

Testimony of Jeffrey H. Smith
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Mr. Chairman, it is a pleasure to appear before the Committee this morning to discuss an issue of great importance, namely the proposal to create a Department of Homeland Security. The issue of how our government is organized – at the federal, state, and local levels – to respond to attacks on our homeland has been examined by many commissions, think-tanks, task forces, scholars, and commentators. Although there is disagreement on the specifics, nearly all agree that some organizational changes are required to meet this threat. In particular, Mr. Chairman, I would like to commend you and your Committee for your leadership on this issue long before the attacks of September 11th.

Indeed, it is the homework done by these commissions and studies and by this Committee and others in the Congress that provides the basis for careful consideration of the proposals made by the President and the various bills pending before this Committee including S.2452 sponsored by Senators Lieberman, Cleland, Durbin, Graham, Reid, and Specter.

Although much work has been done, much lies ahead. These proposals call for nothing less than fundamentally restructuring much of the security apparatus of the United States. The President's program would, for example, combine pieces of many agencies into a new agency of some 170,000 employees with a budget of \$37.5 billion.

In evaluating these proposals Congress must ask four basic questions:

1. What is the right configuration of functions and agencies?
2. How can the reorganization be accomplished without creating even greater problems of coordination during the middle of a war?
3. How should Congress oversee the new agency?
4. What can be done to improve the collection, analysis, and dissemination of intelligence related to homeland security?

I would like to briefly address each of these questions.

I. Agency Configuration

First, what is the right configuration of agencies? There seems to be a consensus, with which I agree, that certain agencies should form the core of the new department. These agencies include the Federal Emergency Management Agency, the Customs Service, the Border Patrol, the Immigration and Naturalization Service (INS), and the Coast Guard. In moving these agencies from their traditional homes to a new department, care must be taken to assure that the emphasis on combating terrorism does not put at risk the functions of these agencies that are not directly related to homeland security. For example, will the role of the Coast Guard to do search-and-rescue be diminished? Will the transfer of INS to this new department make it less sensitive to the aspiration of immigrants coming to the United States genuinely to seek a better life? It seems to me these questions can be dealt with by good management within the new department and by adequate Congressional oversight.

Adding other agencies or portions of other agencies – such as the National Labs, parts of the Department of Energy, the Center for Disease Control and Prevention (CDC), and those concerned with cybersecurity, agricultural inspection, and trade sanctions – seems to me to require closer study. It is my experience that an agency works best when its mission is clear and all of its activities relate to that mission and its associated core competencies. When a department or agency is responsible for some other mission, that mission often becomes an “orphan” and suffers from lack of attention and funding.

Conversely, if the Department of Homeland Security acquires bits of other agencies such as parts of CDC and Energy, I worry that the effectiveness of those “bits” could be diminished by their distance from the agency with the greatest competence in their respective field. I also worry that they might not be able to attract the “best and brightest.” Additionally, in the case of nuclear terrorism, Energy and DoD have worked out over the years a good balance in the complex world of nuclear energy, nuclear weapons, and non-proliferation. I worry that pulling part of Energy out and moving it to the new department will create a third agency involved in nuclear policy, thus causing considerable confusion. My inclination, therefore, would be to leave DOE and CDC intact but explore other ways to improve the coordination among the new department and those elements of DOE and CDC, Homeland Security, the Department of Defense, the Intelligence Community, etc., that are necessary to the department's mission.

I also would be inclined to leave the Office of Foreign Assets Control, which supervises trade sanctions, at the Department of the Treasury because it is essentially a tool to achieve foreign policy goals through economic sanctions.

I think it is imperative that the Committee look at each of these “add-on” functions on a case-by-case basis and make an assessment as to whether the objectives of the nation can be better met by moving them to the new department or by leaving them with their “mother agency.” I suspect that, in many instances, it will be wiser to leave them where they are and to take steps to improve coordination between them and the new Department of Homeland Security. Improving coordination rather than importing them into the new department would greatly reduce the confusion associated with the creation of the new department. If subsequent experience shows that the agencies should be moved, that can be done later.

II. Transition

Second, how can the reorganization be accomplished without creating even greater problems of coordination during the middle of a war? It is hard to overstate the dislocation and confusion that will result from this proposed reorganization. Many of these agencies have been part of their current departments for decades. They have acquired unique cultures, personnel systems, information technology systems, pay systems, and so on. Many – indeed, I hope most – have a high esprit de corps, and people are proud to come to work in the morning to say that they work for this or that agency. My own experience in creating a new agency, the National Imagery and Mapping Agency, in 1995 and 1996 – which was a reorganization on a much smaller scale – persuades me that enormous thought and care must be given to the manner in which agencies are separated from their existing homes and integrated into a new department. I was also on the staff of the Senate Armed Services Committee when the Goldwater-Nichols Act was passed in 1986, and I well remember the extraordinary effort required to pass that landmark bill.

On virtually every front – administrative, human, and political – the problems are daunting. It will likely be years before the desired efficiencies are achieved. In the meantime, great care must be taken to ensure that gaps are not created by poor coordination within the new department, between the new department and the rest of government, and between the new department and state and local officials. In war, field commanders try to attack their opponent in the “seams” between military units or when the enemy is reorganizing. We must make certain that there are no seams between any of the elements of this new department. We can expect that the terrorists – and perhaps hostile states – will seek to take advantage of any seams they can identify.

III. Congressional Oversight

Third, how should Congress oversee the new department? This is, in my judgment, a critically important question. The department must have not only vigorous oversight from Congress but also vigorous support by key members. This Committee fully appreciates the importance of a strong relationship between Congressional oversight committees and the part of government that they oversee.

At the same time, care should be taken to ensure that oversight is not fragmented among many committees on the Hill.

One suggestion that I find appealing is to create a select committee in each house made up of “crossover members” from the key interested committees. In my judgment, the two intelligence committees, which are select committees, serve as a good model for a potential oversight committee. The committees that should be represented on the new select committee include Appropriations, Armed Services, Judiciary, Foreign Relations, Intelligence, and Governmental Affairs. I recognize the great strain on Members’ time but urge the Committee to work diligently to structure a Congressional oversight process that assists rather than complicates this enormously difficult task of creating and overseeing a new department of government.

IV. Intelligence Support

Fourth, what can be done to improve the collection, analysis, and dissemination of intelligence on homeland security? Much attention has been rightfully paid to this issue. It is widely believed that if U.S. intelligence and law enforcement communities had been able to “connect the dots,” we might have determined that a major attack was being planned. Some have even suggested that we might have been able to determine the specifics of the attack and have prevented it. That question is, of course, being carefully examined by the joint investigation by the two intelligence committees, and we all await their conclusions and recommendations. I believe it is

premature to act until we have heard those conclusions and recommendations,¹ but it is not too early to begin thinking about solutions – including possible organizational changes.

A. Discussion

Before discussing possible solutions, it is important to understand the relationship between intelligence, law enforcement, and domestic security. It is clear that we should have done a better job before 9/11. However, it is an oversimplification to say that the failure to predict or prevent the attack was caused solely by the lack of cooperation between the FBI and the CIA. Intelligence – whether it be domestic or foreign – is far more than sharing information and connecting the dots. The production of first-rate intelligence is an enormously sophisticated process that depends on a number of factors, including the collection of raw information from “all-sources,” sophisticated analysis by individuals who are experienced and independent of the policy process, an understanding of our vulnerabilities and of the capacities of our adversaries, and the timely dissemination of “actionable” intelligence to decisionmakers at all levels of government.

Good intelligence depends very much on first understanding what the consumer of intelligence needs. Next, the system must assure that our intelligence collection assets are properly targeted to collect that information from secret sources and open sources, from foreign governments and other parts of our own government. With respect to the collection of human intelligence, which is the hardest to obtain but usually the best information, one cannot say too strongly that CIA clandestine officers in the field must know that we expect them to take risks – and that we will back them up when the going gets tough.

It is imperative that the analyst and the collector work together closely so that the collector knows what the analyst needs, and the analyst understands what the collector can and cannot collect. The analyst also has to be close to the collector so he or she can evaluate the weight to be given to any particular scrap of information. In the case of terrorism, we frequently get only fragmentary information. As a result, intelligence officers – both the collector and the analyst – must be familiar with the terrorist groups, the region in which they operate, their culture, their language, and their religion and have access to all aspects of the collection programs of the individual intelligence agencies. The analysts must also have access to the flow of day-to-day information on operational matters, for example details on the interaction with the source, reports from foreign governments, and so on, that may contain a snippet of information that could be linked to information from another source, such as a domestic law enforcement agency or non-intelligence sources like airplane manifests and port activity, to understand what is going on. This means they must be part of a single, well-integrated, and well-managed agency. Diffusing the responsibility among too many agencies is not wise.

Another fundamental question is whether it is possible to have a single agency responsible for both law enforcement and intelligence. Over time, we have discovered how difficult that is. During the last few years, the CIA and FBI have made major efforts to improve relations and coordination between their agencies. Much progress has been made through such steps as frequent meetings between senior leadership, creation of joint task forces, overseas meetings between CIA and FBI officials to coordinate activities, strengthening the counter-terrorist and counter-intelligence centers, and so on.

Very real results were achieved: for example, the early arrest of Harold Nicholson, only about 18 months after he began to spy for the Russians. In addition, improved cooperation produced good results in terms of preventing terrorist attacks associated with the 1996 Olympics and the millenium change in 2000.

But as 9/11 demonstrated, there are still gaps. The Bureau has some particularly difficult challenges. For example, compartmentalization is required in order to do effective law enforcement but is anathema to effective intelligence. The rules that the Bureau must follow for law enforcement investigations are simply inconsistent with good intelligence. Law enforcement looks backwards to solve a crime that had been committed. Evidence must be painstakingly gathered, analyzed, and protected from disclosure in order to find and arrest criminals. The fewest number of people must be given access to the information, not only to prevent leaks but also to assure a fair trial for the defendant. The prosecutors must be able to comply with the rules of criminal procedure on issues like discovery and disclosure of information to the defense counsel. Intelligence, on the other hand, tries to look forward. Its job is to collect as much information as possible, analyze it, try to predict what will happen, and disseminate that analysis to the widest group with a need to know. As one old hand put it, the FBI plays defense, the CIA plays offense.

¹ This is not a new problem. In 210 B.C., Petronius Arbiter is reported to have said, “We trained hard, but it seemed that every time we were beginning to form up into teams, we would be reorganized. I was to learn later in life that we tend to meet any new situation by reorganizing; and a wonderful method it can be for creating the illusion of progress while producing confusion, inefficiency, and demoralization.”

B. Specific Proposals

Now let me turn to some of the specific proposals.

1. Department of Homeland Security

The Administration's plan to create the Department of Homeland Security would create an Undersecretary for Information Analysis and Infrastructure Protection. This Undersecretary would be a "customer" of the Intelligence Community and would be responsible for "receiving and analyzing law enforcement information, intelligence and other information . . . comprehensively assessing the vulnerabilities of key resources and critical infrastructures . . . integrating relevant information, intelligence analysis . . . developing a comprehensive national plan for securing key resources and critical infrastructures and . . . taking or seeking to effect necessary measures to protect key resources and critical infrastructures." The specifics are still vague and need to be worked out. For example, it is not clear to me what the meaning of the term "taking or seeking to effect necessary measures to protect key resources and critical infrastructures in the United States" is. Does it mean that the Secretary may direct activities of state and local governments, of other government agencies, of private industry? All of this will need to be worked out very carefully over time.

The department must have an intelligence function, but what elements should it include and how should it do it?

I believe that a couple of good models exist. One is the Bureau of Intelligence and Research of the Department of State (INR). INR is a small but highly effective intelligence unit that has access to all sources of intelligence, participates in such basic decisions as "tasking" U.S. intelligence resources, and provides intelligence analysis of exceptionally high quality to the Secretary of State and other senior department officials. Perhaps an even better example is the Office of Net Assessment in the Office of the Secretary of Defense, which is responsible for taking intelligence data on potentially hostile forces and comparing it to data on U.S. forces to produce a "net assessment" of how our forces would perform in an armed conflict with the opposing forces. This is much the same process that the Department of Homeland Security would have to follow as it combines intelligence data with vulnerability data to prepare a plan to protect our nation. Clearly the responsibilities of the Department of Homeland Security are different from those of the Departments of State and Defense, but the basic idea of an intelligence unit embedded in the Department that would perform the same functions as INR and the Office of Net Assessment is a good one. Having said that, it would not be a good idea to create a large and powerful analytical center that would see itself as a competitor to the existing Counter Terrorist Center (CTC) at the CIA. Some competition is good; rivalry is not.

The Department of Homeland Security should, therefore, not be the Government's primary source for the production of intelligence analysis on the terrorist threat. That should remain where it is – at the DCI's Counter Terrorist Center. The department should, however, have the responsibility to take intelligence from all sources (including CTC) and be the Government's primary source for producing specific analysis of terrorist threats to the homeland and the appropriate responses. The intelligence element of the department should have representatives from across the Intelligence Community, who are vital by being able to "reach back" into their own home agencies to effect coordination and achieve efficiency.

2. Create a Single National Counter Intelligence Center

A second possible step, and one that I find appealing, is to consolidate the existing counter-terrorist centers of the CIA and the FBI into a single national counter-intelligence center under the control of the Director of Central Intelligence that would be the primary national center to collect and analyze all threats of terrorism. The new center should be closely linked to the intelligence element of the Department of Homeland Security, but I would leave the primacy for analyzing terrorist threats in the Intelligence Community, where it will most efficiently function. Keep in mind that the CTC also has an operational role, that is in the conduct of activities outside the United States to thwart terrorism. Again, that role cannot be separated from the collection and analysis of intelligence that is vital to the performance of any preemptive operations.

3. Create a Domestic Security Service

Third, I believe the time has come to consider the creation of a new intelligence agency focused solely on domestic security. Virtually every democracy in the world has a domestic security service. Probably the most well-known is Britain's legendary MI5. As this Committee knows, the United States has never had a domestic security service. Indeed, we have resisted one for good reasons. However, I believe we should now seriously explore the establishment of such a service. In brief, such a service would combine elements of the FBI and CIA into a new agency charged with counter-terrorism and counter-intelligence. It would include the current counter-terrorism centers of both CIA and FBI, the National Counterintelligence Executive, parts of the FBI's National Security Division, and the CIA's Counter Intelligence Center. The new service should not have arrest authority but would work closely with the FBI and state and local law enforcement agencies, who would conduct arrests. Similarly, it

would need to have very close relationships with the collection agencies such as the Directorate of Operations at CIA, the National Security Agency (NSA), etc. It should probably be under the Director of Central Intelligence, but consideration should also be given to having it report to the Attorney General. I would not put it in the Department of Homeland Security because the new department already will have its hands full. In the future, it may be appropriate to put the new security service in the Department of Homeland Security, but that decision should be deferred until we see how the department functions and whether it is better to have it under the DCI or Attorney General.

Regardless of where it is housed, the director of the new service should have direct access to the President, much as the Chairman of the Joint Chiefs is part of the Department of Defense but has direct access to the President. The head of the new security service might, by statute, be a career civil servant with a fixed term in office – much as the JCS Chairman is always a career military officer with a fixed tenure.

Much thought must be given to the oversight structure. One possibility, suggested by a bill recently introduced by Senator Feinstein, is to create a new position, “The Director of National Intelligence,” essentially separating the current responsibilities of the Director of Central Intelligence, namely as the head of the CIA and the head of the Intelligence Community. Such a change could be patterned after the Secretary of Defense. For example, the powers of the Director of Central Intelligence (or the Director of National Intelligence) could be expanded so that his powers were closer to those of the Secretary of Defense vis-à-vis the military departments. The various intelligence agencies could then be likened to the relationship the military departments have with the Secretary of Defense. One of these agencies could be the new domestic security service. Obviously, the Director of Central Intelligence would need budgetary and execution authority over these agencies in order to make his or her authority effective – and to make certain that the right person was recruited to be the DCI.

Great care would have to be given to the powers of the new agency in order to protect civil liberties. For example, the existing Attorney General guidelines that govern domestic investigations could be codified. Also, consideration could be given to establishing a requirement for a warrant, perhaps issued by the special court established under the Foreign Intelligence Surveillance Act, in order to conduct clandestine investigations of U.S. persons and organizations.

The responsibility for some aspects of infrastructure protection could also be made part of the new agency. In particular, consideration should be given to including cybersecurity as part of this new agency. Cybersecurity, unlike some other aspects of infrastructure protection, is so closely tied to military operations that I believe it is best made part of the Intelligence Community, where it is closest to DoD and NSA.

V. Other Comments on the President’s Proposal and S.2452

Mr. Chairman, before concluding I would like to provide a few specific comments about particular sections of the President’s proposal and S.2452.

With respect to the President’s proposal, I have the following comments:

- I note that the bill would create “not more than six Assistant Secretaries” who are appointed by and with the advice and consent of the Senate (Section 103(a)(7)). Subsection D authorizes the President to appoint “not more than ten Assistant Secretaries.” It seems to me that whatever the right number of Assistant Secretaries is, they all ought to be subject to Senate confirmation.
- Section 203 sets forth the procedures under which the Secretary of the Department will have access to information from other parts of the Government. Clearly the Secretary must have access to all information that he requires. I find the current draft to be confusing and potentially counterproductive. It categorizes information in three groups and provides different levels of access by the Secretary to each of those three groups (see Section 203(2)(A)-(D)). This categorization is likely to lead to many questions as to whether a particular piece of information falls into this or that category and may or may not be given to the Secretary. I believe it would be far better, and more in keeping with the President’s intentions, that the law should require all Federal Government agencies to keep the Secretary “fully and currently informed” of all information relevant to his responsibilities. The provision should also permit the President to direct that some information – such as sensitive intelligence sources and methods – may be withheld from the Secretary. There are many such provisions in U.S. law, including the requirement to keep U.S. Chiefs of Mission informed about all activities in their country and the requirement for the DCI to keep the intelligence committees “fully and currently” informed about intelligence activities. Thus, it is a well-known concept and will have meaning and impact in the bureaucracy.
- I believe the Department of Homeland Security should include an Office of Science and Technology such as the one proposed in S.2452. This is a vital function for the Department, and the proposal in the Lieberman bill strikes me as a good idea. Moreover, I commend the President for proposing in Section 732 of his bill that the Secretary have broad authority to waive acquisition statutes and regulations when necessary. It is clear that the Secretary must be able to call upon the genius of the American

people whether in industry, National Labs, or academia. To do so, he must have flexibility to negotiate contracts that mirror commercial contracts as closely as possible. I urge the Committee to examine the President's proposal in detail, including whether this authority would permit waiver of statutes that are a barrier to commercial-like operations (such as the patent provisions governing intellectual property produced under a Government contract).

With respect to S.2452 I have the following comments:

- It is imperative that our efforts to combat terrorism be coordinated across the entire Government. Ultimately, that is the responsibility of the President, and some type of White House position is essential. However, I question whether it is wise to create, as Section 201 would do, a National Office for Combating Terrorism in the Executive Office of the President with a Director who is subject to Senate confirmation. Given that the proposal is to create a Department of Homeland Security with a Senate-confirmed Secretary, I believe that he or she should be the principal officer in the Government for homeland security and report directly to the President. A Senate-confirmed "Director" at the White House strikes me as potentially confusing and adding a layer of government that may be unnecessary. I suggest the President be free to create his or her own management structure to coordinate the Government's counter terrorism efforts.
- I believe the requirements in Title III, e.g., the preparation of a national strategy and the establishment of a National Homeland Security Panel, are good ideas and should be included in the President's proposal and enacted by Congress. To give it the clout needed, I believe it should be chaired by the President.

All of this is a vast amount of work, Mr. Chairman, and I am pleased that the Committee has undertaken the review of these important initiatives. I look forward to working with the Committee and its staff and to answering any questions you might have.

Thank you very much.