



G A O

Accountability \* Integrity \* Reliability

---

United States Government Accountability Office  
Washington, DC 20548

B-303692

September 9, 2004

The Honorable Tom Davis  
Chairman  
Committee on Government Reform  
House of Representatives

Dear Mr. Chairman:

We appreciated the opportunity to testify on August 3, 2004, and assist the committee in its consideration of the 9/11 Commission's recommendations. As I testified, GAO has been actively involved in improving government's performance in the critically important homeland security area. And we look forward to continuing to work with your committee as it considers the many areas identified by the Commission as in need of reform.

During the question-and-answer period of my testimony Congressman Christopher Shays asked us to prepare a summary of the Commission's recommendations and provide GAO's opinion as to whether the particular recommendations could be implemented administratively or required legislation to implement. Enclosed is the summary my staff prepared in response to this request. Each item lists the contacts within GAO's General Counsel's office who are available to consult with your staff as needed.

Please let us know whether we can be of any further assistance on this matter.

Sincerely yours,

David M. Walker  
Comptroller General  
of the United States

Enclosure

cc: The Honorable Henry Waxman  
Ranking Minority Member  
Committee on Government Reform  
House of Representatives

The Honorable Christopher Shays  
Chairman, Subcommittee on National Security,  
Emerging Threats, and International Relations  
Committee on Government Reform  
House of Representatives

The Honorable Dennis J. Kucinich  
Ranking Minority Member  
Subcommittee on National Security,  
Emerging Threats, and International Relations  
Committee on Government Reform  
House of Representatives



**G A O**

Accountability \* Integrity \* Reliability

---

**United States Government Accountability Office**  
**Washington, DC 20548**

B-303692

**SUMMARY OF RECOMMENDATIONS –**  
**THE 9/11 COMMISSION REPORT**

September 9, 2004

## Table of Contents

Terrorist Sanctuaries.....	2
Roots of Terrorism .....	4
Human Rights and Civil Liberties.....	8
Weapons of Mass Destruction .....	10
Terrorist Financing and Travel.....	11
Border and Transportation Security .....	13
Resources, Federal Assistance, and National Standards .....	19
Reorganizing the Intelligence Community .....	23
Intelligence Budgets.....	32
Information Sharing and Fusion.....	33
Human Capital .....	35
Threat and Risk Assessment.....	36
Congressional Oversight.....	37
Security Clearances.....	38
Appendix: Summary of Recommendations and Required Responses .....	39

## **SUMMARY OF RECOMMENDATIONS –** **THE 9/11 COMMISSION REPORT**

We reviewed the recommendations (and a number of the sub-recommendations) of the 9/11 Commission to determine whether they could be implemented administratively or instead would require legislation. We conducted our review by analyzing relevant statutes, legislative history, presidential directives, agency regulations and other issuances, GAO reports, and a number of other sources. We did not review the advisability of the Commission's recommendations. In a few instances, we suggested enacting legislation, even where the executive branch possesses authority to act on the recommendation, where GAO or other credible source provided a considered basis to do so.

We focused on the major substantive points of the Commission's recommendations and analyzed the recommendations at a high level, without speculating on the details of their implementation. As the details of implementation become clearer, a decision may be made, either for technical drafting or policy reasons, to address aspects of recommendations legislatively that may otherwise fall within the ambit of administrative authority.

The Commission's formal recommendations are noted in bold; sub-recommendations are also in bold, in smaller type font. We have noted at the end of each recommendation or sub-recommendation the page in the 9/11 Commission Report on which they appear. Our comments, including contacts in our Office of General Counsel, appear in boxes below the recommendations and judgmentally selected sub-recommendations. Because a number of the recommendations and sub-recommendations were inter-related, there is some degree of overlap in our comments.

In addition to the attached legal analysis, we have identified GAO reports, testimony, other products, and ongoing engagements that relate to the 9/11 Commission's recommendations. A summary of these materials that identifies the products and which recommendations they relate to will be prepared and available shortly. The combination of these products and the attached legal analysis should be helpful to the Congress in identifying areas for which additional legislation or congressional oversight may be valuable.

## **Terrorist Sanctuaries**

**The U.S. Government must identify and prioritize actual or potential terrorist sanctuaries. For each, it should have a realistic strategy to keep possible terrorists insecure and on the run, using all elements of national power. We should reach out, listen to, and work with other countries that can help. (Page 367)**

The Administration has a number of foreign policy tools, including diplomatic, military, intelligence, and economic authorities, that it can use as part of a strategy to keep terrorists insecure and on the run. This includes, for example, freezing assets of terrorist organizations and imposition of economic sanctions for countries harboring terrorists imposed pursuant to the International Emergency Economic Powers Act (50 U.S.C. § 1701 et seq.) **Contacts:** Mark Speight, Assistant General Counsel, IAT; Mark Dowling, Senior Attorney

**If Musharraf stands for enlightened moderation in a fight for his life and for the life of his country, the United States should be willing to make hard choices too, and make the difficult long-term commitment to the future of Pakistan. Sustaining the current scale of aid to Pakistan, the United States should support Pakistan's government in its struggle against extremists with a comprehensive effort that extends from military aid to support for better education, so long as Pakistan's leaders remain willing to make difficult choices of their own. (Page 369)**

The recommendation envisions continued appropriations by Congress of both development and military assistance funds to aid Pakistan. After 9/11, restrictions on assistance to Pakistan were lifted and Pakistan has since received over \$2 billion in assistance. (See the 2001 Emergency Supplemental Appropriations Act for Recovery From and Response to Terrorist Acts on the United States, Pub. L. 107-38, 115 Stat. 220, and the 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Acts on the United States, Pub. L. 107-206, 116 Stat. 820.) The President's budget requests \$700 million for assistance to Pakistan for FY 2005. **Contacts:** Mark Speight, Assistant General Counsel, IAT; Mark Dowling, Senior Attorney

**The President and the Congress deserve praise for their efforts in Afghanistan so far. Now the United States and the international community should make a long-term commitment to a secure and stable Afghanistan, in order to give the government a reasonable opportunity to improve the life of the Afghan people. Afghanistan must not again become a sanctuary for international crime and terrorism. The United States and the international community should help the Afghan government extend its authority over the country, with a strategy and nation-by-nation commitments to achieve their objectives. (Page 370)**

The President can implement this recommendation under his constitutional authority to conduct United States foreign policy by working with the appropriate multilateral institutions and to persuade the international community to make a long-term commitment to a secure and stable Afghanistan. Congress can continue to appropriate funds to support Afghanistan in support of this effort. The Afghanistan Freedom Support Act of 2002, Pub. L. 107-327, 116 Stat. 2797, authorized \$3.3 billion in funds over 4 years for reconstruction. The President's budget requests for Afghanistan for fiscal year 2005 total \$929 million. **Contacts:** Mark Speight, Assistant General Counsel, IAT; Mark Dowling, Senior Attorney

**The problems in the U.S.-Saudi relationship must be confronted, openly. The United States and Saudi Arabia must determine if they can build a relationship that political leaders on both sides are prepared to publicly defend—a relationship about more than oil. It should include a shared commitment to political and economic reform, as Saudis make common cause with the outside world. It should include a shared interest in greater tolerance and cultural respect, translating into a commitment to fight the violent extremists who foment hatred. (Page 374)**

The President can carry out this recommendation under his constitutional authority and responsibilities related to the formulation and execution of United States foreign policy. Likewise, the Secretary of State, as the President's principal foreign policy advisor, has sufficient authority under a number of statutes including the State Department Basic Authorities Act of 1956, as amended, Aug. 1, 1956, 70 Stat. 890, the Foreign Service Act of 1980, as amended (Pub. L. 96-465, 94 Stat. 2071), and the Omnibus Security and Antiterrorism Act of 1986, as amended (Pub. L. 99-399, 100 Stat. 853). **Contacts:** Mark Speight, Assistant General Counsel, IAT; Mark Dowling, Senior Attorney

## **Roots of Terrorism**

**The U.S. government must define what the message is, what it stands for. We should offer an example of moral leadership in the world, committed to treat people humanely, abide by the rule of law, and be generous and caring to our neighbors. America and Muslim friends can agree on respect for human dignity and opportunity. To Muslim parents, terrorists like Bin Ladin have nothing to offer their children but visions of violence and death. America and its friends have a crucial advantage—we can offer these parents a vision that might give their children a better future. If we heed the views of thoughtful leaders in the Arab and Muslim world, a moderate consensus can be found. (Page 376)**

The President has sufficient authority to develop and carry out policies in support of this recommendation under his constitutional authority and responsibilities related to the formulation and execution of United States foreign policy. The Secretary of State, as the President's principal foreign policy advisor, also has sufficient authority under a number of statutes including the State Department Basic Authorities Act, of 1956, as amended, Aug. 1, 1956, 70 Stat. 890, the Foreign Service Act of 1980, as amended (Pub. L. 96-465, 94 Stat. 2071), and the Omnibus Security and Antiterrorism Act of 1986, as amended (Pub. L. 99-399, 100 Stat. 853). Similarly, in addition to providing oversight of U.S. foreign policy, Congress can pass legislation to help set and guide policy in this area. **Contacts:** Mark Speight, Assistant General Counsel, IAT; Mark Dowling, Senior Attorney

**Where Muslim governments, even those who are friends, do not respect these principles, the United States must stand for a better future. One of the lessons of the long Cold War was that short-term gains in cooperating with the most repressive and brutal governments were too often outweighed by long-term setbacks for America's stature and interests. (Page 376)**

In the absence of legislation requiring provision of aid to a specific country, the Administration could issue an executive order restricting provision of foreign assistance to governments it deems "most repressive and brutal." Other tools available to the Administration are export controls under the Export Administration Act, 50 U.S.C. app. § 2401, et seq. (expired but authorities continued by Executive Order 13222, Aug. 22, 2001) and economic sanctions imposed under authority of the International Emergency Economic Powers Act (50 U.S.C. § 1701). Congress can exercise oversight of, and if necessary, place restrictions on the provision of foreign assistance to specific governments. **Contacts:** Mark Speight, Assistant General Counsel, IAT; Mark Dowling, Attorney



**Just as we did in the Cold War, we need to defend our ideals abroad vigorously. America does stand up for its values. The United States defended, and still defends, Muslims against tyrants and criminals in Somalia, Bosnia, Kosovo, Afghanistan, and Iraq. If the United States does not act aggressively to define itself in the Islamic world, the extremists will gladly do the job for us.**

**• Recognizing that Arab and Muslim audiences rely on satellite television and radio, the government has begun some promising initiatives in television and radio broadcasting to the Arab world, Iran, and Afghanistan. These efforts are beginning to reach large audiences. The Broadcasting Board of Governors has asked for much larger resources. It should get them. (Page 377)**

The Broadcasting Board of Governors (BBG) was established under the United States International Broadcasting Act of 1994 (22 U.S.C. § 6201). The BBG provides oversight and guidance to U.S. non-military international broadcast services, including Voice of America, Radio and TV Marti, WORLDNET Television and Film Service, Radio Free Europe/Radio Liberty, Radio Free Asia, Radio Sawa, and the Middle East Television Network (METN). Radio Sawa is a region-wide Arabic language radio station that combines western and Arabic popular music with news broadcasts and specialized programming. METN is an Arabic language television station designed to bolster U.S. public diplomacy efforts in the Middle East. *See GAO, State Department and Broadcasting Board of Governors Expand Post-9/11 Efforts but Challenges Remain*, GAO-04-1061T, Aug. 23, 2004. The pending Commerce, Justice, and State Department Appropriations bill, H.R. 4754, FY 2005, provides \$65 million for broadcasting in Arabic (\$20 million increase over President's request). **Contacts:** Mark Speight, Assistant General Counsel, IAT; Ernie Jackson, Senior Attorney

**• The United States should rebuild the scholarship, exchange, and library programs that reach out to young people and offer them knowledge and hope. Where such assistance is provided, it should be identified as coming from the citizens of the United States. (Page 377)**

The U.S. can rebuild the scholarship, exchange, and library programs that reach out to Islamic and Arab youth through executive/administrative actions taken under existing authority. Authority for U.S. cultural and exchange programs derives from the Mutual Educational and Cultural Exchange Act of 1961, as amended (22 U.S.C. § 2451). The State Department's Bureau of Educational and Cultural Affairs carries out programs to implement the goals of the legislation, and the agency's Educational and Exchange account funds those programs. If deemed desirable, Congress could create legislatively an exchange program specifically for countries in the Middle East. This could be modeled after past legislation creating specific programs, such as the Russian Leadership Program after the fall of the Soviet Union (the 1999 Supplemental Appropriations Act, Pub. L. No. 106-31, Title III, 113 Stat. 57, 86-105 (1999); the Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, Appendix B, title III, 114 Stat. 2763, 2763A-118 thru 2763A-123 (2000)). **Contacts:** Mark Speight, Assistant General Counsel, IAT; Ernie Jackson, Senior Attorney

**The U.S. government should offer to join with other nations in generously supporting a new International Youth Opportunity Fund. Funds will be spent directly for building and operating primary and secondary schools in those Muslim states that commit to sensibly investing their own money in public education. (Page 378)**

Using funds received annually through the Foreign Operations Appropriations Act, USAID could contribute to this new Fund under the authority of the Foreign Assistance Act of 1961, as amended (22 U.S.C. § 2151). Alternatively, Congress could earmark an amount in annual foreign operations appropriations to be contributed to this new Fund. This would ensure the existence of a dedicated source of U.S. financial support for the Fund, and would indicate to the international community the U.S.'s long-term commitment to the Fund and encourage other countries to do likewise. (This approach was taken for the U.S. contribution to the Global AIDS Fund.) **Contacts:** Mark Speight, Assistant General Counsel, IAT; Ernie Jackson, Senior Attorney

**A comprehensive U.S. strategy to counter terrorism should include economic policies that encourage development, more open societies, and opportunities for people to improve the lives of their families and to enhance prospects for their children's future. (Page 379)**

Many economic policies in a U.S. strategy to counter terrorism can be implemented through executive/administrative actions. The Foreign Assistance Act authorizes U.S. development assistance to developing countries to assist them in building and maintaining the social and economic institutions necessary to achieve self-sustaining growth and provide opportunities to improve the quality of life for their people. (*See* 22 U.S.C. § 2151-1(a)). In addition, the Millennium Challenge Act of 2003 (22 U.S.C. §§ 7701-7718) established the Millennium Challenge Account to provide additional U.S. foreign assistance to encourage economic development by creating what is intended to be a positive competition among potential recipient countries that adopt policies that help their citizens. Also, foreign assistance legislation over the past few years has placed major emphasis on economic growth in developing countries by authorizing and appropriating funds for trade capacity building (TCB) and directing various trade agencies to obligate certain amounts for TCB activities designed to promote trade. In terms of trade policy, the Administration has proposed a U.S./Middle East Free Trade Area and several legislative proposals are pending to establish trade preference programs for countries in the Middle East (*see, e.g.*, S. 1121, 108<sup>th</sup> Cong./H.R. 2267, 108<sup>th</sup> Cong.). Bilateral Free Trade agreements would require legislative action. **Contacts:** Mark Speight, Assistant General Counsel, IAT; Ernie Jackson, Senior Attorney

**The United States should engage other nations in developing a comprehensive coalition strategy against Islamist terrorism. There are several multilateral institutions in which such issues should be addressed. But the most important policies should be discussed and coordinated in a flexible contact group of leading coalition governments. This is a good place, for example, to develop joint strategies for targeting terrorist travel, or for hammering out a common strategy for the places where terrorists may be finding sanctuary. (Page 379)**

The President can implement this recommendation under his constitutional authority and responsibilities related to the formulation and execution of United States foreign policy. Likewise, the Secretary of State, as the President's principal foreign policy advisor responsible for the conduct of U.S. foreign policy, has sufficient authority. The lead U.S. agencies responsible for implementing U.S. policy at multilateral institutions, such the United Nations and the World Bank, and the U.S. representatives at such institutions, have sufficient statutory authority to address these issues within the institutions. **Contacts:** Mark Speight, Assistant General Counsel, IAT; Mark Dowling, Senior Attorney

## **Human Rights and Civil Liberties**

**The United States should engage its friends to develop a common coalition approach toward the detention and humane treatment of captured terrorists. New principles might draw upon Article 3 of the Geneva Conventions on the law of armed conflict. That article was specifically designed for those cases in which the usual laws of war did not apply. Its minimum standards are generally accepted throughout the world as customary international law. (Page 380)**

The President can implement this recommendation under his constitutional authority and responsibilities related to the formulation and conduct of United States foreign policy. Likewise, the Secretary of State, as the President's principal foreign policy advisor, has sufficient authority to execute U.S. foreign policy (22 U.S.C. § 2656). **Contacts:** Mark Speight, Assistant General Counsel, IAT; Richard Seldin, Senior Attorney

**As the President determines the guidelines for information sharing among government agencies and by those agencies with the private sector, he should safeguard the privacy of individuals about whom information is shared. (Page 394)**

Current law affords a basis for administrative action to safeguard the privacy of individuals about whom information is shared among government agencies and by those agencies with the private sector. *See generally* 5 U.S.C. § 552a (Privacy Act), the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, and the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). *See, e.g.*, GAO, *Aviation Security: Computer-Assisted Passenger Prescreening System Faces Significant Implementation Challenges*, GAO-04-385, Feb. 2004; *see also* GAO, *Homeland Security: Efforts to Improve Information Sharing Need to be Strengthened*, GAO-03-760, Aug. 2003. In this regard, Attorneys General in various administrations have issued guidelines to address concerns regarding information sharing. *See, e.g.*, The Attorney General's Guidelines on Domestic Security Investigations (Apr. 5, 1976), *reprinted in FBI Statutory Charter: Hearings on S. 1612 Before the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 18-26 (1978). **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Thomas Lombardi, Attorney

**The burden of proof for retaining a particular governmental power should be on the executive, to explain (a) that the power actually materially enhances security and (b) that there is adequate supervision of the executive's use of the powers to ensure protection of civil**

**liberties. If the power is granted, there must be adequate guidelines and oversight to properly confine its use. (Pages 394/395)**

This recommendation contemplates both administrative and congressional action. The burden of proof is on the executive to demonstrate that powers, such as those conferred under the USA PATRIOT Act, materially enhance security, and that adequate safeguards are in place to protect civil liberties. The establishment of adequate guidelines and oversight to properly confine the use of governmental powers can be accomplished administratively and legislatively. Congress, in the exercise of its oversight and legislative powers, would decide whether the burden of proof to retain governmental powers has been met. **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Thomas Lombardi, Attorney

**At this time of increased and consolidated government authority, there should be a board within the executive branch to oversee adherence to the guidelines we recommend and the commitment the government makes to defend our civil liberties. (Page 395)**

The President could create a board within the executive branch to oversee adherence to the guidelines recommended by the 9/11 Commission and the government's commitment to defending civil liberties. The tool used to implement this recommendation, such as an executive order, could establish, *inter alia*, the board's administrative structure and procedures, its composition, its duties and authorities. If legislation were preferred, a possible model would be the statutorily created U.S. Commission on Civil Rights, an independent agency within the executive branch that makes findings of fact but lacks enforcement authority, submitting its findings and recommendations to the President and Congress for consideration and appropriate action. *See* 42 U.S.C. § 1975 et seq. An example of a statutorily created board with enforcement authority would be the Equal Employment Opportunity Commission. *See*, 42 U.S.C. §§ 20003-4 & 20003-5. An Executive Order issued on August 27, 2004, established the President's Board on Safeguarding Civil Liberties within the Department of Justice. **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Thomas Lombardi, Attorney

## **Weapons of Mass Destruction**

**Our report shows that Al Qaeda has tried to acquire or make weapons of mass destruction for at least ten years. There is no doubt the United States would be a prime target. Preventing the proliferation of these weapons warrants a maximum effort—by strengthening counter proliferation efforts, expanding the Proliferation Security Initiative, and supporting the Cooperative Threat Reduction program. (Page 381)**

The 9/11 Commission Report concludes that the Cooperative Threat Reduction (CTR) program is in need of expansion, improvement, and resources, which would require legislative action. The CTR program, originally established under the Soviet Nuclear Threat Reduction Act of 1991 (22 U.S.C. §§ 5951-5963), was amended by Title XIII of the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392, 1657-1663 (2003) to support projects and activities outside the former Soviet Union to assist the U.S. in resolution of critical emerging proliferation threats and to permit the U.S. to take advantage of opportunities to achieve long-standing nonproliferation goals. (22 U.S.C. § 5963). However, that legislation limits the total amount that may be obligated in any fiscal year for such activities to no more than \$50 million; hence, any expansion or increase in resources would have to be done through legislative action. **Contacts:** Mark Speight, Assistant General Counsel, IAT; Ernie Jackson, Senior Attorney

**The PSI can be more effective if it uses intelligence and planning resources of the NATO alliance. Moreover, PSI membership should be open to non-NATO countries. Russia and China should be encouraged to participate. (Page 381)**

The Proliferation Security Initiative (PSI) can be expanded through executive/administrative action. The 9/11 Commission Report concludes that the PSI can be more effective if it uses intelligence and planning resources of NATO. The PSI is a coalition of countries, operating under a Statement of Interdiction Principles that seek to enhance and expand efforts to prevent the flow of WMD, their delivery systems, and related materials. As such, non-NATO countries that want to support interdiction efforts consistent with PSI's principles can participate. In this regard, the U.S. could use diplomatic efforts to encourage Russia and China to participate in PSI without the need for legislative action or treaty amendment. NATO intelligence and planning resources can be used under this initiative by PSI participants that are NATO members to more effectively accomplish PSI objectives. **Contacts:** Mark Speight, Assistant General Counsel, IAT; Ernie Jackson, Senior Attorney

## **Terrorist Financing and Travel**

**Vigorous efforts to track terrorist financing must remain front and center in U.S. counterterrorism efforts. The government has recognized that information about terrorist money helps us to understand their networks, search them out, and disrupt their operations. Intelligence and law enforcement have targeted the relatively small number of financial facilitators—individuals Al Qaeda relied on for their ability to raise and deliver money—at the core of Al Qaeda’s revenue stream. These efforts have worked. The death or capture of several important facilitators has decreased the amount of money available to Al Qaeda and has increased its costs and difficulty in raising and moving that money. Captures have additionally provided a windfall of intelligence that can be used to continue the cycle of disruption. (Page 382)**

This recommendation can be implemented by executive/administrative action under a number of statutes, including sections 314 and 326 of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), designed to facilitate the tracking of terrorist financing operations within the United States. With respect to efforts to track terrorist financing operations outside the U.S., the Treasury Department participates in the Financial Action Task Force on Money Laundering (<http://www.fatf-gafi.org/>) and in the Egmont Group (<http://www.egmontgroup.org/>), both of which are informal multilateral organizations established to combat money laundering. To the extent that the executive branch can identify new opportunities to help foreign governments enhance their capacity to detect and deter money laundering, Congress would need to fund such assistance through the appropriations process. **Contacts:** Mark Speight, Assistant General Counsel, IAT; Mark Dowling, Senior Attorney

**Targeting travel is at least as powerful a weapon against terrorists as targeting their money. The United States should combine terrorist travel intelligence, operations, and law enforcement in a strategy to intercept terrorists, find terrorist travel facilitators, and constrain terrorist mobility. (Page 385)**

Combining terrorist intelligence, operations, and law enforcement in the recommended strategy can be implemented through executive/administrative actions, although implementation may raise privacy concerns. Current authorities in such legislation as the USA PATRIOT Act (Pub. L. No. 107-56, 115 Stat. 272 (2001)), the Immigration and Nationality Act of 1952 (8 U.S.C. § 1101), the Aviation and Transportation Security Act (Pub. L. No. 107-71, 115 Stat. 597 (2001)), the Homeland Security Act of 2002 (Pub. L. No. 107-296, 116 Stat. 2135 (2002)), and the Enhanced Border Security and Visa Entry Reform Act of 2002 (Pub. L. No. 107-173, 116 Stat. 543 (2002)), allow the government to devise a strategy that would promote the efficient and reliable movement of people across borders while preventing terrorists from using various modes of transportation to carry out terrorist acts. For example, the Department of Homeland Security (DHS) has established the government-wide United States Visitor and Immigration Status Technology (US-VISIT) program to collect, maintain, and share information on foreign nationals and better control and monitor the entry, visa status, and exit of visitors. As part of US-VISIT, the State Department is implementing the Biometric Visa program, which requires that all persons applying for U.S. visas have certain biometrics (fingerprints) and digital photographs collected during the visa application interview and cleared through a DHS automated biometric identification system before receiving a visa. However, depending on how the recommended strategy is formulated and implemented, privacy concerns could arise as with previous government initiatives such as the Department of Homeland Security's former Computer-Assisted Passenger Prescreening Program (CAPPS II). (See GAO, *Aviation Security: Computer-Assisted Passenger Prescreening System Faces Significant Implementation Challenges*, GAO-04-385 (Washington D.C.: February 2004).)

**Contacts:** Mark Speight, Assistant General Counsel, IAT; Ernie Jackson, Senior Attorney



## **Border and Transportation Security**

**The U.S. border security system should be integrated into a larger network of screening points that includes our transportation system and access to vital facilities, such as nuclear reactors. The President should direct the Department of Homeland Security to lead the effort to design a comprehensive screening system, addressing common problems and setting common standards with system wide goals in mind. Extending those standards among other governments could dramatically strengthen America and the world's collective ability to intercept individuals who pose catastrophic threats. (Page 387)**

The Department of Homeland Security's primary mission encompasses the prevention of terrorist attacks within the United States and the reduction of the nation's vulnerability to terrorism. Pub. L. No. 107-296, 116 Stat. 2135 (2002). The President can direct that DHS, under existing authority, design and coordinate a comprehensive, multi-agency screening system that addresses common problems of, and sets common standards for, an integrated border security system. *See id.* at § 201(d), 116 Stat. at 2146-48; *see also* Homeland Security Presidential Directive (HSPD) -6, Sept. 16, 2003; HSPD-7, Dec. 17, 2003; & HSPD-11, Aug. 27, 2004. However, as demonstrated by the federalization of airport screening operations, Pub. L. No. 107-71, 115 Stat. 597 (2001), and the implementation of an automated entry and exit data system (US-VISIT), *see* Pub. L. Nos. 107-56, 115 Stat. 272 (2001) & 107-173, 116 Stat. 543 (2002), such large-scale endeavors have significant resource implications, *see, e.g.*, GAO, *Information Technology: Homeland Security Needs to Improve Entry Exit System Expenditure Planning*, GAO-03-563, June 2003, that benefit from congressional action. **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Thomas Lombardi, Attorney

**The Department of Homeland Security, properly supported by the Congress, should complete, as quickly as possible, a biometric entry-exit screening system, including a single system for speeding qualified travelers. It should be integrated with the system that provides benefits to foreigners seeking to stay in the United States. Linking biometric passports to good data systems and decision making is a fundamental goal. No one can hide his or her debt by acquiring a credit card with a slightly different name. Yet today, a terrorist can defeat the link to electronic records by tossing away an old passport and slightly altering the name in the new one. (Page 389)**

The federal government currently is required to develop an information system for gathering and sharing information about aliens seeking to enter or stay in the United States. *See, e.g.*, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); the INS Data Management Improvement Act, Pub. L. No. 106-215, 114 Stat. 337 (2000); the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001); and the Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (May 2002). A major element of this system is the interoperability among federal agency systems, the use of machine-readable visas, passports, and other travel documents, and the use of biometric identifiers. **Contacts:** Chuck Roney, Assistant General Counsel, IT; David Plocher, Senior Attorney

**The U.S. government cannot meet its own obligations to the American people to prevent the entry of terrorists without a major effort to collaborate with other governments. We should do more to exchange terrorist information with trusted allies, and raise U.S. and global border security standards for travel and border crossing over the medium and long term through extensive international cooperation.**  
(Page 390)

The President can implement this recommendation under his constitutional authority and responsibilities related to the formulation and execution of United States foreign policy. Likewise, law enforcement agencies, the State Department, the Department of Homeland Security, and other agencies appear to have sufficient authority to exchange information with trusted allies. If necessary, the Administration could enter into mutual assistance and other executive agreements to exchange information and to set standards for travel and crossing. **Contacts:** Mark Speight, Assistant General Counsel, IAT; Richard Seldin, Senior Attorney

**Secure identification should begin in the United States. The federal government should set standards for the issuance of birth certificates and sources of identification, such as driver's licenses. Fraud in identification documents is no longer just a problem of theft. At many entry points to vulnerable facilities, including gates for boarding aircraft, sources of identification are the last opportunity to ensure that people are who they say they are and to check whether they are terrorists.** (Page 390)

Birth certificates and drivers licenses are presently in the purview of the states. Federal legislation would be needed to set standards called for by the recommendation. The President, through HSPD-12 (Aug. 27, 2004), has called for the establishment of a mandatory, government-wide standard for secure and reliable forms of identification issued by the federal government to its employees and contractors. **Contacts:** Chuck Roney, Assistant General Counsel, IT; David Plocher, Senior Attorney

**Improved use of “no-fly” and “automatic selectee” lists should not be delayed while the argument about a successor to CAPPS continues. This screening function should be performed by the TSA, and it should utilize the larger set of watchlists maintained by the federal government. Air carriers should be required to supply the information needed to test and implement this new system.** (Page 393)

The Aviation and Transportation Security Act authorized TSA to issue, rescind, and revise regulations necessary to carry out the functions of TSA and to protect transportation security, and to consider requiring passenger air carriers to share passenger lists with appropriate federal agencies for the purpose of identifying individuals who may pose a threat to aviation safety or national security. *See* Pub. L. No. 107-71, § 101, 115 Stat. 597, 597-604 (2001). Under this authority, TSA can expedite improved use of the “no-fly” and “automatic selectee” lists, perform this screening function and utilize the larger set of watch lists maintained by the federal government to the extent allowable under current law (*see, e.g.*, Pub. L. Nos. 107-296, 116 Stat. 2135 (2002), 107-173, 116 Stat. 543 (2002); 107-56, 115 Stat. 272 (2001)); *see also* HSPDs-6, Sept. 16, 2003, and -11, Aug. 27, 2004), and require that air carriers provide the necessary information to test and implement this new system. GAO is aware of privacy implications associated with this recommendation but knows of no legal barriers to TSA carrying out the specified recommendation. **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Thomas Lombardi, Attorney

**The TSA and the Congress must give priority attention to improving the ability of screening checkpoints to detect explosives on passengers. As a start, each individual selected for special screening should be screened for explosives. Further, the TSA should conduct a human factors study, a method often used in the private sector, to understand problems in screener performance and set attainable objectives for individual screeners and for the checkpoints where screening takes place. (Page 393)**

Existing statutory authority in title 49 of the United States Code permits an administrative response to this recommendation. TSA can undertake to train screeners, utilize current technologies and develop new ones to ensure that individuals selected for special screening are screened for explosives, and can conduct a human factors study to understand problems in screener performance and set attainable objectives for screeners and checkpoints. *See generally* 49 U.S.C. § 44901 et seq. and GAO, *Aviation Security: Challenges Exist in Stabilizing and Enhancing Passenger and Baggage Screening Operations*, GAO-04-440T, Feb. 2004. **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Thomas Lombardi Attorney

**The job of protection is shared among these many defined checkpoints. By taking advantage of them all, we need not depend on any one point in the system to do the whole job. The challenge is to see the common problem across agencies and functions and develop a conceptual framework--an architecture--for an effective screening system. (Page 386)**

Current laws and guidance support the use of the planning concepts recommended by the Commission in developing information systems. *See, e.g.*, the Clinger-Cohen Act, Pub. L. No. 104-106, § 10, 110 Stat. 186 (1996); the E-Government Act, Pub. L. No. 107-347, 716 Stat. 2899 (2002); and OMB Circular A-130 Transmittal Memorandum No. 4, Nov. 28, 2000. **Contacts:** Chuck Roney, Assistant General Counsel, IT; David Plocher, Senior Attorney

**We advocate a system for screening, not categorical profiling. A screening system looks for particular, identifiable suspects or indicators of risk. It does not involve guesswork about who might be dangerous. (Page 387)**

The screening system currently in place at the nation's borders, seaports, and airports necessarily involves a balance of the security and civil liberties interests of individuals; however, administrative action can be taken to alleviate concerns of "categorical profiling." For example, TSA could enhance its screener training—basic, recurrent, and remedial—to educate screeners on how to appropriately observe particular, identifiable suspects or indicators of risk, while guarding against the use of guesswork. *See* 49 U.S.C. § 44935. From the perspective of an automated pre-screening system, such as the proposed CAPPs II system, TSA could implement and follow a policy that ensures the data obtained and algorithms utilized to pre-screen passengers do not result in categorical profiling. *See generally* GAO, *Aviation Security: Computer-Assisted Passenger Prescreening System Faces Significant Implementation Challenges*, GAO-04-385, Feb. 2004. GAO has recommended that entities engaged in screening operations should undertake periodic data collection and analysis to link characteristics of potential passengers with screening results to develop criteria for determining which persons to choose for screening. *See* GAO, *U.S. Customs Service: Better Targeting of Airline Passengers for Personal Searches Could Produce Better Results*, GAO/GGD-00-38, Mar. 2000. **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Thomas Lombardi, Attorney

**There is a growing role for state and local law enforcement agencies. They need more training and work with federal agencies so that they can cooperate more effectively with those federal authorities in identifying terrorist suspects. (Page 390)**

Enabling state and local law enforcement to better cooperate with federal agencies by prescribing more training and work with federal agencies can be accomplished administratively. In the maritime security domain, for example, the Maritime Transportation Security Act (MTSA) calls on the Coast Guard to lead the Area Maritime Security Committees to improve intergovernmental and private-sector cooperation and mandates the preparation of a National Maritime Security Plan that would, among other things, require coordination with state and local government agencies. *See* Pub. L. No. 107-295, § 102, 116 Stat. 2068, 2069-72, 81-82 (2002). Similarly, the FBI has taken steps to facilitate the flow of information to state and local law enforcement agencies to enable them to better help prevent or respond to terrorist attacks by enhancing the security clearance and information-sharing process. *See* GAO, *Security Clearances: FBI has Enhanced its Process for State and Local Law Enforcement Officials*, GAO-04-596, Apr. 2004; *see also* HSPD-6 (Sept. 16, 2003). With respect to aviation, TSA currently requires that airport operators regulated under 49 C.F.R. part 1542 maintain an armed law enforcement presence and authorizes aircraft operators regulated under 49 C.F.R. parts 1544 and 1546 to allow state and local law enforcement officers to fly armed. GAO knows of no legal barriers to, for example, implementing a training program to ensure that state and local law enforcement officers receive adequate training in coordination with federal authorities, such as the Federal Air Marshals Service. **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Thomas Lombardi, Attorney

**Despite congressional deadlines, the TSA has developed neither an integrated strategic plan for the transportation sector nor specific plans for the various modes—air, sea, and ground.** (Page 391)

Neither the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, the Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064, nor the Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, 115 Stat. 597 (2001), required that TSA develop an integrated strategic plan for the transportation sector or specific plans for the various transportation modes. However, section 101 of ATSA did charge the Under Secretary (now TSA Administrator) with responsibility for security in all modes of transportation and identified the development of policies, strategies, and plans for dealing with threats to transportation security among its various duties and powers. *See* 49 U.S.C. § 114(d) & (f). TSA can satisfy this recommendation administratively by developing such a plan or plans either at its own initiative or by executive direction. Congress can undertake to pass legislation that establishes deadlines for the development of such a plan or plans. **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Thomas Lombardi, Attorney

**Congress should set a specific date for the completion of these plans and hold the Department of Homeland Security and TSA accountable for achieving them.** (Page 392)

Just as Congress established deadlines with respect to distinct aspects of transportation security, such as federalizing the screener workforce at airports or the screening of all checked baggage using explosive detection systems, *see* Pub. L. No. 107-71, § 110, 115 Stat. 597, 614-16 (2001), so can Congress establish specific dates by which DHS or TSA shall have completed a strategic plan for the transportation sector or specific plans for the various transportation modes. Such deadlines, accompanied by reporting requirements, would support congressional oversight and agency accountability. **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Thomas Lombardi, Attorney

**No single security measure is foolproof. Accordingly, the TSA must have multiple layers of security in place to defeat the more plausible and dangerous forms of attack against public transportation.** (Page 392)

TSA currently utilizes a “system of systems” layered approach to aviation security, which includes, *inter alia*, passenger pre-screening, passenger and baggage screening, and the presence of federal air marshals aboard flights. *See, e.g.,* GAO, *Aviation Security: Computer-Assisted Passenger Prescreening System Faces Significant Implementation Challenges*, GAO-04-385, Feb. 2004. TSA has broad authority to secure all modes of transportation, *see* 49 U.S.C. § 114, and can take administrative action to ensure that security plans take into consideration the full array of possible enemy tactics, to improve weak individual layers of this system and its effectiveness at thwarting more plausible and dangerous forms of attack against public transportation, and to expand this system across other modes of transportation as appropriate. **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Thomas Lombardi, Attorney

**The TSA should expedite the installation of advanced (in-line) baggage-screening equipment. Because the aviation industry will derive substantial benefits from this deployment, it should pay a fair share of the costs. (Page 393)**

Legislation has yet to mandate the installation of in-line baggage-screening equipment but has provided funding mechanisms for the installation of such advanced systems. TSA predominantly utilizes letters of intent (LOIs), authorized by Public Laws 108-7, 117 Stat. 11 (2003) and 108-176, 117 Stat. 2490 (2003), to fund the installation of in-line baggage screening systems by agreeing to pay a certain percentage of the installation costs pending availability of future appropriations. The LOI recipient pays for the system up front but is ultimately only responsible for a set percentage of the final cost. Instituting a revised funding mechanism would benefit from legislation that addresses what constitutes the aviation industry's "fair share" of the costs. **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Thomas Lombardi, Attorney

**The TSA should require that every passenger aircraft carrying cargo must deploy at least one hardened container to carry any suspect cargo. TSA also needs to intensify its efforts to identify, track, and appropriately screen potentially dangerous cargo in both the aviation and maritime sectors. (Page 393)**

TSA can administratively require that every passenger aircraft carrying cargo deploy at least one hardened container to carry any suspect cargo. However, pending legislation that would require an evaluation of blast-resistant cargo container technology and an examination of operational impacts that may result from use of this technology suggest that considerations such as these could be taken into account. *See* S. 165, 108<sup>th</sup> Cong. § 11(2003). A mechanism to fund this proposed requirement would benefit from legislation. *See, e.g.*, Pub. L. No. 108-7, § 367, 117 Stat. 11, 423-24 (2003). Further, TSA has authority to intensify its efforts to identify, track, and appropriately screen potentially dangerous cargo in both the aviation, *see* Pub. L. No. 107-71, 115 Stat. 614 (2001), and maritime sectors, *see* Pub. L. No. 107-295, 116 Stat. 2064 (2002). **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Thomas Lombardi, Attorney

## **Resources, Federal Assistance, and National Standards**

**Hard choices must be made in allocating limited resources. The U.S. Government should identify and evaluate the transportation assets that need to be protected, set risk-based priorities for defending them, select the most practical and cost-effective ways of doing so, and then develop a plan, budget, and funding to implement the effort. The plan should assign roles and missions to the relevant authorities (federal, state, regional, and local) and to private stakeholders. In measuring effectiveness, perfection is unattainable. But terrorists should perceive that potential targets are defended. They may be deterred by a significant chance of failure. (Page 391)**

Identifying and evaluating transportation assets that need protection, setting risk-based priorities for defending them, selecting the most practical and cost-effective ways of doing so, and developing a plan and budget to implement that effort can be accomplished administratively, see GAO, *Transportation Security: Federal Action Needed to Help Address Security Challenges*, GAO-03-843, June 2003, though funding levels would be dependent on congressional appropriations and any applicable statutory allocation formulas. See, e.g., 49 U.S.C. § 44923(h). The plan to implement this effort could identify appropriate roles and missions for the relevant federal, state, regional, and local authorities and for private stakeholders. See, e.g., GAO, *Homeland Security: Federal Leadership and Intergovernmental Cooperation Required to Achieve First Responder Communications*, GAO-04-740, July 2004. **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Thomas Lombardi, Attorney

**Homeland security assistance should be based strictly on an assessment of risks and vulnerabilities. Now, in 2004, Washington, D.C., and New York City are certainly at the top of any such list. We understand the contention that every state and city needs to have some minimum infrastructure for emergency response. But federal homeland security assistance should not remain a program for general revenue sharing. It should supplement state and local resources based on the risks or vulnerabilities that merit additional support. Congress should not use this money as a pork barrel. (Page 396)**

The current homeland security grant structure includes minimum percent distributions per state and population-based allocations (*see, e.g.*, the State Homeland Security Grant Program and Emergency Management Performance Grant Program), needs-based discretionary grants vetted through an application process (*see, e.g.*, Assistance to Firefighter Program grants), and discretionary grants that consider DHS risk and vulnerability assessments, critical infrastructure, and population density (*see, e.g.*, the Urban Area Security Initiative Program). As a result, implementing a system based strictly on the assessments of risk and vulnerability would require amendments to relevant legislation to eliminate barriers to this proposed system, such as the USA PATRIOT Act's per-state minimum percent allocation, Pub. L. No. 107-56, § 1014, 115 Stat. 272, 399-400 (2001). To date, proposed legislation has not advocated a strict risk/vulnerability-based assistance system, although there have been proposals to direct more appropriated funds toward the urban, threat-based grants and less toward grants that guarantee a minimum amount of funding for every state. *See* H.R. 4852, 108<sup>th</sup> Cong. (2004); H.R. 3266, 108<sup>th</sup> Cong. (2003); S. 930, 108<sup>th</sup> Cong. (2003), S. 1245, 108<sup>th</sup> Cong. (2003). **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Thomas Lombardi, Attorney

**Emergency response agencies nationwide should adopt the Incident Command System (ICS). When multiple agencies or multiple jurisdictions are involved, they should adopt a unified command. Both are proven frameworks for emergency response. We strongly support the decision that federal homeland security funding will be contingent, as of October 1, 2004, upon the adoption and regular use of ICS and unified command procedures. In the future, the Department of Homeland Security should consider making funding contingent on aggressive and realistic training in accordance with ICS and unified command procedures. (Page 397)**

To encourage the adoption and regular use of the Incident Command System (ICS), the President announced that administrative action will be taken to condition the availability of federal preparedness assistance through grants, contracts, or other activity on the adoption of a National Incident Management System, of which ICS qualifies. *See* HSPD-5, Feb. 28, 2003. DHS, to the extent allowed by law, can make funding contingent on aggressive and realistic training in accordance with ICS and unified command procedures. However, conditioning the availability of funds on the adoption and regular use of ICS would require that legislation be amended since, under current law, states are entitled to certain funds regardless of any contingency. *See, e.g.*, Pub. L. No. 107-56, § 1014, 115 Stat. 272, 399-400 (2001). **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Thomas Lombardi, Attorney

**Congress should support pending legislation which provides for the expedited and increased assignment of radio spectrum for public safety purposes. Furthermore, high-risk urban areas such as New York City and Washington, D.C., should establish signal corps units to ensure communications connectivity between and among civilian authorities,**



**local first responders, and the National Guard. Federal funding of such units should be given high priority by Congress. (Page 397)**

With regard to the issue of improving first responder communications connectivity, GAO knows of no federal legal barriers to administrative implementation of the recommendation for improved coordination among local, state, and federal government bodies to ensure better communications connectivity with and among first responders. **Contacts:** Chuck Roney, Assistant General Counsel, IT; David Plocher, Senior Attorney

**We endorse the American National Standards Institute’s recommended standard for private preparedness. We were encouraged by Secretary Tom Ridge’s praise of the standard, and urge the Department of Homeland Security to promote its adoption. We also encourage the insurance and credit-rating industries to look closely at a company’s compliance with the ANSI standard in assessing its insurability and creditworthiness. We believe that compliance with the standard should define the standard of care owed by a company to its employees and the public for legal purposes. Private-sector preparedness is not a luxury; it is a cost of doing business in the post-9/11 world. It is ignored at a tremendous potential cost in lives, money, and national security. (Page 398)**

The standard for private preparedness recommended by the American National Standards Institute (ANSI) provides criteria to assess current programs or to develop, implement, and maintain a program to mitigate, prepare for, respond to, and recover from disasters and emergencies. The standard is designed for use by entities with responsibility for disaster, emergency management, and business continuity programs. See National Fire Protection Association 1600 (2004). DHS has promoted the use of ANSI standards and could be directed to do so by legislation, such as pending bill H.R. 4830, 108<sup>th</sup> Cong., 2d Sess. (2004). (The “Private Sector Preparedness Act of 2004,” H.R. 4830, would require the Secretary of DHS to support the development of standards for private sector preparedness using ANSI standards and other specified guidance.) Establishing the ANSI standard as the standard of care owed by a company to its employees and the public for legal purposes would need to be accomplished legislatively. **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Thomas Lombardi, Attorney

**What should Americans expect from their government in the struggle against Islamist terrorism? The goals seem unlimited. (Page 364)**

AND

**With such benchmarks, the justifications for action and spending seem limitless. Goals are good. Yet effective public policies also need concrete objectives. Agencies need to be able to measure success. (Page 364)**

AND

**These measurements do not need to be quantitative: government cannot measure success in the ways that private firms can. But the targets should be specific enough so that reasonable observers—in the White House, the Congress, the media,**

**or the general public—can judge whether or not the objectives have been attained.**  
(Page 364)

Establishing concrete objectives and goals by which agencies can measure success can be accomplished administratively. The Government Performance and Results Act of 1993 (GPRA), Pub. L. No. 103-62, 107 Stat. 285, requires that agencies submit a strategic plan for their program activities covering a period of at least five fiscal years from the date submitted to the Director of OMB and the Congress. The plan should include, *inter alia*, general goals and objectives for the major functions and operations of the agency, along with a description of how these goals and objectives will be achieved. GPRA also requires that agencies set annual performance goals and report on progress made towards achieving those goals in annual performance reports. *See generally*, GAO, *Results-Oriented Government: GPRA Has Established a Solid Foundation for Achieving Greater Results*, GAO-04-38, Mar. 2004; *see also*, GAO, *Aviation Security: Efforts to Measure Effectiveness and Address Challenges*, GAO-04-232T, Nov. 2003. In addition, HSPD-8 (Dec. 17, 2003) required the Secretary of Homeland Security to develop a national domestic all-hazards preparedness goal. Administrative action can be taken to ensure the availability of this information to observers, including the general public, and that it is specific enough so that such observers can judge whether or not the objectives have been achieved. **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Thomas Lombardi, Attorney

**Resources must be allocated according to vulnerabilities. We recommend that a panel of security experts be convened to develop written benchmarks for evaluating community needs. We further recommend that federal homeland security funds be allocated in accordance with those benchmarks.** (Page 396)

Convening a panel of security experts to advise on and recommend written benchmarks for evaluating community needs can be accomplished administratively. *See, e.g.*, Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. 2). However, a system for allocating homeland security funds in accordance with vulnerability-based benchmarks could potentially require legislation to reconcile inconsistent statutory provisions to the implementation of such an allocation system, such as the USA PATRIOT Act's 75-percent minimum per state allocation formula. Pub. L. No. 107-56, § 1014, 115 Stat. 272, 399-400 (2001). State implementation of such vulnerability-based benchmarks in disbursing federal funds could be accomplished through grant requirements, provided the funds were not distributed pursuant to a statutorily mandated purpose such as the Firefighter Assistance Grants. *See* 15 U.S.C. § 2201 et seq. **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Thomas Lombardi, Attorney

**Congress should pass legislation to remedy the long-standing indemnification and liability impediments to the provision of public safety mutual aid in the National Capital Region and where applicable throughout the nation.** (Page 397)

Both the Courts and the Comptroller General have consistently held that, absent specific statutory authority, indemnity provisions that subject the United States to contingent and undetermined liability violate the Antideficiency Act. *Hercules, Inc. v. U.S.*, 516 U.S. 417, 426-428 (1996); *see also* B-242146, Aug. 16, 1991, and B-260063, June 30, 1995. Our Office has not objected, on legal grounds, to indemnity agreements the liability of which is covered by existing appropriations or a specific dollar amount, so-called closed ended indemnity agreements. Congress would need to provide express authority for federal agencies to enter into mutual aid agreements with adjacent law enforcement that contain open-ended indemnity agreements. **Contact:** Carlos Diz, Assistant General Counsel, AB

## HOW TO DO IT

### Reorganizing the Intelligence Community

**We recommend the establishment of a National Counterterrorism Center (NCTC), built on the foundation of the existing Terrorist Threat Integration Center (TTIC). Breaking the old mold of national government organization, this NCTC should be a center for joint operational planning and joint intelligence, staffed by personnel from the various agencies. The head of the NCTC should have authority to evaluate the performance of the people assigned to the Center. (Page 403)**

Authorities needed to address this recommendation are in the numbered sub-recommendations below. As a general observation many aspects of establishing the Commission's recommended NCTC will require amendments to the National Security Act of 1947, but the President also has significant executive authority to prescribe the NCTC's roles and functions. We also note that Senator Roberts recently released a draft bill calling for the creation of an NCTC similar to the one recommended by the 9/11 Commission that would be responsible for tasking intelligence collection and analysis and coordinating the intelligence operations related to counterterrorism. Senator Roberts' bill, however, would establish the NCTC in the Office of the National Intelligence Director instead of in the Executive Office of the President (EOP) as recommended by the 9/11 Commission. On August 27, 2004, the President issued an Executive Order establishing a NCTC that meets the Commission's recommendation of creating a centralized institution that combines strategic intelligence analysis and joint operational planning. Rather than placing the NCTC in the EOP, however, the President has directed it to be under the supervision of the Director of Central Intelligence (DCI) and headed by a director who is appointed by the DCI and approved by the President. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**1. We therefore propose a new institution: a civilian-led unified joint command for counterterrorism. It should combine strategic intelligence and joint operational planning. (Page 403)**

Although this sub-recommendation could be accomplished by executive order, it could require legislation to empower the NCTC to function effectively as a "joint command." Given that there is currently no executive reorganization statute in effect (*see* 5 U.S.C. § 905(b)), the President's authority to establish offices is limited, especially if the new office causes reallocation of budget authority, is formed by portions of existing executive departments or agencies, or where it will have authority to order other agencies to execute operational plans. Nevertheless, several intelligence or national security offices have been established by executive declaration, directive, or order. (*See* E.O. 13228, Establishing the Office of Homeland Security and the Homeland Security Council, Oct 8, 2001.) In addition, the President also administratively established the Terrorist Threat Integration Center (TTIC), the National Security Agency, the National Reconnaissance Office, and the Defense Intelligence Agency by declaration/directive/executive order. The creation of the National Geospatial-Intelligence Agency (formerly National Imagery and Mapping Agency) is an example of where specific legislation was used to establish an executive agency formed from portions of several existing agencies (Pub. L. No. 104-201, Title XI, 110 Stat. 2675 (1996)). **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**2. It should task collection requirements both inside and outside the United States.**  
(Page 404)

This sub-recommendation would require amendment to existing law (50 U.S.C. § 403-3) that gives the DCI the general responsibility to establish priorities and approve intelligence collection requirements for national collection assets and provide overall direction for the collection of national intelligence through human sources. In addition, legislation would be helpful to clarify the role of a National Intelligence Director in directing intelligence collection inside the United States. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**3. The NTCT should perform joint planning. The plans would assign operational responsibilities to lead agencies such as ... Defense and its combatant commands ... The NCTC should not direct the actual execution of these operations, leaving that job to the agencies. The NCTC would then track implementation ... (Page 404) In this conception, the NCTC should plan actions, assigning responsibilities for operational direction and execution to other agencies. (Footnote 4, Page 565) The proposed NCTC would be given the authority of planning the activities of other agencies. Law or executive order must define the scope of such line authority. (Page 406)**

The selection of either an executive order or legislation to implement this sub-recommendation depends on who will exercise actual tasking authority (i.e., the ability to order execution of an operational plan). If the NCTC will serve merely as a terrorist intelligence analysis and planning center, an executive order could suffice to establish the joint analytical and operational planning procedures. If, however, the NCTC will have the authority to order the execution of a plan, then legislation will be needed to “trump” the existing statutory authorities governing the other agencies (*e.g.*, 10 U.S.C. §113(b), 10 U.S.C. §162(b) - authorities placing command and control of DOD assets in the hands of SecDef). The existing Terrorist Threat Integration Center (TTIC), which focuses on analyzing terrorist threat-related intelligence available to all government agencies and disseminating it to appropriate recipients while exercising no operational planning or tasking authority, was established by Presidential declaration and departmental memorandums of understanding. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**4. The NCTC should not be a policymaking body. Its operations and planning should follow the policy direction of the President and the National Security Council. (Page 404)**

This sub-recommendation could be accomplished by either executive order or legislation. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**5. NCTC—Authorities.** The head of the NCTC should be appointed by the president, and should be equivalent in rank to a deputy head of a cabinet department. The head of the NCTC would report to the national intelligence director, an office ... placed in the Executive Office of the President. This official's nomination should be confirmed by the Senate and he or she should testify to the Congress, as is the case now with other statutory Presidential offices ... (Page 405)

The creation and reporting requirements of an officer whose rank is equivalent to a deputy head of a cabinet department must be accomplished via legislation. *See* U.S. Const. Art. II, § 2, cl. 2 (appointments clause). Similar statutory provisions are found at 10 U.S.C. § 132 (DepSecDef), 22 U.S.C. § 2651a(a)(2) (DepSecState), 6 U.S.C. § 113(a)(1) (DepSecHS), 50 U.S.C. § 403(b)(DDCI), 21 U.S.C. § 1703(a) DepDirNDCP. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**6. The head of the NCTC must have the right to concur in the choices of personnel to lead the operating entities of the departments and agencies focused on counterterrorism ... and also work with the director of the Office of Management and Budget in developing the president's counterterrorism budget.** (Page 405)

This sub-recommendation could be accomplished by either executive order or legislation, although legislation would enhance the head of the NCTC's concurrence power in the appointment of U.S. counterterrorism leaders and role in developing the President's counterterrorism budget. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**7. The NCTC would not eliminate interagency policy disputes. These would still go to the National Security Council. To improve coordination at the White House, we believe the existing Homeland Security Council should soon be merged into a single National Security Council. The creation of the NCTC should help the NSC staff concentrate on its core duties of assisting the president and supporting interdepartmental policymaking.** (Page 406)

To merge the Homeland Security Council (HSC) with the National Security Council (NSC) would require legislation since both entities are defined by existing statutes (50 U.S.C. § 402 (NSC)) and 6 U.S.C. §§ 491 – 496 (HSC)). **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**8. One such problem is counterterrorism. In this case, we believe that the center (NCTC) should be the intelligence entity (formerly TTIC) inside the National Counterterrorism Center we have proposed. It would sit there alongside the operations management unit we described earlier, with both making up the NCTC, in the Executive Office of the President (EOP).** (Page 411)

*See* comments to sub-recommendation 1 above. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**The current position of Director of Central Intelligence should be replaced by a National Intelligence Director with two main areas of responsibility: (1) to oversee national intelligence centers on specific subjects of interest across the U.S. Government and (2) to manage the**

**national intelligence program and oversee the agencies that contribute to it. (Page 411)**

Legislative action would be required to amend the National Security Act of 1947 to address this recommendation. Specific provisions are addressed in the numbered sub-recommendations below.

Two bills currently before Congress (S. 190, 108<sup>th</sup> Cong. (2003), sponsored by Senator Feinstein and H.R. 4104, 108<sup>th</sup> Cong. (2004), sponsored by Representative Harman) call for the establishment of a Director of National Intelligence (DNI). Both bills would have the DNI serve as the head of the U.S. intelligence community and act as the principal adviser to the President for intelligence matters related to national security. These bills also would give the DNI the responsibility for developing and approving annual budgets for the National Foreign Intelligence Program (NFIP) and Senator Feinstein's bill (S. 190) would make the DNI responsible for executing this budget. Representative Harman's bill (H.R. 4104) would establish training, assignment, and promotion criteria for intelligence personnel and fix the DNI's term of service at 10 years. Another current legislative proposal by Representative Goss (H.R. 4584, 108<sup>th</sup> Cong.) seeks to strengthen the role of the Director of Central Intelligence (DCI) by appropriating all NFIP funds directly to the DCI, making him/her responsible for determining the NFIP budget, and by establishing eight new associate directors and six assistant directors to help manage the intelligence community. *See* CRS RL32506 for a summary of the bills' major provisions.

Another proposed bill, released by Senator Roberts, seeks to restructure the entire intelligence community into a "National Intelligence Service" (NIS) headed by a National Intelligence Director (NID) and organized along functional lines (*e.g.*, intelligence collection, intelligence analysis and production, research and development, and acquisition, and intelligence in support of the Department of Defense) instead of organizational lines (*e.g.*, CIA, DOD, Homeland Security) as proposed by the 9/11 Commission. Under this bill the National Security Agency, the National Geospatial-Intelligence Agency, and the former divisions within the CIA would be placed under the direction, supervision, and control of the NID. The NID would have complete control over preparing, approving, and executing the budget for the National Intelligence Program, which would replace the current NFIP. He/she would also have complete hire/fire and assignment authority over personnel serving in the NIS and would have the authority to establish National Intelligence Centers to focus on issues such as counterproliferation, counterintelligence, and counternarcotics.

On August 27, 2004, the President issued an Executive Order designed to enhance the powers of the Director of Central Intelligence (DCI) to manage and control the activities of the Intelligence Community. Many of the provisions in the Executive Order address specific aspects of the Commission's sub-recommendations (*e.g.*, improving intelligence information sharing, establishing common security and access standards and uniform personnel training, education and assignment policies, and creating National Intelligence Centers to focus on major national security threats). However, the Executive Order did not meet several key aspects of the Commission's recommendations that, as discussed below in the numbered sub-recommendations, require legislative action (*e.g.*, the creation of the NID and the three deputy directors, empowering the NID with complete NFIP budget formulation responsibility and execution authority, and nomination authority for the directors of national intelligence agencies.) **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**1. First, the National Intelligence Director should oversee *national intelligence centers* to provide all-source analysis and plan intelligence operations for the whole government on major problems.** (Page 411)

Current law (50 U.S.C. § 403-3) giving DCI wide oversight responsibilities would have to be amended to address this sub-recommendation. Including specific responsibility relating to the provision of all-source analysis and intelligence operational planning in amended legislation would firmly define the scope of the NID's oversight authority over the national intelligence centers. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**2. The National Intelligence Director would retain the present DCI's role as the principal intelligence adviser to the President.** (Page 411)

Designating the NID as the principal intelligence adviser to the President will require, at a minimum, legislation to amend 50 U.S.C. § 403(a), which currently assigns this role to the DCI. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**3. Second, the National Intelligence Director should manage the national intelligence program and oversee the component agencies of the intelligence community.** (Page 412) **The new program would replace the existing National Foreign Intelligence Program (NFIP).** (Footnote 11, Page 566)

Numerous legislative amendments to Title 50 (*e.g.*, 50 U.S.C. § 403(a), 50 U.S.C. § 403-3(c), 50 U.S.C. § 403-4(d)) would be needed to (1) replace the existing NFIP program and (2) empower the NID instead of the DCI with the authority to manage the intelligence program and oversee the component agencies. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**4. The National Intelligence Director would submit a unified budget for national intelligence ... He or she would receive an appropriation for national intelligence and apportion the funds to the appropriate agencies, in line with that budget and with authority to reprogram funds among the national intelligence agencies to meet any new priority ...** (Page 412)

This sub-recommendation needs legislation that amends current budget responsibilities and authorities given to the DCI (50 U.S.C. §§ 403-3 and 403-4) and the head of the various executive agencies and departments and establishes these roles under the NID. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**5. The National Intelligence Director should approve and submit nominations to the president of the individuals who would lead the CIA, DIA, FBI Intelligence Office, NSA, NGA, NRO ... and other national intelligence capabilities.** (Page 412)

Legislation would be needed to amend the current laws that give the DCI the authority to concur or consult in most of these nominations. *See* 50 U.S.C. § 403-6 and 10 U.S.C. § 201. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**6. The National Intelligence Director would manage this national effort with the help of three deputies, each of whom would also hold a key position in one of the component agencies ... foreign intelligence (the head of the CIA), defense intelligence (the undersecretary of defense for intelligence), homeland intelligence (the FBI's executive assistant director for intelligence or the undersecretary of homeland security for information analysis and infrastructure protection) ... Other agencies in the intelligence community would coordinate their work within each of these three areas, largely staying housed in the same departments or agencies that support them now ... these three deputies...would have the job of acquiring the systems, training the people and executing the operations planned by the national intelligence centers. (Page 412)**

Numerous legislative amendments to Title 50, Title 10, and Title 6 would be needed to establish, as deputies to the NID, officials who also will be serving in positions and offices in separate executive agencies and departments and to delineate their chains of command. Coordination of other agencies in the intelligence community within the three principal areas (foreign, defense, and homeland intelligence) could be accomplished by executive order or legislation. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**7. Other national intelligence centers—for instance, on counterproliferation, crime and narcotics and China—would be housed in whatever department or agency is best suited for them. (Page 411) The directors of the national intelligence centers (NICs)—e.g., for counterproliferation, crime and narcotics, and the rest—also would report to the National Intelligence Director. (Page 412)**

Designating the national intelligence offices in a department or agency could be accomplished by executive order since they are recommended to have no specified tasking or operational authority over outside agencies. Depending on the scope and directness of the NIC Directors' "reporting" requirements, legislation may be necessary to clearly define the chain of command between the directors, their agency heads, and the NID. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**8. The National Intelligence Director would set personnel policies to establish standards for education and training and facilitate assignments at the national intelligence centers and across agency lines. (Page 414)**

Current law (50 U.S.C. § 403-4(f)) specifying the DCI authorities over intelligence community personnel would have to be amended. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**9. The National Intelligence Director would set information sharing and information technology policies to maximize data sharing, as well as policies to protect the security of information. (Page 414)**

Granting this power to the NID would require amendments to current laws (e.g., 50 U.S.C. § 403g) that place this authority with the DCI. The specific policies could be issued via executive/administrative directives/orders. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney



**10. The National Intelligence Director should participate in an NSC executive committee that can resolve differences in priorities among the agencies and bring the major disputes to the president for decision. (Page 414)**

This could be accomplished by either executive order or legislation depending upon Congress' desire to formally establish an NSC executive committee. Currently, National Security Presidential Directive 1 establishes several non-statutory committees (NSC Principals Committee, NSC Deputies Committee, NSC Policy Coordinating Committees, etc.), whereas 50 U.S.C. § 402 establishes the Committee on Foreign Intelligence and the Committee on Transnational Threats. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**11. The National Intelligence Director should be located in the Executive Office of the President (EOP). This official, who would be confirmed by the Senate and would testify before Congress, would have a relatively small staff of several hundred people, taking the place of the existing community management offices housed at the CIA. (Page 414)**

This sub-recommendation would require amendments to the National Security Act of 1947, to locate the National Intelligence Director in, and move existing CIA offices to, the Executive Office of the President. See also comment to NCTC sub-recommendation 5, page 27. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**The current DCI is responsible for community performance but lacks the three authorities critical for any agency head or chief executive officer: (1) control over purse strings, (2) the ability to hire or fire senior managers, and (3) the ability to set standards for the information infrastructure and personnel. (Page 410)**

If the Director of Central Intelligence (DCI) maintains its current position atop the intelligence community, empowering that position with control over the purse strings of the intelligence budget, the ability to hire or fire senior managers, and the ability to set standards for the information infrastructure and personnel would require amendments to the National Security Act (NSA) of 1947. *See* 50 U.S.C. § 401 et seq. Pending bill H.R. 4584, 108<sup>th</sup> Cong. (2004), proposes to strengthen the DCI's authority over the intelligence community while other bills, notably H.R. 4104, 108<sup>th</sup> Cong. (2004), and S. 190, 108<sup>th</sup> Cong. (2003), would replace the DCI atop the intelligence community with a National Intelligence Director. Each bill would, to varying degrees, empower the head of the intelligence community with respect to some or all of the powers addressed by the recommendation. President Bush's Executive Order of August 27, 2004, addresses the DCI's authorities over the intelligence community. **Contacts:** Jan Montgomery, Assistant General Counsel, HSI; Thomas Lombardi, Attorney

**The CIA Director should emphasize (a) rebuilding the CIA's analytic capabilities; (b) transforming the clandestine service by building its human intelligence capabilities; (c) developing a stronger language program, with high standards and sufficient financial incentives; (d) renewing emphasis on recruiting diversity among operations officers so they can blend more easily in foreign cities; (e) ensuring a seamless relationship between human source collection and signals collection at**

**the operational level; and (f) stressing a better balance between unilateral and liaison operations. (Page 415)**

The recommendation is suited for administrative management direction and action. Emphasis on (d) and (e) could be addressed appropriately through a revision of Executive Order 12333, United States Intelligence Activities, Dec. 4, 1981. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**Lead responsibility for directing and executing paramilitary operations, whether clandestine or covert, should shift to the Defense Department. There it should be consolidated with the capabilities for training, direction, and execution of such operations already being developed in the Special Operations Command. (Page 415)**

This recommendation could be accomplished by either executive order or legislation; however, legislation would provide formal legal authority for DOD to be the sole U.S. government entity to conduct paramilitary operations. Modifying 10 U.S.C. § 167 would be a logical place to give this authority to the Special Operations Command. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**A specialized and integrated national security workforce should be established at the FBI consisting of agents, analysts, linguists, and surveillance specialists who are recruited, trained, rewarded, and retained to ensure the development of an institutional culture imbued with a deep expertise in intelligence and national security. (Page 425/426)**

The establishment of this specialized and integrated national security workforce could be addressed by administrative action. The 9/11 Commission Report provides, specifically with respect to this recommendation, that the President, by executive order or directive, should direct the FBI to develop this intelligence cadre. The Commission asserts that a number of changes need to occur within the FBI to implement this recommendation such as the implementation of a recruiting, hiring, and selection process for agents and analysts that enhances its ability to target and attract individuals with educational and professional backgrounds in intelligence, international relations, language, technology, and other relevant skills. Pending legislation addresses some types of changes. For example, S. 1520, 108<sup>th</sup> Cong. (2003), would require the Director of FBI to, among other things, take actions relating to strengthening FBI's counterterrorism program such as establishing independent career tracks, implementing various types of training, and the recruiting of linguists. **Contacts:** Jan Montgomery, Assistant General Counsel, HJS; Geoffrey Hamilton, Senior Attorney

**Our recommendation to leave counterterrorism intelligence collection in the United States with the FBI still depends on an assessment that the FBI—if it makes an all-out effort to institutionalize change—can do the job. (Page 424)**

AND

**We want to ensure that the Bureau’s shift to a preventive counterterrorism posture is more fully institutionalized so that it survives beyond Director Mueller’s tenure. (Page 425)**

The desire to ensure that FBI’s shift to a preventive counterterrorism posture is more fully institutionalized so as to survive beyond the current Director could be addressed either by executive or by legislative action depending upon the level of involvement Congress desires in addressing the permanency of FBI’s transformation efforts. Pending bill S. 1520, 108<sup>th</sup> Cong. (2003), exemplifies a legislative desire to address certain aspects of counterterrorism capabilities at the FBI in a manner that would survive beyond the current Director. The FBI’s efforts to shift to a preventive counterterrorism posture have been the subject of several GAO testimonies. *See* GAO, *FBI Reorganization: Initial Steps Encouraging but Broad Transformation Needed*, GAO-02-865T (Washington, D.C.: June 21, 2002); GAO, *FBI Reorganization: Progress Made in Efforts to Transform, but Major Challenges Continue*, GAO-03-759T (Washington, D.C.: June 18, 2003); GAO, *FBI Reorganization: FBI Continues to Make Progress in Its Efforts to Transform and Address Priorities*, GAO-04-578T (Washington, D.C.: Mar. 23, 2004); and GAO, *FBI Transformation: Human Capital Strategies May Assist the FBI in Its Commitment to Address Its Top Priorities*, GAO-04-817T (Washington, D.C.: June 3, 2004). **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Geoffrey Hamilton, Senior Attorney

## **Intelligence Budgets**

**Finally, to combat the secrecy and complexity we have described, the overall amounts of money being appropriated for national intelligence and to its component agencies should no longer be kept secret. Congress should pass a separate appropriations act for intelligence, defending the broad allocation of how these tens of billions of dollars have been assigned among the varieties of intelligence work. (Page 416)**

The United States Constitution provides that: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” Art. I, § 9, cl. 7. This provision of the Constitution gives Congress plenary authority to appropriate funds and require the reporting and accounting of the receipt and expenditure of appropriated funds it considers proper. U.S. v. Richardson, 418 U.S. 166, 178-179 (1974), Harrington v. Bush, 553 F.2d 190, 194-195 (D.C. Cir. 1977). Thus, Congress has the authority and latitude to require the disclosure and reporting to the public of amounts authorized and appropriated for intelligence and intelligence-related activities. **Contact:** Carlos Diz, Assistant General Counsel, AB

## **Information Sharing and Fusion**

**Information procedures should provide incentives for sharing, to restore a better balance between security and shared knowledge.** (Page 417)

The Homeland Security Information Sharing Act (sections 891 - 899 of the Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135, 2252 (2002)) requires the President to develop procedures for agencies, including intelligence agencies, with regard to sharing homeland security information. While the President delegated this function to the Secretary of Homeland Security in Executive Order No. 13311 (July 29, 2003), the President issued an Executive Order on August 27, 2004, on Strengthening the Sharing of Terrorism Information to Protect Americans. The August 27, 2004, Order is intended to improve sharing of terrorism-related information among federal agencies and with state and local governments. Among other things, the order requires the development of common standards, with provisions for incentives, for sharing of terrorism information within the intelligence community. **Contacts:** Chuck Roney, Assistant General Counsel, IT; David Plocher, Senior Attorney

**The president should lead the government-wide effort to bring the major national security institutions into the information revolution. He should coordinate the resolution of the legal, policy, and technical issues across agencies to create a "trusted information network."** (Page 418)

As the Commission states, this recommendation depends on replacing the traditional intelligence "need-to-know" presumption with that of "need-to-share." Generally, current laws and policies for government-wide information security (*e.g.*, under the Federal Information Security Management Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2946 (2002)) and security for national security systems (*e.g.*, under E.O. 13292, Mar. 25, 2003; 12333, Dec. 4, 1981; 12958, Apr. 17, 1995; 12863, Sept. 13, 1993; and National Security Telecommunications and Information Systems Security Directive (NSTISSD) No. 502) provide broad authority for the executive branch in this area. More specifically, the Homeland Security Information Sharing Act (sections 891 - 899 of the Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135, 2252 (2002)) mandates the use of homeland security information sharing systems that can transmit both unclassified and classified information (sec. 892(b)). The President issued an Executive Order on August 27, 2004, on terrorism information sharing that creates an interagency Information Systems Council to plan for and oversee the establishment of an interoperable terrorism information environment to support automated information sharing. GAO knows of no legal barriers to administrative implementation of this recommendation. **Contacts:** Chuck Roney, Assistant General Counsel, IT; David Plocher, Senior Attorney

**White House leadership is also needed because the policy and legal issues are harder than the technical ones. The necessary technology already exists. What does not [sic] are the rules for acquiring, accessing, sharing, and using the vast stores of public and private data that may be available. When information sharing works, it is a powerful tool. Therefore the sharing and uses of information must be guided by a set of practical policy guidelines that simultaneously empower and constrain officials, telling them clearly what is and is not permitted. (Page 419)**

As a general matter, the executive branch has broad authority under laws, such as the Paperwork Reduction Act, 44 U.S.C. § 3503-3506, and the Federal Information Security Management Act, Pub. L. No. 107-347, 116 Stat. 2899, 2946, Dec. 17, 2002, and executive orders, such as Executive Order 13292, Mar. 25, 2003, and Executive Order 12333, Dec. 4, 1981, to set both government-wide and national security information management and security policies and procedures. More specifically, presidential guidance in this area is required by the Homeland Security Information Sharing Act (sections 891 - 899 of the Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135, 2252 (2002)). Also, related responsibilities are given to the Homeland Security Directorate for Information Analysis and Infrastructure Protection by Title II of the Homeland Security Act. Recently, the President issued an Executive Order dated August 27, 2004, on terrorism information sharing that directs the development of common standards for information sharing within the intelligence community, and of executive branch-wide collection and sharing requirements, procedures, and guidelines for terrorism information to be collected within the United States, including from publicly available sources. GAO knows of no legal barriers to administrative implementation of this recommendation.

**Contacts:** Chuck Roney, Assistant General Counsel, IT; David Plocher, Senior Attorney

## **Human Capital**

**Since a catastrophic attack could occur with little or no notice, we should minimize as much as possible the disruption of national security policymaking during the change of administrations by accelerating the process for national security appointments. We think the process could be improved significantly so transitions can work more effectively and allow new officials to assume their new responsibilities as quickly as possible. (Page 422)**

This recommendation envisions both executive and legislative branch actions to accelerate decisionmaking on national security appointments. One means to avoid transition problems is to create term appointments for selected agency heads, such as the NID and/or the CIA Director. Such appointments would require legislation. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

## **Threat and Risk Assessment**

**The Department of Defense and its oversight committees should regularly assess the adequacy of Northern Command’s strategies and planning to defend the United States against military threats to the homeland. (Page 428)**

This recommendation could be accomplished by executive order or DOD directive and congressional oversight. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

**The Department of Homeland Security and its oversight committees should regularly assess the types of threats the country faces to determine (a) the adequacy of the government’s plans—and the progress against those plans—to protect America’s critical infrastructure and (b) the readiness of the government to respond to the threats that the United States might face. (Page 428)**

DHS can regularly assess the types of threats faced by the country to determine the adequacy of the government’s plans—and the progress under those plans—to protect America’s critical infrastructure and the readiness of the government to respond to the threats that the United States might face. Section 201 of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, charged the Under Secretary for Information Analysis and Infrastructure Protection to, *inter alia*, access, receive, and analyze information to identify and assess the nature and scope of terrorist threats to the homeland, to detect and identify threats of terrorism against the United States, and to understand such threats in light of actual and potential vulnerabilities of the homeland. Congressional committees with jurisdiction over the Department can conduct oversight based on information voluntarily provided by the Department or pursuant to legislative mandate. **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Thomas Lombardi, Attorney



## Congressional Oversight

**Congressional oversight for intelligence—and counterterrorism—is now dysfunctional. Congress should address this problem. We have considered various alternatives: A joint committee on the old model of the Joint Committee on Atomic Energy is one. A single committee in each house of Congress, combining authorizing and appropriating authorities, is another .... We also recommend that the intelligence committee should have a subcommittee specifically dedicated to oversight, freed from the consuming responsibility of working on the budget. (Pages 420-421)**

Either of the Commission's proposals for congressional intelligence oversight would require changes to the chamber rules of both houses, which currently vest intelligence oversight authority in the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence. A joint committee on intelligence, which would replace the House and Senate select committees, could be created by concurrent resolution, joint resolution, or through the regular bill process, just as the Atomic Energy Act of 1946 created the Joint Committee on Atomic Energy. Unlike a joint resolution or bill, however, only a concurrent resolution could be passed without presentment to the President. The Commission's alternate proposal—a single committee in each house combining authorizing and appropriating authorities—would require that each chamber strengthen its intelligence committee and provide them appropriations authority, which currently rests with the chambers' appropriations committees. Congress could accomplish such a rules change either by separate House and Senate resolutions or through the regular bill process. Regardless of whether Congress establishes one joint or two separate intelligence committees, applicable chamber rules would authorize the resulting committee(s) to determine its own subcommittee structure, including the establishment of a separate intelligence oversight subcommittee. **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Christine Davis, Senior Attorney

**Congress should create a single, principal point of oversight and review for homeland security. Congressional leaders are best able to judge what committee should have jurisdiction over this department and its duties. But we believe that Congress does have the obligation to choose one in the House and one in the Senate, and that this committee should be a permanent standing committee with a nonpartisan staff. (Page 421)**

Creating a permanent standing committee on homeland security in the House and Senate would require that both chambers change their existing chamber rules to realign the legislative jurisdictions of their current committee structures. *See* U.S. Const. Art. I, § 5, cl. 2. This could most easily be accomplished by separate resolution in each house, by joint or concurrent resolution or through the regular bill process. During the 108th Congress, the House established a select Committee on Homeland Security to provide legislative and oversight coordination for the newly created Department of Homeland Security and homeland security issues generally. However, the establishment of the select committee (which is set to expire at the end of the 108<sup>th</sup> Congress) did not affect the jurisdiction of existing House committees over specific aspects of homeland security such as the Committee on the Judiciary's jurisdiction over subversive activities affecting domestic security. As for the Senate, it has continued to consider homeland security issues within its existing committee structure. **Contacts:** Jan Montgomery, Assistant General Counsel, HSJ; Christine Davis, Senior Attorney

## Security Clearances

**A single federal agency should be responsible for providing and maintaining security clearances, insuring uniform standards--including uniform security questionnaires and financial report requirements, and maintaining a single database. This agency can also be responsible for administering polygraph tests on behalf of organizations that require them. (Page 422)**

This sub-recommendation could be accomplished by either executive order or legislation. Executive Order 12968, Access to Classified Information, Aug. 2, 1995, establishes procedures and criteria for granting security clearances for federal agencies and could be amended to designate a single federal agency sole responsibility for granting and maintaining security clearances. Consolidating all security clearance functions, however, may involve the transfer of several thousand federal civilian adjudicative and investigative personnel that would benefit from express legislative authority. As an example, Congress recently passed legislation authorizing the transfer of DOD security clearance adjudication to OPM that involved the transfer of over 1,800 security clearance investigative employees. *See* FY 2003 National Defense Authorization Act, Pub. L. No. 108-136, Section 906, 117 Stat. 1392, 1561-1563 (2002). None of the intelligence community reorganization bills currently before Congress or the Executive Order, issued by the President on August 27, 2004, designed to strengthen the management of the intelligence community contain a provision designating one federal agency with responsibility for issuing and maintaining security clearances. The Presidential Executive Order, the Harman Bill (H.R. 4104), and Senator Roberts' recently released draft bill do call for the establishment of uniform standards and procedures throughout the intelligence community for granting access to classified information. **Contacts:** John Van Schaik, Assistant General Counsel, DCM; David A. Mayfield, Senior Attorney

## APPENDIX

### SUMMARY OF RECOMMENDATIONS AND REQUIRED RESPONSES

9/11 Commission Recommendations	Executive/Administrative Action May Be Sufficient	Legislation Required
<b>Terrorist Sanctuaries</b>		
Identify and prioritize terrorist sanctuaries (p.2)	X	
Aid to Pakistan (p.2)		X
Commitment to Afghanistan (p.3)	X	X
Relationship with Saudi Arabia (p.3)	X	
<b>Roots of Terrorism</b>		
Moral leadership (p.4)	X	
Take stand against countries that do not respect our principles (p.4)	X	
Resources for Broadcasting Board of Governors (p.5)		X
Rebuild scholarship, exchange, and library programs (p.5)	X	
Support International Youth Opportunity Fund (p.6)	X	
Economic policies to counter terrorism (p.6)	X	X
Coalition strategy against Islamist terrorism (p.7)	X	
<b>Human Rights and Civil Liberties</b>		
Coalition approach towards treatment of captured terrorists (p.8)	X	
Protect privacy when sharing information (p.8)	X	
Burden of proof for retaining governmental powers (p.8)	X	
Oversight board on civil liberties (p.9)	X	
<b>Weapons of Mass Destruction</b>		
Strengthening counter proliferation efforts (p.10)		X
Expand Proliferation Security Initiative (p.10)	X	
<b>Terrorist Financing and Travel</b>		
Track terrorist financing (p.11)	X	
Target terrorist travel (p.12)	X	
<b>Border and Transportation Security</b>		
Develop comprehensive screening program (p.13)	X	
Biometric entry-exit screening program (p.13)	X	
Share terrorist information with allies (p.14)	X	
Secure identification standards (p.14)		X

**Note that the above summary assessments regarding actions required reflect only a general response and thus are not definitive. Many of the recommendations include nuances that affect the type of response required and thus, for example, both boxes may be checked. For a more detailed response please refer to the narrative provided at the designated page.**

<b>9/11 Commission Recommendations</b>	<b>Executive/Administrative Action May Be Sufficient</b>	<b>Legislation Required</b>
TSA explosives screening (p. 15)	X	
Conceptual framework for screening system (p.15)	X	
Avoid categorical profiling (p.16)	X	
Coordination with state and local agencies on identifying terrorists (p.16)	X	
Lack of integrated plan for transportation sector security (p.17)	X	
Congress should set dates for integrated transportation security plan (p.17)		X
Multiple layers of security needed (p.17)	X	
Advanced baggage-screening equipment (p.18)	X	
Hardened cargo containers (p.18)	X	
<b>Resources, Federal Assistance, and National Standards</b>		
Priorities for defending transportation assets (p. 19)	X	
Allocation of homeland security assistance (p.19)		X
Incident command system (p.20)	X	X
Ensuring communications connectivity (p.20)	X	X
Private preparedness standards (p.21)		X
Measuring success in meeting objectives (p.22)	X	
Benchmarks for allocation of homeland security funds (p.22)	X	X
Remedy indemnification impediments to mutual aid (p.22)		X
<b>Reorganizing the Intelligence Community</b>		
Establish a National Counterterrorism Center (pp.23-25)		X
Create National Intelligence Director (pp.25-29)		X
CIA priorities and emphasis (p.29)	X	
Shift paramilitary operations to the Defense Department (p.30)	X	
FBI national security workforce (p.30)	X	
Institutionalize FBI reforms (p.31)	X	
<b>Intelligence Budgets</b>		
Declassify overall intelligence budget (p.32)	X	
<b>Information Sharing and Fusion</b>		
Incentives for information sharing (p.33)	X	

**Note that the above summary assessments regarding actions required reflect only a general response and thus are not definitive. Many of the recommendations include nuances that affect the type of response required and thus, for example, both boxes may be checked. For a more detailed response please refer to the narrative provided at the designated page.**

<b>9/11 Commission Recommendations</b>	<b>Executive/Administrative Action May Be Sufficient</b>	<b>Legislation Required</b>
Create trusted information network (p.33)	X	
Policy guidelines regarding information sharing (p.34)	X	
<b>Human Capital</b>		
National security appointments during transitions (p.35)	X	
<b>Threat and Risk Assessment</b>		
Assessment of Northern Command's strategies and planning on homeland security (p.36)	X	
DHS assessment of threats and plans to respond (p.36)	X	
<b>Congressional Oversight</b>		
Congressional oversight (p.37)	Internal rule reforms	
<b>Security Clearances</b>		
Single agency for security clearances (p.38)	X	

**Note that the above summary assessments regarding actions required reflect only a general response and thus are not definitive. Many of the recommendations include nuances that affect the type of response required and thus, for example, both boxes may be checked. For a more detailed response please refer to the narrative provided at the designated page.**