive intelligence database. In other words, database users would be able to access only the information in the database that their security clearances allowed them to view.

This would allow the myriad of intelligence agencies to safely combine all of their databases, including those containing the most sensitive data and make the entire combined database accessible to a wide range of intelligence and law enforcement personnel, without sacrificing security for the most highly classified data. For example, a detective in Cincinnati who notices unusual activity around city hall could do a search of the comprehensive Community-wide database for “city halls in Ohio” and come up with some non-classified FBI information about possible attacks on city halls around the state or in other states. He then would get a notification from the system that there was more information about the topic, but that it was classified at a level above his clearance. At that point, he could go to his supervisor and begin the process of having that information sent to someone within the department who has the appropriate level of clearance. This would help resolve one of the many information-sharing problems facing the Intelligence Community.²¹⁵

Finally, Senator DeWine’s separate filing contains a thoughtful and in-depth scenario for changing the existing American Intelligence Community’s “[b]roken [c]orporate [c]ulture” which is risk averse, rather than prudently risk-taking.²¹⁶ From his perspective: “A new organization must be built from the ground up as a small, agile, and adaptive organization with a corporate culture of taking prudent risks.”²¹⁷ Moreover, it would have a limited list of targets: terrorists, proliferators, and ‘rogue states’.”²¹⁸ And, its operations, according to DeWine, would emphasize “non-official operations or NOC’s”²¹⁹ —unaffiliated with any official U.S. government “cover” job²²⁰ and operating over long stretches of time with considerable autonomy.²²¹

D. *Rep. Jane Harman.*

Rep. Jane Harman (D-CA) offered a few nuggets of concurring insight which enlarged on the *Joint Inquiry Report*. First, she pointed out that the *JIR* recommendation for creating a Director of National Intelligence (DNI) would “empower” this official “to lead the [Intelligence Community] by pairing authority with responsibility.”²²² By way of comparison, Harman pointed out that the Director of Central Intelligence “currently lacks the statutory authority” to provide “a coherent approach across agencies and overarching leadership.”²²³ Second, offering a lighter touch than the tone of the *Joint Inquiry Report*, Rep. Harman opined that while “[t]he investigation revealed that significant intelligence leads about some of the hijackers were available but did not get widely shared,” this lapse “was less a willful refusal to share information than it was a failure to grasp its significance.”²²⁴

E. *Sen. John Kyl & Sen. Pat Roberts.*

In what is, in effect, a joint dissenting opinion from the *JIR*, Senator John Kyl (R-AZ) and Senator Pat Roberts (R-KS) divided their concerns into three major headings:

- (1) “[t]he [n]eed for [a]dditional [v]iews,”²²⁵
- (2) “[d]efficiencies in the [r]eport,”²²⁶ and
- (3) “[c]omments on [r]ecommendations.”²²⁷

1. *A Perspective on Process.*

We gain a valuable insider’s peek on the Joint Inquiry process from the perspective of two relatively junior and conservative United States Senators. They begin their dissenting statement with a lament about how the content of the *Joint Inquiry Report* was assembled. Thus, by examining their opening salvo, we can discern that they were displeased with the way the staff and the combined committees’ leadership controlled things. As they complain:

The Report is a product of the Joint Inquiry Staff (JIS), not the Senators and the Representatives who sit, respectively, on the Senate Select Committee on Intelligence (SSCI) and the House Permanent Select Committee on Intelligence (HPSCI). The Chairman and Vice Chairman of the SSCI and the Chairman and Ranking Member of the HPSCI (the “Big Four”) made most decisions and supervised the JIS. The JIS should be commended for putting together the first official account of events leading up to the terrorist attacks of September 11, 2001.

It is difficult, however, for rank-and-file Members of the two Committees to know how thorough or accurate the Report is because of the way the JIS and the “Big Four” conducted the inquiry, withholding information and decisions from the Members and SSCI and HPSCI staff throughout the process. While the Report should be a useful historical

document on which to base further inquiries, we cannot vouch for its contents.²²⁸

A second, process-pique of Kyl and Roberts was that reasons *why* mistakes were made by the Intelligence Community were not emphasized. As they noted:

After prodding by several Senators, some underlying causes of these failures were identified, but even then, they were not further probed to determine what might have been done differently. And the fact that the prodding was necessary illustrates our concern that the JIS either ran out of time or did not have the inclination or instruction to examine, for instance, *why U.S. government agencies were risk-averse, who is responsible for the inadequate resources devoted to counter-terrorism efforts, why legal authorities were so confusing, and why leadership was so lacking. Without this examination, the Report will be of limited value in determining “lessons learned.”*²²⁹

Fascinating stuff! There is more process vitriol. Third, Senators Kyl and Roberts grouched that the Joint Inquiry process “was conducted and overseen in a way that left rank-and-file Members at a distinct disadvantage, and left insufficient time to examine many relevant issues.”²³⁰ In this regard, they grumbled that the voluminous final draft of the *JIR* “was delivered to Members four days before the one and only meeting scheduled for its consideration, when most Members were out of town.”²³¹ Moreover, they griped that “[t]here was no debate about the Report, only the Recommendations. But there was little basis for debate since the product was strictly the work of the JIS—more like an Inspector General’s report than a typical congressional committee report.”²³² Roberts and Kyl provided numerous details of what they perceived to be serious defects in the Joint Inquiry process that were

labeled by the senators as “irregularities.”²³³ These included the following:

- “Upon instructions from the Chairmen—and in violation of SSCI rules—the JIS often failed to tell Members and staff of important non-compartmented information it discovered in a timely manner.”²³⁴
- “Information relating to open hearings such as the JIS staff statement and witness statements—were routinely provided only late on the night before the hearing.”²³⁵
- “Committee staff and sometimes even the staff directors, were often excluded from meetings of the “Big Four”, whose decisions were often made without consultation. Members’ liaison staff, and, therefore, the Members themselves, were in the dark about these decisions.”²³⁶

A fourth key process failure noted by the joint separate statement of Senators Kyl and Roberts dealt with the holding of open hearings by the Joint Inquiry during the autumn of 2002. As extensively explained by these gentlemen:

The holding of open hearings was particularly frustrating. The decision to hold them was apparently made by the “Big Four” despite the concerns of the JIS and objections of other Senators. The JIS was forced to focus on them for three months, and from there had to go right into drafting the Report in order to meet the year-end deadline.

Several Members voiced their opposition to holding open hearings before the investigative work was completed and the Report written (and, we had supposed agreed to). We objected, mostly in closed committee business meetings, that it was premature to convene open hearings before the investigation was complete. And indeed, at the point when the JIS began preparing for them (July, 2002), its investigations into the causes of 9/11 largely ground to a halt. Due to dramatic media leaks and the potential for further compromise, intelligence agencies “pushed back” against open hearings, causing further friction with the JIS investigation.

The hearings distracted these agencies, our “front line troops” on the war on terrorism, and they distracted Members and congressional staff from our traditional oversight responsibilities. They also, in our view ... publicly revealed a lot of sensitive information from which our enemies could profit. Most of the information presented had already been revealed in closed hearings which were far more productive because those who participated could delve freely into classified information.

Key figures in our counter-terrorism efforts were unnecessarily compromised by these public hearings. * * * We should have been more circumspect about publicly releasing results before the investigation was complete and the two intelligence committees had had a chance to adequately review the final Report.²³⁷

2. *Claimed Deficiencies in the JIR.*

Senators Kyl and Roberts explicitly linked the previously-discussed process failures²³⁸, to a resulting substantive Congressional report “that falls well short of addressing the core problems that led to 9/11.”²³⁹ They confidently asserted in support of this conclusion: “Because the fundamental problems that led to 9/11 are almost certainly rooted in poor policy and inadequate leadership, the investigation should have delved more deeply into conflicting interpretations of legal authorities (including presidential directives), budget allocations, institutional attitudes, and other key areas.”²⁴⁰ As they explained in other words, “only such a thorough exercise will help us to make sure the failures [of American counterterrorism policy] are not repeated.”²⁴¹ Continuing to build on this assertion, the two senators observed that “[w]hat best shows the tendency of the JIS investigations to go to the water’s edge but no farther is that, in the Report, there is a pronounced tendency to identify problems as ‘facts’, or ‘realities’, rather than as matters to be plumbed for

underlying causes.”²⁴² The example provided here is staff analysis that did not dig for the root causes of why the CIA did not make efforts to penetrate terrorist havens in Afghanistan and why the Pentagon did not attempt a “comprehensive response” to the terrorist bombings of American embassies in Africa in 1998 or the bombing of the U.S.S. Cole in 2000.²⁴³

The Additional Views of Senators Roberts and Kyl highlighted five additional substantive deficiencies of the *Joint Inquiry Report* analysis and discussion: (a) “[r]isk [a]version”²⁴⁴, (b) “[i]nsufficient [r]esources”²⁴⁵, (c) “[a] [f]lawed [l]egal/[i]nstitutional [f]ramework”²⁴⁶, (d) “[l]eadership [f]ailures”²⁴⁷, and (e) the “[i]nadequate [s]cope”²⁴⁸ of the *JIR*.

3. *Criticism of JIR Recommendations.*

The Kyl-Roberts statement closes with two specific criticisms of the *JIR* recommendations and a general summary criticism of the failing of the *JIR* process. First, they dismissed the notion that an “intelligence czar” would be able to “succeed where they Director of Central Intelligence has not.”²⁴⁹ Second, they objected to the *Joint Inquiry Report’s* recommendation “calling for lower-level personnel to be held accountable by the various agencies Inspectors General” instead of pursuing “[a]ccountability of those at the very top” which would, in turn, “produce[] accountability at the intervening levels, and among officers in the field who run down leads to find terrorists.”²⁵⁰ Finally, Senators Kyl and Roberts concluded: “Our duty to understand precedes our ability to improve. The [*JIR*] in not fully coming to terms

with what produced the intelligence failures it identified, left that duty unfulfilled.”²⁵¹

VI. CONGRESS AND THE ART OF OVERSIGHT OF COUNTERTERRORISM POLICY.

A. *Congress’ Constitutional Role of Executive Oversight.*

Relatively little has been written on Congress’ constitutional responsibility to oversee the executive branch. Most commentators who have considered the subject²⁵² have focused on the need to counterbalance the extraordinary power of the President and his executive branch officials in implementing and interpreting laws passed by Congress, the responsibility of Congress to assure that publicly appropriate funds are spent wisely and effectively and according to the intent of Congress, and the salutary effects of publicizing government operations in a free society. Oversight by Congress of executive branch operations stems from the broad constitutional grant of “[a]ll legislative powers” to the Congress²⁵³ made more specific by the interconnected all-encompassing web of Article I Section 8 and Section 9 powers dealing with the funding and structuring of executive activities.²⁵⁴

B. *The Lost Art of Congressional Oversight.*

While the tradition of vigorous congressional oversight of executive branch operations goes back in time more than 200 years²⁵⁵ in recent decades there has been an “erosion of Congress’ oversight skills” and inclination to investigate executive operations.²⁵⁶ Possible causes for this diminished effectiveness of

congressional oversight include the packed schedules and shorter workweeks of Senators and Members of Congress, term limits on chairmanships of congressional committees, less funds for investigative staff, the hard-work and low-payoff of traditional oversight by legislators, the higher priority given by legislators to constituent services and legislative work, and political-pressure to go easy on the executive branch during a time of same-party control of Congress and the White House, since George W. Bush became President in January 2001.²⁵⁷

With regard to the combined Senate-House Joint Inquiry into the September 11th terrorist attacks, knowledgeable observers contend that Congress has been “outperformed” by the National Commission on terrorist attacks.²⁵⁸ One commentator has concluded that the independent commission—turned over to commissioners outside of Congress: “has pried more disclosures about the 2001 terrorist attacks” than the congressional Joint Inquiry and “generated enough public pressure to force national security advisor Condoleeza Rice to testify publicly, and Bush and Vice President Dick Cheney to brief the panel in private—all witnesses that the congressional” Joint Inquiry “never heard from.”²⁵⁹ Another observer, commenting on the 17 preliminary staff reports written by the independent commission on 9/11, noted, in implicit criticism to the congressional *Joint Inquiry*

Report:

In contrast to the plodding or self-promoting style of so many government documents, the staff reports of the commission investigating the September 11, 2001 attacks have provided something truly rare in official Washington: a good read.

In 17 crisply worded reports, the commission staff laid out facts from the events that shook and marred the lives of millions. Using a style that is remarkably free of artifice, the authors achieved a high point in detail, clarity and coherence.²⁶⁰

C. *Improving Congressional Oversight of Counterterrorism.*

The conventional wisdom is that because of the profound distrust between Republicans and Democrats in Congress there exists “political paralysis” to conduct effective congressional oversight of executive counterterrorism activities and to implement the type of structural changes needed to improve post-September 11th national security.²⁶¹ As this line of thinking goes, until the voters decide to create divided government between Congress and the Presidency, nothing much will happen to change the culture of counterterrorism policy in the CIA, the FBI and the Pentagon.²⁶² Perhaps this is correct. But looking to the long-term, there are some institutional improvements that Congress should consider.

1. *Consolidate Intelligence Functions.*

“Jurisdiction over the various intelligence agencies and their budgets is currently divided among a number of committees” in both the House and the Senate.²⁶³ Keeping up on the oceanic flow of 21st century counterterrorism policy requires focus. “If lawmakers are going to try to consolidate the government’s intelligence gathering operations, as they should, they can set a good example by taking on the turf battles within their own ranks first.”²⁶⁴

2. *Foster Intelligence Expertise.*

Under current congressional rules, individual members of the intelligence committees “may serve only a prescribed term.”²⁶⁵ This procedural restriction “was adopted in the 1970s to prevent lawmakers from being co-opted by the” executive branch’s intelligence agencies.²⁶⁶ In practice, however, members of the House and Senate are “driven from the committees just as they develop the necessary expertise to become ... good overseer[s] of the intelligence community.”²⁶⁷ As a related reform, the House and the Senate “should consider limiting the number of other positions that the leaders of the intelligence committees may hold to make sure that they have all the time needed for their responsibilities.”²⁶⁸

3. *Experiment With More Decentralized and Indirect Forms of Intervention.*

While centralized statutory and budgetary changes in American executive branch intelligence activities and counterterrorism policies are appropriate (like the recent congressional acquiescence to the *JIR* recommendations for a statutory change to create a new Director of National Intelligence and the recommendation for a centralized all-source terrorism information fusion center (IFC))²⁶⁹ innovative congressional initiatives that complement this fundamental restructuring are needed to make sure that the executive branch is vigorously following through on new counterterrorism reforms. The intelligence committees of the House and the Senate should consider drawing upon the model of “destabilization

rights” in public law litigation, articulated by Columbia Law professors Sabel and Simon, whereby plaintiffs earn judicial approval “to disentrench or unsettle a public institution when, first, it is failing to satisfy minimum standards of adequate performance and, second, it is substantially immune from conventional political mechanisms of correction.”²⁷⁰

While counterterrorist institutional failures of key national security agencies of the executive branch of the federal government, like the FBI, CIA and NSA fitfully uncovered in the *Joint Inquiry Report*, are different from institutional failures of public schools, mental health facilities, prisons, police departments and housing authorities, these differences are in degree, not in kind.²⁷¹ Institution building, maintenance, repair and improvement have been a recurrent theme of American law and democracy since Hart and Sacks articulated their vision of legal process philosophy back in the 1950s.²⁷² As they noted, in this regard:

[T]o help in seeing that the principle of institutional settlement operates not merely as a principle of necessity but as a principle of justice *this means attention to the constant improvement of all of the procedures which depend upon the principle in the effort to assure that they yield decisions which are not merely preferable to the chaos of no decision but are calculated as well ... to advance the larger purposes of society.*²⁷³

Guido Calabresi, indeed, has described the legal process school as primarily interested in “comparative institutional analysis”²⁷⁴ with new legal process legal theorists of the Columbia School, like Sabel and Simon, embracing “a spirit of Deweyan experimentalism by focusing on the development of *new institutions*”²⁷⁵ and

institutional procedures.

Just as courts in various types of public law litigation involving schools, prisons and the like have, with maturing experience, developed a general sense of the “inadequacy of command-and-control approaches”²⁷⁶ of highly prescriptive and detailed injunctive orders because they came to appreciate that “they lacked both the information and depth and range of control to properly formulate and enforce command-and-control injunctions”²⁷⁷, while “command-and-control interventions exacerbated resistance on the part of [institutional] defendants”²⁷⁸, so should the United States Congress and its intelligence committees develop a general sense of the inadequacy of top-down, command-and-control statutory and budgetary measures to alter the behavior of executive branch intelligence and counterterrorism agencies. With the threat of imposing a “penalty of default”²⁷⁹ of fundamental restructuring of executive branch intelligence and counterterrorism executive branch agencies or appropriations riders, the intelligence committees of the House and the Senate should seek to experiment with three specific decentralized and indirect forms of congressional oversight borrowed from the Sabel-Simon new legal process insights about recent trends in judicial supervision of public interest litigation. First, the intelligence committees of Congress should seek to spur “*stakeholder negotiation*”²⁸⁰ superintended by a special mediator, with appropriate security clearance, appointed by the relevant congressional committee. Conducted with authority of an ongoing legislative oversight hearing, a congressional intelligence committee should mandate

that all relevant stakeholders from the executive branch intelligence community deliberate with each other (most frequently in secret closed sessions) “face to face” and be required to “defend their positions with reasons.”²⁸¹ Intelligence committee imposed stakeholder negotiations should require participants “to listen to each other in good faith and to remain open to learning”²⁸² and “[t]o the extent that a [stakeholder’s] proposals rest on factual premises, the [stakeholder] must make available relevant information with her control”²⁸³ without the excessive security blocks on sensitive information that has characterized past executive branch responses to congressional inquiries. The goal of these stakeholder negotiations under congressional oversight imprimatur should be consensus, to be achieved through “openness”²⁸⁴ and “mutual respect”²⁸⁵ within the confines of the (often secret) negotiations. The intelligence committees of Congress should strive to groom one or more of its members to develop the role as mediator between executive branch agencies because of the power and prestige this legislator would enjoy. However, a professional, non-legislator intelligence/counterterrorism mediator, under the control of the relevant congressional intelligence committees, might prove to be useful as well.

Second, the intelligence committees of Congress should seek to instigate a “*rolling-rule regime*”²⁸⁶ where the norms of counterterrorism policy emerging from stakeholder negotiations with executive branch officials are “provisional”²⁸⁷, “incorporate a process of reassessment and revision with continuing stakeholder

participation.”²⁸⁸ Stakeholders would be urged by the congressional oversight mediators to develop “performance measures that are as specific as possible”²⁸⁹, leaving to executive branch intelligence and counterterrorism agency officials “substantial discretion”²⁹⁰, subject, however, to “precise targets.”²⁹¹ In addition, “some processes, most often including documentation and reporting, will be specified in detail.”²⁹² With continuous feedback by the congressional mediators, the intelligence committees of Congress should develop interim oversight reports which include “general descriptions of the [intelligence/counterterrorism stakeholders’] goals, prescriptions for measuring their progress toward them, and commitments to make information available.”²⁹³ Moreover, these congressional interim intelligence oversight reports might also include “a variety of other norms that set out, perhaps in great detail, practices or operations procedures”²⁹⁴ of executive branch agencies.

Third, the intelligence committees of Congress should try to attain “*transparency*”²⁹⁵ in the executive branch intelligence and counterterrorism operations, which, at a minimum, insists that “the policies and operating norms of the rolling-rule regimes must be explicit”²⁹⁶ and publicly declared to Congress (subject to reasonable national security blocks to public access). Transparency should be “both an accountability norm and a learning device”²⁹⁷, which is “intended in part to facilitate practices of disciplined comparison.”²⁹⁸ Congress, when armed with these comparative metrics—which might include private sector assessments of performance of counterterrorism measures²⁹⁹—could reward those executive branch

agencies which achieve good performance with autonomy and recommendations for requested funding.³⁰⁰ “As for poor performance, the trick” for Congress would be “to balance remedial support, loss of control, and outright punishment” of deficient executive branch actions.³⁰¹ But legislative oversight “[e]xperimentalism does not provide determinate guidance on the question of sanctions. It pins hopes largely on the effects of transparency”³⁰² with a context of national security secretism. “By exposing poor performance as clearly as possible, it opens the system to general scrutiny and exposes it more readily”³⁰³ to congressional intervention.

CONCLUSION

The Joint Inquiry conducted by the intelligence committees of Congress to ascertain the causes of executive branch failures to anticipate and possibly prevent the terrorist attacks of September 11, 2001 was deeply flawed. Hobbled by secretism and obstruction by the executive branch, including the lack of cooperation by the President and Vice President, divided by partisan bickering within Congress, distracted by misguided public hearings and accompanying political grandstanding and weakened by poor leadership of the Senate and House intelligence committees, the Joint Inquiry and its work product, the *Joint Inquiry Report*, suffered a lack of credibility. Moreover, the ineffectiveness of the Joint Inquiry on 9/11 can be understood as part of a steady erosion in recent decades of the art of congressional oversight of the executive branch of the federal government.

Congress could help to rectify its lackluster performance of executive branch oversight, in general, and improve its oversight of executive agency counterterrorism performance, in particular, by considering three pragmatic internal congressional reforms³⁰⁴: (1) consolidating intelligence review functions into the intelligence committees; (2) fostering intelligence expertise of Senate and House intelligence committee members; and (3) experimentation with more decentralized and indirect forms of intervention by creating intelligence mediators who would be responsible to Congress and who would seek to spur (a) stakeholder negotiation; (b) a rolling rule regime of norms for counterterrorism performance and practice, and (c) transparency in executive branch intelligence and counterterrorism operations, subject to reasonable secrecy required by legitimate national security considerations.

ENDNOTES

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- ¹ Jonathan Raban, *The Truth About Terrorism*, N.Y. REV. BKS. 22, 25 (Jan. 13, 2005).
- ² STEPHEN FLYNN, *AMERICA THE VULNERABLE: HOW OUR GOVERNMENT IS FAILING TO PROTECT US FROM TERRORISM* (2004).
- ³ *Id.* at 3 (emphasis added).
- ⁴ *Id.* at 1-2. See also AMITAI ETZIONI, *FROM EMPIRE TO COMMUNITY* 118-20 (2004) (comparing “small-scale terrorism” with the “massive terrorism” risks of attacks on domestic populations with weapons of mass destruction (WMD), opining that “[t]he difference between small-scale and massive terrorism is as significant as the difference between a crime wave and genocide”, providing the horrific hypothetical of al Qaeda “[getting] its hands on a nuclear device” that could conceivably “obliterate Manhattan, Washington, D.C., or Tel Aviv”).
- ⁵ The principal Constitutional provisions which support presidential power over foreign policy and national security are: U.S. CONST. art. II, § 1, cl. 1 (“The executive power shall be vested in a President of the United States of America”), § 1, cl. 8 (prescribing a presidential oath to “preserve, protect, and defend the Constitution of the United States”), § 2, cl. 1 (the “President shall be commander in chief” of the armed forces”), § 2, cl. 2 (presidential power, with advice and consent of the Senate to “make treaties”).
- ⁶ The principal constitutional provisions which support the congressional power of oversight over the executive branch are: U.S. CONST. art. I, § 1 (“[a]ll legislative powers herein granted shall be vested in a Congress of the United States”, § 7, cl. 2 (passage of bills), § 8, cl. 1 (taxing power), § 8, cl. ___ (borrowing power), § 8, cl. 3 (regulation of foreign and interstate commerce), § 8, cl. 4 (naturalization power), § 8, cl. 5 (coinage and regulation of foreign coin value powers), § 8, cl. 10 (powers to punish piracies and “felonies committed on the high seas”), § 8, cl. 11 (power to “declare war” and related powers), § 8, cl. 12 (power to “raise and support armies”), § 8, cl. 13 (power to “provide and maintain a navy”), § 8, cl. 14 (power to “make rules for the government and regulation of the land and naval forces”), § 8, cl. 15 (powers to “provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions”); § 8, cl. 16 (powers to organize army and discipline militia), § 8, cl. 18 (“necessary and proper” power to make laws).
- ⁷ U.S. SENATE SELECT COMM. ON INTELLIGENCE & U.S. HOUSE PERMANENT SELECT COMM. ON INTELLIGENCE, *REPORT ON JOINT INQUIRY INTO INTELLIGENCE COMMUNITY ACTIVITIES BEFORE AND AFTER THE TERRORIST ATTACKS OF SEPTEMBER 11, 2001*, S. REPT. NO. 107-351, H. REPT. NO. 107-792 (December 2002).
- ⁸ See Pub. L. No. 107-306 (2002). The 9/11 Commission ultimately prepared a report NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, *THE 9/11 COMMISSION REPORT* (2004).
- ⁹ See *infra* notes 14-55 and accompanying text.
- ¹⁰ See *infra* notes 56-122 and accompanying text.
- ¹¹ See *infra* notes 123-177 and accompanying text.

¹² See *infra* notes 178-251 and accompanying text.

¹³ See *infra* notes 252-304 and accompanying text.

¹⁴ JOINT INQUIRY REPORT, *supra* note 7, at 1. While the Senate Select Committee on Intelligence has no subcommittees, the name of one of the four subcommittees of the House Permanent Select Committee on Intelligence—Subcommittee on Terrorism and Homeland Security—reflects the post-9/11 national security context. See MICHAEL BARONE & RICHARD E. COHEN, THE ALMANAC OF AMERICAN POLITICS-2004 (2003) at 1799, 1806. Interestingly, the House now has a separate committee that did not participate in the JOINT INQUIRY called the Select Committee on Homeland Security with five subcommittees: Cybersecurity, Science, Research and Development; Emergency Preparedness & Response; Infrastructure & Border Security; Intelligence & Counterterrorism; and Rules. *Id.* at 1807.

¹⁵ JOINT INQUIRY REPORT, *supra* note 7, at 1. There have been, however, joint committee undertakings in the past by both the House of Representatives and the Senate. See *infra* note 255 and accompanying text.

¹⁶ JOINT INQUIRY REPORT, *supra* note 7, at 1.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 2.

²⁰ *Id.* (three unnumbered pages following the title page). Interestingly, while the transmittal letter of Dec. 20, 2002 to Robert C. Byrd, President Pro Tempore of the U.S. Senate, from Bob Graham, chair of the Senate Select Committee on Intelligence, and Richard Shelby, vice chair, indicated that the “highly classified and sensitive information” not included in the *JIR* would be available to “all members of the Senate” for readings in “secure facilities of the Senate Select Committee on Intelligence,” *id.*, the House of Representatives transmittal letter was more restrictive. The transmittal letter of Dec. 20, 2002 to J. Dennis Hastert, Speaker of the House, from Porter Goss, chair, and Nancy Pelosi, ranking Democrat, while indicating that classified documents not included in the *JIR* would be held in “a Sensitive Compartmented Information Facility (SCIF)”, there was no mention in the transmitted letter to the Speaker of the House of reading access by other members of the House to the classified material. *Id.*

²¹ *Id.* (one unnumbered page following the Senate and House transmittal letter). The foreword provides a three paragraph explanation for understanding additions and deletions to the original report (before classification review). The foreword describes the process of *JIR* writing, classification, addition and redaction as follows:

This is the declassified version of the Final Report of the Joint Inquiry that was approved and filed with the House of Representatives and the Senate on December 20, 2002. With the exception of portions that were released to the public previously (e.g., the additional views of Members, the GAO Anthrax Report, etc.), this version has been declassified by the Intelligence Community prior to its public release. That review was for classification purposes only and does not indicate Intelligence Community

agreement with the accuracy of this report, or concurrence with its factual findings or conclusions.

At appropriate points in the report, relevant information that developed after the report was filed, or that has appeared in other public sources, has been inserted and is denoted with an asterisk (*) and an accompanying footnote. Where necessary, information that the Intelligence Community has identified as classified for national security purposes has been deleted. Such deletions are indicated with brackets and a strikethrough [-----]. In other portions of the report, alternative language that the Intelligence Community has agreed is unclassified has been substituted for the original report language which remains classified. Paragraphs that contain alternative language, whether one word or several sentences, have been identified by brackets at the beginning and end of the paragraph.

As a result of these changes to the text, the page numbers at the bottom of each page do not match those of the original report. In order to preserve a record of the original pagination, page numbers have been inserted in gray font [page xx] in the text to mark where the corresponding pages begin and end in the original report.

Id.

From the process perspective of congressional oversight of executive intelligence gathering, one is reminded of the Escher print, depicting a hand drawing another hand drawing the original hand.

²² *Id.* at 1. This is the first page of the *JIR* that contains capital letters in gray font with a strikethrough, at both the top and bottom of the page with the words “TOP SECRET”. Every page of the *JIR* from i-435 bears the same “TOP SECRET” strikethrough markings.

The summary table of contents reads as follows:

Table of contents
Members of the Joint Inquiry
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Part One-The Joint Inquiry

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Id.

²³ *Id.* at ii-vii.

²⁴ *Id.* at viii-x.

²⁵ *Id.* at xi-xix.

²⁶ U.S. SENATE SELECT COMM. ON INTELLIGENCE & U.S. HOUSE PERMANENT COMM. ON INTELLIGENCE REPORT ON JOINT INQUIRY INTO INTELLIGENCE COMMUNITY ACTIVITIES BEFORE AND AFTER THE TERRORIST ATTACKS OF SEPTEMBER 11, 2001, S. REPT. NO. 107-351, H. REPT. NO. 107-792 (December 2002) (ERRATA PRINT) [hereinafter JOINT INQUIRY REPORT ERRATA PRINT].

From the process perspective of congressional oversight of executive intelligence gathering, one is reminded of a scene in the movie *MR. SMITH GOES TO WASHINGTON* (Columbia Pictures, 1939) involving the character of Jefferson Smith (played by Jimmy Stewart) being flustered and rattled by the august presence of the more senior senator and his wily daughter. Stewart drops and fumbles with his hat throughout the scene, only to knock over a lamp at the end of the scene.

²⁷ JOINT INQUIRY REPORT, *supra* note 7, at 128-43.

²⁸ *Id.* at 143-55.

²⁹ *Id.* at 155-57. A considerable portion of the content is deleted by brackets and strikethroughs.

³⁰ *Id.* at 157-68. A considerable portion of the content is deleted by brackets and strikethroughs.

³¹ *Id.* at 168-83. A considerable portion of the content is deleted by brackets and strikethroughs.

³² *Id.* at 183-87. A considerable portion of the content is deleted by brackets and strikethroughs.

³³ *Id.* at 187-90.

³⁴ *Id.* at 190-215. This heading of the *JIR* is subdivided into six sub-headings:

- A. A New Breed of Terrorists
- B. Emergence of Usama Bin Ladin and al-Qa'ida
- C. Attributes of Bin Ladin's Terrorist Operations
- D. Intelligence about Bin Ladin's Intentions to Strike Inside the United States
- E. Indications of a Possible Terrorist Attack in Spring and Summer 2001
- F. Intelligence Information on Possible Terrorist Use of Airplanes as Weapons.

Id.

It should be noted that the JIR uses different spellings for Al Qaeda. To the extent that I discuss matters in my own language I will utilize the aforementioned spelling. Otherwise, when I am quoting the JIR I will use the spelling provided by Congress.

³⁵ *Id.* at 215-49. A considerable portion of the content is deleted by brackets and strikethroughs. This heading of the *JIR* is subdivided into 19 sub-headings:

- A. Counterterrorism as an Intelligence Priority
- B. Growing Importance in the Clinton Administration
- C. Uncertainty During the Transition
- D. The George W. Bush Administration
- E. Competing Priorities
- F. Policy Measures to Fight Terrorism
- G. The Law Enforcement Approach
- H. Disruption and Renditions
- I. Afghanistan as a Terrorist Sanctuary
- J. The Intelligence Community
- K. The Declaration of War
- L. The Intelligence Community's Response
- M. Shortcomings in the Intelligence Community's Response
- N. The President and Senior Policy Advisor Responsibility
- O. Lack of an Integrated Response
- P. The Intelligence Community's Failure to Establish a Coordinated Domestic Focus Before September 11
- Q. Steps Taken to Fight International Terrorism at Home
- R. Lack of Focus on Domestic Threat
- S. Limited Counterterrorism by Other Intelligence Community Members.

³⁶ *Id.* at 250-70.

³⁷ *Id.* at 270-78. A considerable portion of the content is deleted by brackets and strikethroughs.

³⁸ *Id.* at 279-307. The vast majority of the content is deleted by brackets and strikethroughs.

³⁹ *Id.* at 308-09.

⁴⁰ *Id.* at 309-15. A considerable portion of the content is deleted by brackets and strikethroughs.

⁴¹ *Id.* at 315-24.

⁴² *Id.* at 325-35.

⁴³ *Id.* at 336-45. This heading of the *JIR* is subdivided into four sub-headings:

- A. The Intelligence Community's Lack of Strategic Analysis
- B. Analyst Qualifications and Training
- C. Analysts' Access to Information
- D. Language Skills

Id.

⁴⁴ *Id.* at 345-54. This heading of the JIR is subdivided into seven subheadings:

- A. Setting Priorities
- B. Strategy and Organization
- C. Should a Strong Director of National Intelligence Be Established?
- D. Should the Same Person be both DNI and Director of the CIA?
- E. Counterterrorism Within the United States and Creation of a Domestic Intelligence Agency
- F. A Legislative Charter for the Intelligence Community
- G. Respect for the Rule of Law

Id.

⁴⁵ *Id.* at 354-68.

⁴⁶ *Id.* at 368-73. The vast majority of the content is deleted by brackets and strikethroughs.

⁴⁷ *Id.* at 373-85. The vast majority of the content is deleted by brackets and strikethroughs.

⁴⁸ *Id.* at 385-93. A considerable portion of the content is deleted by brackets and strikethroughs.

⁴⁹ *Id.* at 393-94.

⁵⁰ See *supra* note 21 and accompanying text.

⁵¹ JOINT INQUIRY REPORT, *supra* note 7, at 424-33. Among the more fascinating definitions contained in this portion of the *JIR* are the following:

Actionable Intelligence:

Intelligence information that is directly useful to customers for immediate exploration without having to go through the full intelligence production process; it may address strategic or tactical needs, close support of US negotiating teams, or action elements dealing with such matters as international terrorism or narcotics.

Id. at 424.

Asset:

- (1) Any resource—a person, group, relationship, instrument, installation, supply—at the disposition of an intelligence agency for use in an operational or support role.
- (2) A person who contributes to a clandestine mission but is not a fully controlled agent.

Id.

Clandestine Operation:

A preplanned secret intelligence collection activity or covert political, economic, propaganda, or paramilitary action conducted so as to assure the secrecy of the operation; encompasses both clandestine collection and covert nation.

Id. at 425.

Classification:

The determination that official information requires, in the interest of national security, a specific degree of protection against unauthorized disclosure, coupled with a designation signifying that such a determination has been made; the designation is normally termed a security classification and includes Confidential, Secret, and Top Secret.

Id.

Counterintelligence:

Information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations, persons, or terrorist activities, but not including personnel, physical, document, or communication security programs.

Id.

Counterterrorism:

Offensive measures taken to prevent, deter, and respond to a terrorist act or the documented threat of such an act.

Id. at 425-26.

Domestic Collection:

The acquisition of foreign intelligence information within the United States from governmental or nongovernmental organizations or individuals who are willing sources and chose to cooperate by sharing such information.

Id. at 427.

IC:

Intelligence Community—the aggregate of the following executive branch organizations and agencies involved in intelligence activities: the Central Intelligence Agency; the National Security Agency; the Defense Intelligence Agency; offices within the Department of Defense for the collection of specialized reconnaissance programs; the Bureau of Intelligence and Research of the Department of State; intelligence elements of the military services, the Federal Bureau of Investigation, the Department of Treasury, and the Department of Energy; and staff elements of the office of the Director of Central Intelligence.

Id. at 428-29.

International Terrorism:

Terrorist acts that transcend national boundaries in their conduct or purpose, the nationalities of the victims, or the resolution of the incident. Such an act is usually designed to attract wide publicity to focus attention on the existence, cause, or demands of the perpetration.

Id. at 429-30.

PDB:

President’s Daily Brief (prepared by CIA for President and very small number of other senior officials)[.]

Id. at 431.

⁵² *Id.* at 434.

⁵³ *Id.* at 435.

⁵⁴ *Id.* (consisting of separately paginated additional views of Sen. Richard C. Shelby, Rep. Michael N. Castle, Sen. Mike DeWine, Rep. Jane Harman, Sen. John Kyl, and Sen. Pat Roberts, Sen. Carl Levin, Sen. Barbara Mikulski, Rep. Jim Roemer).

⁵⁵ *Id.* The list of appendices to the JIR includes the following:

- Initial Scope of Joint Inquiry.
- Supplemental Joint Inquiry Rules.
- Joint Inquiry Hearings.
- List of Persons Interviewed.
- Counterterrorism Organizations Within the Intelligence Community.
- Evolution of the Terrorist Threat and the U.S. Response, 1983-2001.
- Selected Events in the Chronology of Terrorism, 1982-2001.
- CIA/FBI Failures in Regard to Two September 11 Hijackers, The Phoenix Electronic Communication.
- Moussaoui Related FBI Field Agent Notes and Field Office/Headquarters E-mails.
- General Accounting Office: Analysis of U.S. Anthrax Attacks.
- CTC Watchlisting Guidance—December 1999.
- The Joint Inquiry in Court.
- Access Limitations Encountered by the Joint Inquiry.

Id. While a detailed discussion of these voluminous appendices is beyond the scope of this Article, it is tempting to offer a few miscellaneous comments. First, most of the names on the Appendix List of Persons Interviewed are deleted by brackets and strikethroughs, although their official positions are referenced. Second, the Appendix-Evolution of the Terrorist Threat and the U.S. Response, 1983-2001, provides a synoptical summary of “big picture” world events, “selected major terrorist events”, and “U.S. institutional responses to terrorism”, although a considerable portion of the content is deleted by brackets and strikethroughs. Third, the Appendix-Selected Events in the Chronology of Terrorism, 1982-2001 offers a striking visual timeline of the following types of information: terrorist incident, information indicating terrorist activity or intentions to strike inside the United States, information indicating terrorist activity or intentions to use airplanes as weapons, and communications intercepts suggesting possible imminent terrorist activities. Fourth, the Appendix Joint Inquiry in Court details the tripartite branch processes of the executive, legislative and judicial branches surrounding the investigation and litigation involving Zacarias Moussaoui—the suspected “20th hijacker” on 9/11. Legal counsel from the congressional offices of Senate Legal Counsel, House General Counsel, and General Counsel of the Joint Inquiry were involved in contesting a DOJ-sought judicial protective order in the Moussaoui case. According to this Appendix:

With the assistance of the Offices of Senate Legal Counsel and House General Counsel, the General Counsel of the Joint Inquiry ... participated in the argument on August 29, 2002. The reply asked the District Court to deny the DOJ's requested relief for three main reasons: (1) the protective order does not govern testimony before Congress, nor does it govern the production of documents to Congress, the use of documents by it, or the issuance of its reports; (2) Local Criminal Rule 57 specifically does not preclude the holding of legislative hearings or the issuance of legislative reports, and (3) the proposed expansion of the [protective] order by the Department of Justice runs afoul of the separation of powers.

Id., Appendix Joint Inquiry in Court at 3. The DOJ lost its motion to expand the scope of the Moussaoui judicial protective order to cover the Joint Inquiry legislative proceedings. *Id.* at 4-5. Yet, the following novel procedure was allowed by the Joint Inquiry:

In accordance with its commitment to consult with the Department of Justice, the Joint Inquiry continued to allow DOJ to review and comment regarding the contents of staff statements related to the Moussaoui case and other matters. At the Joint Inquiry's September 24 [2002] public hearing that followed concerning the Moussaoui matter, the Joint Inquiry permitted a DOJ representative to attend with FBI witnesses for the purpose of advising whether any question called for an answer that might impair the Moussaoui prosecution. Thus, the Inquiry was able to proceed with a full public exposition of the issues raised in the Moussaoui investigation without impeding the due process and fair interests of Moussaoui and the DOJ.

Id. at 5.

⁵⁶ Factual finding of the JIR states:

While the Intelligence Community had amassed a great deal of valuable intelligence regarding Usama Bin Ladin and his terrorist activities, none of it identified the time, place, and specific nature of the attacks that were planned for September 11, 2001. Nonetheless, the Community did have information that was clearly relevant to the September 11 attacks, particularly when considered for its collective significance.

Id. at xi.

⁵⁷ Factual finding of the JIR states:

During the spring and summer of 2001, the Intelligence Community experienced a significant increase in information indicating that Bin Ladin and al-Qa'ida intended to strike against U.S. interests in the very near future.

Id.

⁵⁸ Factual finding of the JIR states:

Beginning in 1998 and continuing into the summer of 2001, the Intelligence Community received a modest, but relatively steady, stream of intelligence reporting that

indicated the possibility of terrorist attacks within the United States. Nonetheless, testimony and interviews confirm that it was the general view of the Intelligence Community, in the spring and summer of 2001, that the threatened Bin Ladin attacks would most likely occur against U.S. interests overseas, despite indications of plans and intentions to attack in the domestic United States.

Id.

⁵⁹ Factual finding 4 of the JIR states:

From at least 1994, and continuing into the summer of 2001, the Intelligence Community received information indicating that terrorists were contemplating, among other means of attack, the use of aircraft as weapons. This information did not stimulate any specific Intelligence Community assessment of, or collective U.S. Government reaction to, this form of threat.

Id.

⁶⁰ Factual finding number 5 of the JIR consists of an overarching finding and, then, ten sub-findings numbered 5a through 5j, inclusive. Overarching finding number 5 states:

Although relevant information that is significant in retrospect regarding the attacks was available to the Intelligence Community prior to September 11, 2001, the Community too often failed to focus on that information and consider and appreciate its collective significance in terms of a probable terrorist attack. Neither did the Intelligence Community demonstrate sufficient initiative in coming to grips with the new transnational threats. Some significant pieces of information in the vast stream of data being collected were overlooked, some were not recognized as potentially significant at the time and therefore not disseminated, and some required additional action on the part of foreign governments before a direct connection to the hijackers could have been established. For all these reasons, the Intelligence Community failed to fully capitalize on available, and potentially important, information.

Id. Five of the sub-findings relate to the forest from the trees problem: sub-finding 5a concerning “[t]errorist [c]ommunications in 1999” about persons who, after September 11, 2001, were connected with the terrorist attacks of that day, *id.* at (JIR brackets omitted) sub-finding 5b concerning “Malaysia [m]eeting and [t]ravel of al-Qaida [o]peratives to the United States” regarding a 2000 rendezvous between two individuals who had a key role in the September 11, 2001 terrorist attacks, *id.*; and sub-finding 5c dealing with [t]errorist [c]ommunications in [s]pring 2000 regarding known communication involving an individual who had attended the Malaysia meeting, *id.* (JIR brackets omitted) sub-finding 5g concerning “[h]ijackers in [c]ontact [w]ith [p]ersons of FBI [i]nvestigative [i]nterest in the United States,” *id.* at xiv; and sub-finding 5h concerning the CIA’s awareness, but missed opportunities, of the [h]ijackers’ [a]ssociation in Germany.” *Id.* (JIR brackets omitted).

⁶¹ Related finding 17 of the JIR, *id.* at xvii.

⁶² Related finding 19 of the JIR, *id.* at xix.

⁶³ Conclusion-factual findings of the JIR, *id.* at xv (emphasis added).

⁶⁴ Systemic finding 1, *id.*

⁶⁵ Factual sub-finding 5d, *id.* at xii.

⁶⁶ Systemic finding 9 of the JIR states:

The U.S. Government does not presently bring together in one place all terrorism-related information from all sources. While the CIA's Counterterrorist Center does manage overseas operations and has access to most Intelligence Community information, it does not collect terrorism-related information from all sources, domestic and foreign. Within the Intelligence Community, agencies did not adequately share relevant counterterrorism information, prior to September 11. This breakdown in communications was the result of a number of factors, including differences in the agencies' missions, legal authorities and cultures. Information was not sufficiently shared, not only between different Intelligence Community agencies, but also within individual agencies, and between the intelligence and the law enforcement agencies.

Id. at xvii (emphasis added).

⁶⁷ Systemic finding 10 of the JIR provides:

Serious problems in information sharing also persisted prior to September 11, between the Intelligence Community and relevant non-Intelligence Community agencies. This included other federal agencies as well as state and local authorities. This lack of communication and collaboration deprived those other entities, as well as the Intelligence Community, of access to potentially valuable information in the "war" against Bin Ladin. *The Inquiry's focus on the Intelligence Community limited the extent to which it explored these issues, and this is an area that should be reviewed further.*

Id. (emphasis added).

⁶⁸ For an updated version see JAMES FINN GARDNER, *POLITICALLY CORRECT BEDTIME STORIES* 57-62 (1994).

⁶⁹ Factual sub-finding 5e, JOINT INQUIRY REPORT, *supra* note 7, at xii. For a journalistic account of the FBI and international terrorism leading up to the events of 9/11 see generally PETER LANCE, *1000 YEARS FOR REVENGE: INTERNATIONAL TERRORISM AND THE FBI—THE UNTOLD STORY* (2003).

In the discussion supporting factual sub-finding 5e, the JIR suggests that the problem was, at bottom, a resource issue. Before the Joint Inquiry, the Phoenix agent who authored the Phoenix communication testified that:

"What I wanted was an analytical product. I wanted this discussed with the Intelligence Community. I wanted to see if my hunches were correct. He noted, however, that he also knew this type of analytical product took a back seat to operational matters at the FBI:

But, I am also a realist. I understand that the people at FBI Headquarters are terribly overworked and understaffed, and they have been for years. And at the time that I am ... sending this in, having worked this stuff for 13 years, and watched the unit in action over the years, I knew that this was going to be at the bottom of the pile, so to speak, because they were dealing with real-time threats, real-time issues trying to render fugitives back to the United States from overseas for justice. And again, it is a resource issue.

The Phoenix agent was correct, and his communication did fall to the bottom of the pile. * * *

JOINT INQUIRY REPORT, *supra* note 7, at 20-21.

⁷⁰ Bud Abbott and Lou Costello, *Who's On First?*, performed in *THE NAUGHTY NINETIES* (1945).

⁷¹ Factual sub-finding 5f, JOINT INQUIRY REPORT, *supra* note 7, at xiii. The sub-finding provides:

In August 2001, the FBI's Minneapolis field office, in conjunction with the INS [Immigration and Naturalization Service], detained Zacarias Massouri, a French national who had enrolled in flight training in Minnesota. FBI agents there also suspected that Moussaoui was involved in a hijacking plot. FBI Headquarters determined that there was not probable cause to obtain a court order to search Moussaoui's belongings under the Foreign Intelligence Surveillance Act (FISA). However, personnel at FBI Headquarters, including the Radical Fundamentalism Unit and the National Security Law Unit, as well as agents in the Minneapolis field office, misunderstood the legal standards for obtaining an order under FISA. As a result, FBI Minneapolis field office personnel wasted valuable investigative resources trying to connect the Chechen rebels to al-Qa'ida. Finally, no one at the FBI apparently connected Moussaoui investigation with the heightened threat environment in the summer of 2001, the Phoenix communication, or the entry of al-Mihdhar and al-Hazmi into the United States.

Id.

⁷² Factual sub-heading 5i, *id.* at xiv. The sub-finding states:

Prior to September 11, the Intelligence Community had information linking Khalid Shaykh Mohammed (KSM), now recognized by the Intelligence Community as the mastermind of the attacks to Bin Ladin, to terrorist plans to use an aircraft as weapons, and to terrorist activity in the United States. The Intelligence Community, however, relegated ... KSM to rendition target status following his 1996 indictment in connection with the Bojinka Plot and, as a result, focused primarily on his location, rather than his activities and place in the al-Qa'ida hierarchy. The Community also did not recognize the significance of reporting in June 2001 concerning KSM's active role in sending terrorists to the United States, or the facilitation of their activities upon arriving in the United States. Collection efforts were not targeted on information about KSM that might have helped better understand al-Qa'ida's plans and intentions and KSM's role in the September 11 attacks was a surprise to the Intelligence Community.

Id.

⁷³ Factual sub-finding 5j, *id.* at xv. The sub-finding provides:

In the period from September 8 to September 10, 2001, NSA intercepted, but did not translate or disseminate until after September 11, some communications that indicated possible impending terrorist activity.

Id. (brackets omitted). The discussion supporting sub-finding 5j is largely deleted or bracketed. *Id.* at 32.

⁷⁴ *Id.* at xvi.

⁷⁵ *Id.* at 39.

⁷⁶ *Id.*

⁷⁷ *Id.* at 41(original emphasis).

⁷⁸ *Id.* at xvi.

⁷⁹ *Id.* at 68.

⁸⁰ JOINT INQUIRY REPORT, *supra* note 7, at xvii. The discussion in support of this systemic finding mentions a lack of basic skills by NSA personnel, “frustration regarding their current working environment”, and “a high level of frustration among contractors who do business with the NSA.” *Id.* at 76-7.

⁸¹ *Id.* at xvii. The discussion in support of this systemic finding has been sanitized by substantial deletion of national security sensitive information. *See id.* at 90-96.

⁸² *See supra* note 81 and accompanying text.

⁸³ JOINT INQUIRY REPORT, *supra* note 7, at xviii. The discussion in support of this systemic finding is mostly uninformative because of the substantial deletion of national security sensitive information. *See id.* at 109-13.

⁸⁴ *Id.* (brackets omitted). As one would expect in a situation where even the systemic finding, itself, was subject to revision on grounds of national security, the discussion supporting this finding is likewise sanitized. *See id.* at 113-17.

⁸⁵ JERRY MCGUIRE (Jerry McGuire Productions 1996).

⁸⁶ JOINT INQUIRY REPORT, *supra* note 7, at xvi. Systemic finding 3 states:

Between the end of the Cold War and September 11, 2001, overall Intelligence Community funding fell or remained even in constant dollars, while funding for the Community’s counterterrorism efforts increased considerably. Despite these increases, the accumulation of intelligence priorities, a burdensome requirement process, the

overall decline in Intelligence Community funding, and reliance on supplemental appropriations made it difficult to allocate Community resources effectively against an evolving terrorist threat. Inefficiencies in the resource and requirements process were compounded by problems in Intelligence Community budgeting practices and procedures.

Id.

⁸⁷ *Id.* at 46 (brackets omitted).

⁸⁸ *Id.* at xvi.

⁸⁹ *Id.* at 70.

⁹⁰ *Dueling Banjos* (from the Movie DELIVERANCE Soundtrack 1973).

⁹¹ JOINT INQUIRY REPORT, *supra* note 7, at xvi. Systemic finding 7, in sanitized language, provides:

Prior to September 11, the Intelligence Community's ability to produce significant and timely signals intelligence on counterterrorism was limited by NSA's conflict between Intelligence Community agencies, NSA's cautious approach to any collection of intelligence relating to activities in the United States, and insufficient collaboration between NSA and FBI regarding the potential for terrorist attacks within the United States.

Id. (brackets omitted).

⁹² *Id.* at 74-5 (brackets omitted).

⁹³ *Id.* at 75 (brackets omitted).

⁹⁴ *Id.* (brackets omitted).

⁹⁵ Systemic finding 14, edited for reasons of national security, states:

Senior U.S. military officials were reluctant to use U.S. military assets to conduct offensive counter-terrorism efforts in Afghanistan, or to support or participate in CIA operations directed against al-Qa'ida prior to September 11. At least part of this reluctance was driven by the military's view that the Intelligence Community was unable to provide the intelligence needed to support military operations. Although the U.S. military did participate in [----] counterterrorism efforts to counter Usama Bin Ladin's terrorist network prior to September 11, 2001, most of military's focus was on force protection.

Id. at xviii (brackets omitted).

⁹⁶ *Id.* at 107.

⁹⁷ *Id.* at 106.

⁹⁸ *Id.*

⁹⁹ These included cruise missile attacks against Bin Ladin on August 20, 1998, “following the bombings of two U.S. embassies in East Africa”, *id.* at 108, (brackets omitted); positioning of U.S. naval vessels in the North Arabian Sea between 1999 and 2001 “to launch additional cruise missile strikes at Bin Ladin in the event the Intelligence Community was able to obtain precise information on his whereabouts in Afghanistan”, *id.* (brackets omitted); and military assistance “in the development of the Predator unmanned aerial vehicle as a second source of intelligence on Usama Bin Ladin’s precise whereabouts in Afghanistan.” *Id.* (brackets omitted).

¹⁰⁰ 1 COR. 13:12 states: “For now we see through a glass, darkly; but then face-to-face; now I know, in part, then shall I know even as also I am known.”

¹⁰¹ JOINT INQUIRY REPORT, *supra* note 7, at xvii.

¹⁰² *Id.* at 96-97.

¹⁰³ My sense of using the term “good cop, bad cop” differs a bit from its typical use as “a psychological tactic, often used by police for interrogation”. Thus:

Two ‘cops’ alternate their interviews. The ‘Bad Cop’ behaves negatively toward the subject, making blatant accusations, derogatory comments, threats, and in general raising the subject’s antipathy. This sets the stage for the ‘Good Cop’ to deceptively act supportive, understanding, defensive, and in general show sympathy for the subject, which may make the subject cooperative towards the latter.

[http://www.webster-dictionary.org/definition/Good%20cop%Fbad%20cop.](http://www.webster-dictionary.org/definition/Good%20cop%Fbad%20cop)

¹⁰⁴ JOINT INQUIRY REPORT, *supra* note 7, at xviii-xix (emphasis added).

¹⁰⁵ *Id.* at 120.

¹⁰⁶ *Id.* at 121 (brackets omitted). Tellingly, there is a bracketed and deleted two and a half sentence set forth in the JIR after the quoted sentence in the text—presumably a detailed assessment of specific executive branch failings to support the topic sentence of the paragraph—excised by national security censors.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 123 (brackets omitted in last two sentences).

¹⁰⁹ JOSEPH HELLER, *CATCH-22* (1961).

¹¹⁰ *See generally*, THE OXFORD COMPANION TO ENGLISH LITERATURE 176-77 (Margaret Drabble, ed., 5th ed. 1985).

¹¹¹ JOINT INQUIRY REPORT, *supra* note 7, at xvii-xviii.

¹¹² *Id.* at 98 (Brackets omitted).

¹¹³ *Id.* at 98-99 (brackets omitted).

¹¹⁴ *Id.* at 99.

¹¹⁵ As of April of 2004, Richard Clarke's exposé book on pre-9/11 events was a national bestseller. See RICHARD CLARKE, AGAINST ALL ENEMIES (2004).

¹¹⁶ JOINT INQUIRY REPORT, *supra* note 7, at 100 (emphasis added).

¹¹⁷ *Id.* at xix. The language of finding 20 in the summary findings simply states: "Located in Part Four entitled "Finding, Discussion and Narrative Regarding Certain Sensitive National Security Matters." *Id.* A sanitized, expanded version of finding 20 is found buried at the end of the report. *Id.* at 395.

¹¹⁸ *Id.* at 296-422. Isolated, unhelpful words and phrases are sprinkled throughout these pages. See e.g. *id.* at 406 ("The Joint Inquiry also found"), *id.* at 413 ("In testimony before the Joint Inquiry"), *id.* at 416 ("Finally"). Why did Congress bother to insert these inane phrases amid a sea of deleted pages?

¹¹⁹ *Id.* at 395 (brackets omitted).

¹²⁰ *Id.* (brackets omitted).

¹²¹ *Id.* (brackets omitted).

¹²² See generally, LANCE, *supra* note 69. Cf. BOB GRAHAM, INTELLIGENCE MATTERS: THE CIA, THE FBI, SAUDI ARABIA AND THE FAILURE OF AMERICA'S WAR ON TERROR 168-69, 202, 216, 225, 229, 237 (2004)(arguing financial support of Saudi Arabia for terrorists).

¹²³ JOINT INQUIRY ERRATA PRINT, *supra* note 26, at 1. Sloppiness is further apparent in the ERRATA print's footnoted reference to a "[l]ist of previous commissions that addressed intelligence organizational issues, 1990-present" and its omission of these commissions from both the original JIR and the ERRATA print. Perhaps, the footnote is a sloppy reference to the "Appendix-Evolution of the Terrorist Threat and the U.N. Response, 1983-2001", JOINT INQUIRY REPORT, *supra* note 7, at App. 5-49.

¹²⁴ *Id.* at 2.

¹²⁵ *Id.* at 3.

¹²⁶ *Id.* at 2 (footnote omitted).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 3.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 5 (emphasis added).

¹³⁶ *Id.*

¹³⁷ According to the JIR, the “information fusion center” (IFC) should be given legal authority and resources needed to:

- have full and timely access to all counterterrorism-related intelligence information, including “raw” supporting data as needed;
- have the ability to participate fully in the existing requirements process for tasking the Intelligence Community to gather information on foreign individuals, entities and threats;
- integrate such information in order to identify and assess the nature and scope of terrorist threats to the United States in light of actual and potential vulnerabilities;
- implement and fully utilize data mining and other advanced analytical tools, consistent with applicable law;
- retain a permanent staff of experienced and highly skilled analysts, supplemented on a regular basis by personnel on “joint tours” from the various Intelligence Community agencies;
- institute a reporting mechanism that enables analysts at all the intelligence and law enforcement agencies without waiting for dissemination of a formal report;
- maintain excellence and creativity in staff analytic skills through regular use of analysis and language training programs; and
- establish and sustain effective channels for the exchange of counterterrorism-related information with federal agencies outside the Intelligence Community as well as with state and local authorities.

Id. at 5-6.

¹³⁸ *Id.* at 9-10.

¹³⁹ See *supra* notes 124-37 and accompanying text.

¹⁴⁰ JOINT INQUIRY ERRATA PRINT, *supra* note 26, at 11.

¹⁴¹ *Id.* The JIR recommendation continues by stating:

The Director of National Intelligence should require more extensive use of “joint tours” for intelligence and appropriate law enforcement personnel to broaden their experience and help bridge existing organizational and cultural divides through service in other agencies. These joint tours should include not only service at Intelligence

Community agencies, but also service in those agencies that are users or consumers of intelligence products. Serious incentives for joint services should be established throughout the Intelligence Community and personnel should be rewarded for joint service with career advancement credit at individual agencies. The Director of National Intelligence should also require Intelligence Community agencies to participate in joint exercises[.]

Id. at 11-12.

¹⁴² *Id.* at 12.

¹⁴³ *Id.* at 14.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 15.

¹⁴⁶ GEORGE ORWELL, 1984 (1948).

¹⁴⁷ See Ian Fleming's classic book, *GOLDFINGER* (1959).

¹⁴⁸ JOINT INQUIRY ERRATA PRINT, *supra* note 26, at 3-4.

¹⁴⁹ See U.S. CONST. art. II, § 2, cl. 1.

¹⁵⁰ See *id.*, art. II, § 2, cls. 4-5.

¹⁵¹ See *id.*, art. I, § 9, cl. 7.

¹⁵² JOINT INQUIRY ERRATA PRINT, *supra* note 26, at 4.

¹⁵³ *Id.* at 8. The JIR goes on to request, by way of a prominent example, executive branch proposals on “whether the range of persons subject to searches and surveillances authorized under the Foreign Intelligence Surveillance Act (FISA) should be expanded.” *Id.*

¹⁵⁴ *Id.* Comparative law perspectives are usually helpful in pondering the content and structure of legislation. But *query*: have the domestic intelligence problems of the United States—the world’s sole “super-power” with the enmity of many groups from around the world—become *sui generis*? Perhaps the experience of Israel in conducting its domestic intelligence would be most apropos to the domestic intelligence program needed for the United States in the post 9/11 era.

¹⁵⁵ *Id.* at 9.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 10.

¹⁵⁸ *Id.* The language used by the JIR is ambiguous and open to varying interpretations. As a final shot over the bow of NSA, the JIR in conjunction with the forthcoming requested report from NSA indicates

as follows: “In evaluating the plan, the Committees should also consider issues pertaining to whether civilians should be appointed to the position of Director of National Security Agency and whether the term of service for the position should be longer than it has been in the recent past.” *Id.*

¹⁵⁹ *Id.* at 13. Interestingly, the JIR wants the State Department review to “address the degree to which current categories of extraditable offenses should be expanded to cover offenses, such as visa and immigration fraud, which may be particularly useful against terrorists and those who support them.” *Id.*

¹⁶⁰ See generally JOHN W. DEAN, *WORSE THAN WATERGATE* 113-14 (2004) (“Because of the lack of White House cooperation with the joint inquiry, the families of 9/11 victims began lobbying Congress to create an independent commission, with subpoena power, to investigate 9/11, even before the congressional effort had been completed”). Of course, the Joint Inquiry, acting through the respective houses of Congress, could have subpoenaed all pertinent documents that it wanted from the executive branch. See generally LEGISLATIVE PROCESS (Abner J. Mikva & Eric Lane, eds. 2nd ed. 2002) 216-30 (discussing compulsory process before congressional committees).

¹⁶¹ JOINT INQUIRY ERRATA PRINT, *supra* note 26, at 13. In July of 2004 the commission issued its report. See *supra* note 8 and accompanying text. This report “concluded in its unanimous final report ... that the attacks were a shock but they should not have come as a surprise.” Philip Shenon, ‘*We Are Not Safe*’: Commission Warns of Another Catastrophe Under Status Quo, N.Y. TIMES, July 23, 2004, at A1 (internal quotation marks omitted). For an account of the formation of the Commission because of the perceived lack of success of the Joint Inquiry by Congress see CONGRESSIONAL QUARTERLY INC., 2002 ALMANAC 7-18-7-19 (2003).

¹⁶² *Id.* at 14. JOINT INQUIRY ERRATA PRINT, *supra* note 26, at 14.

¹⁶³ DEAN, *supra* note 160, at 113.

¹⁶⁴ JOINT INQUIRY ERRATA PRINT, *supra* note 26, at 15 (emphasis added).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 16. In what may be called an omnibus reporting mandate, the following language appears at the close of the JIR recommendations: “The Intelligence Community should fully inform the House and Senate Intelligence Committees of significant developments [regarding evidence of state sponsored terrorism], through regular reports and additional communications” with the expectation that “the [congressional] Committees should, in turn, exercise vigorous and continuing oversight of the [Intelligence] Community’s work in this critically important area.” *Id.* at 17.

¹⁶⁷ *Id.* at 4. The JIR goes on to specify how Congress would like this national counterterrorism strategy to look including discussion of the following:

- develop[ing] human sources to penetrate terrorist organizations and networks both overseas and within the United States;
- fully utilize[ing] existing and future technologies to better exploit terrorist communications; to improve and expand the use of data mining and other cutting edge analytical tools; and to develop a multi-level security capability to facilitate the timely and complete sharing of relevant intelligence information both within

-
- the Intelligence Community and with other appropriate federal, state, and local authorities;
- enhance[ing] the depth and quality of domestic intelligence collection and analysis by, for example, modernizing current intelligence reporting formats through the use of existing information technology to emphasize the existence and the significance of links between new and previously acquired information;
 - maximize[ing] the effective use of covert action in counterterrorist efforts;
 - develop[ing] programs to deal with financial support for international terrorism; and
 - facilitate[ing] the ability of CIA paramilitary units and military special operations to conduct joint operations against terrorist targets.

Id. at 4-5.

¹⁶⁸ *Id.* at 5.

¹⁶⁹ *Id.* at 7-8.

¹⁷⁰ *Id.* at 9.

¹⁷¹ *Id.* at 10.

¹⁷² *Id.* at 11. One of the more intriguing specific congressional recommendations is a “Civilian Linguist Reserve Corps” outside of the Intelligence Community “whose abilities are relevant to the needs of counterterrorism[.]” Moreover, ever “politically correct” in its aspirations, the JIR directs that:

the Intelligence Community should enhance recruitment of a more ethnically and culturally diverse workforce and devise a strategy to capitalize upon the unique culture and linguistic capabilities of first-generation Americans, a strategy designed to utilize their skills to the greatest practical effect, while recognizing the potential counterintelligence challenges such hiring decisions might pose.

Id. at 12.

¹⁷³ *Id.* at 12-13.

¹⁷⁴ *Id.* at 14.

¹⁷⁵ *Id.* at 15-16.

¹⁷⁶ *Id.* at 16.

¹⁷⁷ *Id.*

¹⁷⁸ See JOINT INQUIRY REPORT, *supra* note 7, following page 435. The “additional views” are separately paginated. Citation will be to the JOINT INQUIRY REPORT followed by a parenthetical reference to the congressional member filing the additional views and a page reference to the member’s separate pagination. For example, *id.* (Additional Views of Sen. Richard C. Shelby at 7).

¹⁷⁹ See e.g. MIKVA & LANE, *supra* note 160, at 284-85.

¹⁸⁰ Cf. Robert F. Blomquist, *Dissent, Posner-Style: Judge Richard A. Posner's First Decade Dissenting Judicial Opinions, 1981-1991—Toward An Aesthetics of Judicial Dissenting Style*, 69 MO. L. REV. 73 (2004). See also CASS SUNSTEIN, *WHY SOCIETIES NEED DISSENT* (2003).

¹⁸¹ The additional views of members are as follows and appear in the following order:

- Sen. Richard C. Shelby (R-AL) (135 pages)
- Rep. Michael N. Castle (R-DE) (2 pages)
- Sen. Mike DeWine (R-OH) (16 pages)
- Rep. Jane Harman (D-CA) (5 pages)
- Sen. John Kyl (R-AZ) and Sen. Pat Roberts (R-KS) (21 pages)
- Sen. Carl Levin (D-MN) (3 pages)
- Sen. Barbara A. Mikulski (D-MD) (3 pages)
- Rep. Tim Roemer (D-IN) (5 pages)

A total of 17 U.S. Senators and members of the Senate Select Committee on Intelligence were part of the JOINT INQUIRY. A total of 20 U.S. Representatives and members of the House Permanent Select Committee on Intelligence, were part of the Joint Inquiry. Therefore, 9 out of 37 (or about 24%) of the Joint Inquiry members filed additional views.

¹⁸² See JOINT INQUIRY REPORT, *supra* note 7, at viii.

¹⁸³ See *supra* note 181 and accompanying text.

¹⁸⁴ DEAN, *supra* note 160, at 113 (footnote omitted).

¹⁸⁵ JOINT INQUIRY REPORT, *supra* note 7, (Additional Views of Sen. Richard C. Shelby at 3).

¹⁸⁶ *Id.* (Additional Views of Sen. Richard C. Shelby at 4). In partial support of his reference to centrifugal tendencies, Shelby observed: “The most obvious problem with respect to the IC’s [Intelligence Committee’s] ability to act as a coherent and effective whole is the fact that more than 80 percent of its budgets and personnel resources are controlled by the Department of Defense (DOD).” *Id.* (Additional Views of Sen. Richard C. Shelby at 21).

¹⁸⁷ *Id.* (Additional Views of Sen. Richard C. Shelby at 28). He elaborated in this point by observing:

This is what might be called the “meta-lesson” of our current round of “lessons learned” studies of intelligence failures: 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. Adopting uniform personnel standards would help the Community ensure that its personnel and organizational units remain unique and valuable individual resources but they would also become *administratively* fungible assets, capable of being reorganized and redirected efficiently as circumstances demand.

Id. (original emphasis).

¹⁸⁸ *Id.* (Additional Views of Sen. Richard C. Shelby at 29).

¹⁸⁹ *Id.* (Additional Views of Sen. Richard C. Shelby at 33-46).

¹⁹⁰ *Id.* (Additional Views of Sen. Richard C. Shelby at 47-51).

¹⁹¹ *Id.* (Additional Views of Sen. Richard C. Shelby at 52-70).

¹⁹² *Id.* (Additional Views of Sen. Richard C. Shelby at 6-7).

¹⁹³ *Id.* (Additional Views of Sen. Richard C. Shelby at 8).

¹⁹⁴ Pub. L. 107-56 (Oct. 26, 2001).

¹⁹⁵ 18 U.S.C. § 1801, *et. seq.*

¹⁹⁶ JOINT INQUIRY REPORT, *supra* note 7 (Additional Views of Sen. Richard C. Shelby at 86).

¹⁹⁷ *Id.* (Additional Views of Sen. Richard C. Shelby at 89) (original emphasis) (footnote omitted).

¹⁹⁸ *Id.* (Additional Views of Sen. Richard C. Shelby at 10). He went on to contend:

In light of the FBI’s dismal recent history of disorganization and institutional incompetence in its national security work, many of us in Congress have begun to consider whether it might better serve the interests of the American people to separate the counterintelligence and counterterrorism functions of the [FBI] into an entirely separate organization—one that would be free of the structural, organizational, and cultural constraints that have greatly handicapped the FBI’s ability to conduct the domestic intelligence work our country depends upon it to perform.

Id. (Additional Views of Sen. Richard C. Shelby at 98-99).

¹⁹⁹ *Id.* (Additional Views of Sen. Richard C. Shelby at 12).

²⁰⁰ *Id.* (Additional Views of Sen. Richard C. Shelby at 129). A significant reason for this covert action timidity, from Shelby’s perspective, was a history, during the Clinton Administration, of legal authorizations contained in presidential Memoranda of Notifications (MONs) “as to what [covert] agents are permitted to do in pursuit of the stated aim—with absolute clarity.” *Id.* (footnote citing Joint Inquiry testimony of former National Security Advisor Sandy Berger).

²⁰¹ *Id.*

²⁰² *Id.* (Additional Views of Sen. Richard C. Shelby at 13) (original emphasis).

²⁰³ *Id.* (original emphasis).

²⁰⁴ *Id.* (Additional Views of Rep. Mike Castle at 1).

²⁰⁵ *Id.*

²⁰⁶ *Id.* (Additional Views of Rep. Mike Castle at 1-2).

²⁰⁷ *Id.* (Additional Views of Sen. Mike DeWine at 2). *Cf.* Blomquist, *supra* note 180, at 91-2 (discussing the concept of a collaborative versus an oppositional judicial dissenting opinion).

²⁰⁸ JOINT INQUIRY REPORT *supra* note 7 (additional views of Sen. Mike DeWine at 2).

²⁰⁹ *Id.* Senator DeWine's suggestions for additional congressional oversight activities are incisive and perspicacious. He proposes, for example:

[T]he Intelligence Committees [of Congress] should hold regularly scheduled hearings to examine the FISA process and receive testimony from senior [executive branch] officials These hearings should explore the FISA process and provide information as to how FISA is being implemented. For example, in order to better determine how the Executive Branch is utilizing FISA, the Committee should examine the number of FISA warrants issued during a given period of time and the general subject matter or issues those warrants were meant to address. Furthermore, these hearings should be used to explore a wide range of hypothetical situations—situations based on actual cases that demonstrate to [Congress] ... how the law would be applied in certain scenarios. This would allow [Congress] to develop a better understanding of how FISA is being implemented in a practical, day-to-day manner and also alert [Congress] to any instances where the [relevant intelligence entities are] departing from Congressional intent.

Id. (Additional Views of Sen. Mike DeWine at 3).

²¹⁰ *Id.* (Additional Views of Sen. Mike DeWine at 4).

²¹¹ *Id.* (Additional Views of Sen. Mike DeWine at 4, n. 2).

²¹² *Id.* (Additional Views of Sen. Mike DeWine at 5).

²¹³ *Id.* (Additional Views of Sen. Mike DeWine at 6).

²¹⁴ *Id.*

²¹⁵ *Id.* An obvious potential problem with this particular idea, however, is securing the combined intelligence database against computer hackers.

²¹⁶ *Id.* (Additional Views of Sen. Mike DeWine at 7).

²¹⁷ *Id.* (Additional Views of Sen. Mike DeWine at 8).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* (Additional Views of Sen. Mike DeWine at 8-15). As explained by DeWine, this might include attendance at a radical Islamic mosque in the U.S., allowing the American operative to travel abroad, receiving training at a terrorist camp and to “infiltrate organizations like al Qaeda.” *Id.* (Additional Views of Sen. Mike DeWine at 14).

²²² *Id.* (Additional Views of Rep. Jane Harman at 1).

²²³ *Id.*

²²⁴ *Id.* (Additional Views of Rep. Jane Harman at 2). In this regard, she went on to note that the “raw databases” of many American intelligence agencies like the CIA and the NSA “contain extremely valuable information that does not get noticed, shared, integrated, or acted upon.” *Id.*

²²⁵ *Id.* (Additional Views of Sen. John Kyl & Sen. Pat Roberts at 1-4).

²²⁶ *Id.* (Additional Views of Sen. John Kyl & Sen. Pat Roberts at 4).

²²⁷ *Id.* (Additional Views of Sen. John Kyl & Sen. Pat Roberts at 20-1).

²²⁸ *Id.* (Additional Views of Sen. John Kyl & Sen. Pat Roberts at 20-1).

²²⁹ *Id.* (Additional Views of Sen. John Kyl & Sen. Pat Roberts at 1) (emphasis added).

²³⁰ *Id.*

²³¹ *Id.* (Additional Views of Sen. John Kyl & Sen. Pat Roberts at 1-2).

²³² *Id.* (Additional Views of Sen. John Kyl & Sen. Pat Roberts at 2).

²³³ *Id.* (Additional Views of Sen. John Kyl & Sen. Pat Roberts at 2).

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *See supra* notes 228-37 and accompanying text.

²³⁹ *Id.* (Additional Views of Sen. John Kyl & Pat Roberts at 4).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* (Additional View of Sen. John Kyl & Sen. Pat Roberts at 4-5).

²⁴⁴ *Id.* (Additional Views of Sen. John Kyl & Sen. Pat Roberts at 5-8) (discussing a “legacy of caution” at key American intelligence agencies dealing with official concern about past congressional criticisms of civil liberties violations and a cultural ethos that was afraid to make mistakes).

²⁴⁵ *Id.* (Additional Views of Sen. John Kyl & Sen. Pat Roberts at 8-13) (discussing the “contradiction between high-ranking officials’ complaints about inadequate resources and the fact that, according to the Office Management and Budget, the intelligence agencies usually got what they asked for”).

²⁴⁶ *Id.* (Additional Views of Sen. John Kyl & Sen. Pat Roberts at 13-15) (criticizing ambiguous legal materials from presidential decision directives to the FISA statute).

²⁴⁷ *Id.* (Additional Views of Sen. John Kyl & Sen. Pat Roberts at 15-17) (Among other things, noting that “al Qaeda’s attack on Washington and New York occurred after a long period of poor leadership at the highest levels of the U.S. Government regarding terrorism. Despite repeated assaults on the United States and its interests—the 1993 World Trade Center attack, the bombing of the American embassies in Kenya and Tanzania in 1998, the attack on the *U.S.S. Cole* in 2000, to name a few—the U.S. Government was still unwilling to treat terrorism as a true national security issue until 9/11”).

²⁴⁸ *Id.* (Additional Views of Sen. John Kyl & Sen. Pat Roberts at 17-20) (criticizing the failure of the JIR to fully discuss the failure of the U.S. State Department to deny visa access by 15 of the 19 hijackers from Saudi Arabia).

²⁴⁹ *Id.* (Additional Views of Sen. John Kyl & Sen. Pat Roberts at 20) (internal quotation marks omitted).

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² For an excellent discussion of the constitutional and interactive problems of the congressional oversight of the executive branch see WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRET, *LEGISLATION AND STATUTORY INTERPRETATION* 203-10 (2000).

²⁵³ U.S. CONST., art. I, § 1.

²⁵⁴ *Id.* at art. I, § 8; art. I § 9.

²⁵⁵ David Nather, *Congress As Watchdog: Asleep on the Job?*, 62 CONG. QUART. WKLY 1190, 1190-93 (May 22, 2004). Prominent instances of past congressional oversight investigations include: the 1792 inquiry on the Indian attacks on American troops—the first congressional oversight inquiry—by a select House committee investigating the circumstances of an attack that killed about 600 U.S. troops commanded by Maj. Gen. Arthur St. Clair, *id.* at 1190; the first joint House-Senate investigative panel, conducted from December 1861 through May 1865, that examined “past and future battle plans, disloyal employees, navy installations, and war supplies and contracts” (considered “the worst-run congressional inquiry until the McCarthy hearings of the 1950s”), *id.*; the Financial Trusts investigation from February 1912 to February 1913 by a House Banking and Currency subcommittee looking into “the concentration of money and credit, especially the control exercised by two New York banks,” with the “panel’s report help[ing] [the] enactment of the Federal Reserve Act of 1913” among other legislation;

id.; the investigations by the Senate Subcommittee on Public Lands and Surveys and the Senate Select Committee to Investigate the Justice Department, during 1923-24, into the “lease of naval oil reserves, including one called Teapot Dome under a Wyoming rock formation by the Harding Administration”, *id.* at 1190-91; the Defense Programs inquiry by the Special Senate Committee to Investigate the National Defense Program, during March 1941 to April 1948 (viewed as “the most effective congressional investigation ever”) into “the status of national defenses to a more specific review of war mobilization problems, shortages of critical materials such as aluminum, and fraud among contractors and lobbyists”, *id.* at 1191; the Kefauver Crime Hearings, from May 1950 to Summer 1951, being the Senate Special Committee to Investigate Organized Crime in Interstate Commerce, which was “the first congressional hearings to draw the rapt attention of television viewers across the nation as prominent gangsters and underworld leaders were paraded in front of the panel”, *id.*; the McCarthy Investigations, from January 1953 to December 1954, as the Senate Government Operations Committee’s Permanent Investigations Committee conducted “a sweeping array of probes of purported communist subversion of the U.S. government and the United Nations,” *id.* at 1191-92; the Watergate Hearings, during January 1973 to July 1974 of the Senate Select Committee on Presidential Campaign Activities and the House Judiciary Committee’s impeachment inquiry into President Richard M. Nixon’s illegal activities, *id.* at 1192; the Senate “Select Committee to Study Government Operations With Respect to Intelligence Activities,” from January 1975 to April 1976, chaired by Senator Frank Church (D-Idaho), focusing on the CIA’s domestic spying activities during the Vietnam War and leading to the formation of the Senate Select Committee on Intelligence, *id.* at 1192-93; and the Iran Contra hearings, from November 1986 to August 1987, before the jointly-convened House and Senate Intelligence Committees, *id.* at 1193.

²⁵⁶ *Id.* at 1191.

²⁵⁷ *Id.* at 1191-94.

²⁵⁸ *Id.* at 1193.

²⁵⁹ *Id.*

²⁶⁰ Christopher Marquis, *Reports On Attacks Are Gripping, Not Dry*, N.Y. TIMES, June 20, 2004, at A23.

²⁶¹ See Helen Fessenden, *Intelligence Panels’ Mission Corroded by Air of Distrust*, 62 CONG. QUART. WKLY. 730 (Mar. 27, 2004).

²⁶² *Id.* at 733.

²⁶³ Editorial, *Wake Up the Watchdogs*, N.Y. TIMES, June 12, 2004, at A26.

²⁶⁴ *Id.* See also 9/11 COMMISSION REPORT, *supra* note 8, at 419-21 (recommending consolidation of congressional oversight over counterterrorism and fostering expertise of specific members of Congress).

²⁶⁵ Editorial, *supra* note 263, at A26.

²⁶⁶ *Id.*

²⁶⁷ *Id.* (internal quotation marks omitted).

²⁶⁸ *Id.* See also 9/11 COMMISSION REPORT, *supra* note 8, at 419-21.

²⁶⁹ See *supra* notes 119-32 and accompanying text; see *infra* note 304.

²⁷⁰ Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1062 (2004).

²⁷¹ Cf. *id.* at 1021-53 (discussing the details of institutional breakdown in public schools, mental health facilities, prisons, police departments and housing authorities).

²⁷² See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1-4 (tenth ed. 1958) (William N. Eskridge, Jr. & Philip P. Frickey, eds. 1994) (theorizing that human conflict, in the satisfaction of human wants is an inescapable feature of human interdependence and in resolving this inherent and systemic conflict “affirmative and knowledgeable cooperation” through law is necessary. Moreover, Hart and Sacks recognized that as part of their fundamental interdependence with others, “people form themselves into groups for the protection and advancement of their common interests”; so, too, individuals establish “[t]he [i]nstitutionalization of [p]rocedures for the [s]ettlement of [q]uestions of [g]roup [c]oncern”).

²⁷³ *Id.* at 6 (emphasis added).

²⁷⁴ Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113, 2113 (2003).

²⁷⁵ *Id.* at 2125, n. 50 (original emphasis) (internal quotation marks omitted).

²⁷⁶ Sabel & Simon, *supra* note 270, at 1053.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 1067. For a general theoretical discussion of the challenges and tools available for the conscientious American legislator see Robert F. Blomquist, *The Good American Legislator: Some Legal Process Perspectives and Possibilities*, 30 AKRON L. REV. (2005) (forthcoming).

²⁸⁰ Sabel & Simon, *supra* note 270, at 1067.

²⁸¹ *Id.* at 1068.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 1069 (footnote omitted).

287 *Id.*

288 *Id.*

289 *Id.*

290 *Id.*

291 *Id.* at 1070.

292 *Id.*

293 *Id.* at 1071.

294 *Id.* According to Professors Sabel and Simon:

[W]hatever the technical legal status of the plans, their function is not so much to coerce obedience as to introduce internal deliberation and external transparency. Forcing the [stakeholders] ... to agree on a clear description of their practices puts pressure on them to reflect on and explain what they are doing. Moreover, the practice norms enable outsiders to determine what the practitioners are up to. They complement the performance norms by describing the inputs that generate the outputs indicated by those norms.

Id. (footnote omitted).

295 *Id.*

296 *Id.*

297 *Id.* at 1072.

298 *Id.*

299 As an excellent model for private sector input into sensitive national security matters see NATIONAL INTELLIGENCE COUNCIL, GLOBAL TRENDS 2015: A DIALOGUE ABOUT THE FUTURE WITH NONGOVERNMENTAL EXPERTS NIC 2000-02 (December 2000) (discussing, among other “drivers and trends” the development of “transnational terrorism” and possible American responses).

300 Sabel & Simon, *supra* note 270, at 1072.

301 *Id.*

302 *Id.* at 1073.

303 *Id.*

304 The danger of these proposed reforms is that they will end up being more process than real congressional oversight of executive branch counterterrorism policy. *Cf.* Orde F. Kittrie, *More Process*

Than Peace: Legitimacy, Compliance, and the Oslo Accords (Book Review Essay), 101 MICH. L. REV. 1661, 1663 (2003) (the reliance of the drafters of the Oslo Accords relied to an excessive degree “on open-ended gradualism and ambiguity in their efforts to turn peace negotiations into a legally binding, final settlement” which “reliance proved to be disastrously counterproductive”). For the rather tepid suggestions by the 9/11 Commission to improve congressional oversight of intelligence and homeland security see THE 9/11 COMMISSION REPORT, *supra* note 156, at 419-21.

For interesting recent articles discussing the constitutional dimensions of the post-9/11 terrorism environment—beyond the scope of this Article—see e.g. Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004).

For an account of congressional bills to incorporate the 9/11 COMMISSION REPORT’s recommendations into legislation see Philip Shenon, *Bipartisan Bill Offered on 9/11 Panel’s Proposals*, N.Y. TIMES, Sept. 8, 2004, at A1. See also *Editorial, Duty Chafes on Capitol Hill*, N.Y. TIMES, Sept. 8, 2004, at A26 (“The bipartisan Report’s parallel warning that Congress must reform itself to apply true intelligence oversight is flat-lining so far on Capitol Hill as rival committee leaders defend a checkerboard full of important fiefs.”)

Congress—in late 2004—with prodding by President Bush, ended up passing legislation that encapsulated many of the 9/11 Commission recommendations—some of which had also been suggested by the congressional Joint Inquiry. Perhaps the most significant change in the intelligence law reforms was the creation of the position of National Intelligence Director. See *Intelligence*, 63 CONG. QUART. WKLY. 24 (Jan. 3, 2005) (“The first homeland security question to be resolved is whether the House will create a more powerful committee to oversee [intelligence] or continue to fragment oversight among dozens of panels”; “Congress passed the intelligence overhaul bill, but now the Intelligence and Homeland Security committees will have to deal with what they wrought, overseeing yet another major government reorganization.”)