

**Testimony of**

**Kate Martin**

**Director**

**Center for National Security Studies**

**Before the**

**Subcommittee on Intelligence, Information Sharing  
and Terrorism Risk Assessment**

**Committee on Homeland Security**

**United States House of Representatives**

**"Homeland Security Intelligence: Its Relevance and Limitations"**

**Wednesday, March 18, 2009**

Chairwoman Harman, Ranking Member McCaul, and distinguished Members of the House Homeland Security Subcommittee on Intelligence, Information Sharing and Terrorism Risk Assessment, thank you for inviting me to testify today. I am the Director of the Center for National Security Studies a think tank and civil liberties organization, which for 30 years has worked to ensure that civil liberties and human rights are not eroded in the name of national security. The Center is guided by the conviction that our national security must and can be protected without undermining the fundamental rights of individuals guaranteed by the Bill of Rights. In our work on matters ranging from national security surveillance to intelligence oversight, we begin with the premise that both national security interests and civil liberties protections must be taken seriously and that by doing so, solutions to apparent conflicts can often be found without compromising either.

I especially appreciate the Committee using the opportunities created by the change in administration to hold this hearing and take stock, evaluate and reassess the role of the Department of Homeland Security and in particular domestic intelligence. While there has been much work done on the enormously complex task of creating the Department of Homeland Security, defining its responsibilities and authorities, etc., it is now time to take a broader look at the role, usefulness, and risks of homeland security intelligence. The past seven years have been marked by politicians using the rhetoric of fear for political advantage and as a substitute for in-depth analysis and public discussion of the admittedly difficult issues of counter-terrorism, domestic intelligence and civil liberties. The Executive Branch has operated with unnecessary and in my view unconstitutional secrecy, the Congress has largely acquiesced (despite the objections of

some, including Members of this Subcommittee), and intelligence and security issues have been used to score partisan points. The result has been an unprecedented and insufficiently understood expansion of government power to conduct surveillance on Americans, with very little evidence of its effectiveness, much less its necessity.

Congress needs to examine domestic surveillance and intelligence as a whole.

There is no doubt that the government made many mistakes before 9/11, that globalization has changed the vulnerabilities of the United States, that technology has outpaced the law in some areas, and that changes were needed to ensure the most effective possible counterterrorism effort consistent with our Constitution. The last administration, enabled by an explosion in technological surveillance capabilities took the opportunity to change basic principles and practices limiting government surveillance of Americans in fundamental and far-reaching ways.

They did so, however, without any acknowledgment of the enormity of the changes. As Suzanne Spaulding has pointed out, the legal framework for surveillance is now a "Rube Goldberg"-like structure, and this patchwork of laws makes it very difficult to understand the full impact of the changes. Moreover, the issues that have been the focus of public debate have been largely technical and frequently subjected to less scrutiny than they deserved because of the political pressures surrounding the debate. There has also been a proliferation of agencies and entities with domestic intelligence responsibilities, although it is not clear that such arrangement was a deliberate effort to create redundancy or just an accident resulting from so many different initiatives by different actors.

Thus, this Committee's examination of the role of DHS and "homeland security intelligence" is both timely and much needed. I hope it will serve as a key part of a comprehensive review of the changes made in domestic surveillance and intelligence in the past seven years that will provide an understanding of the changes as a whole. Such a review is essential to evaluate the effectiveness and necessity of these changes and to recommend changes to make such activities more effective and less threatening to the balance of power between the government and the people. I expect such review to be facilitated by increased cooperation by the Executive Branch.

Today, I want to outline a few issues that I would urge the Committee to consider in examining "homeland security intelligence" and the role of DHS in domestic intelligence. They will not be new ideas to the Members of this Committee because they are essentially first principles. Yet an examination of recent testimony before the Committee suggests that they are frequently overlooked and even lost sight of by witnesses focusing on the necessary details of bureaucratic authorities, funding and organization.

When evaluating any homeland security intelligence capability, the first question should be whether it has a specific and concretely defined mission. This is especially crucial in the case of DHS, which has myriad and diverse departmental missions. It is not adequate to describe the mission of "homeland security intelligence" as providing intelligence to keep Americans safe or the "homeland" secure. While intelligence may well be useful for many if not all of the Department's missions, it is essential to distinguish conceptually between the different objectives; for example, between the activity of collecting and analyzing information in order to prevent another Katrina, and

intelligence aimed at preventing another Mohammed Atta from being admitted into the United States.

Today, I will focus on domestic intelligence for counterterrorism and criminal law enforcement purposes. However, even that mission description is too general to be very useful. In the case of DHS, for example, it could encompass evaluating the vulnerabilities of domestic infrastructures, from water reservoirs to cyber networks; assessing how best to prevent al Qaeda terrorists from entering the United States; and trying to identify any "homegrown terrorists." It is also important to distinguish between activities intended to improve the government response to terrorist incidents by helping victims and repairing property damage, and government activities aimed at identifying and apprehending those responsible for such crimes. (There has been a fair amount of work done on analyzing such post-incident tasks and the appropriate legal authorities therefor with regard to Defense Department activities in such situations.)

While each of these objectives requires both information and smart analysis as well as coordination, the relevant information and analysis are quite different depending on the objective. Today, I will not address what intelligence is needed to assess and protect against infrastructure vulnerabilities. Members of this Committee, and especially Chairwoman Harman, have long played a leadership role on these issues. And much of the work necessary to protect against such vulnerabilities does not raise the same kind of constitutional and civil liberties concerns as other counterterrorism activities. Rather, I will focus on homeland security intelligence that is aimed at identifying, locating and "disabling" individuals from carrying out terrorist acts, whether through arrest, deportation or surveillance.

In evaluating homeland security intelligence, it is crucial to identify when the mission of such intelligence is to prevent or respond to acts of terrorism in the United States, by identifying and locating those individuals involved in such plans or responsible for such acts. It is then equally important to articulate whether the intelligence mission is focused on individuals inside the U.S. or the intentions and activities of overseas individuals and groups that threaten U.S. interests. It would be enormously useful to require DHS officials when describing and testifying about intelligence activities always to identify whether the activities under discussion include collecting or analyzing information about Americans.

Of course, communications and transactions between Americans and foreigners overseas can be a legitimate subject of inquiry and there must be coordination between intelligence aimed overseas and intelligence conducted in the U.S. As the Committee is aware, an enormous amount of work has been done to ensure such coordination, beginning with the most basic objective that foreign individuals identified by U.S. agencies overseas as plotting terrorist attacks be barred from entering the U.S. But all too often, the mission lines are blurred. One example is the terrorist watch list, which is apparently designed as one list containing the names of both Americans and suspected foreign terrorists living overseas. Such commingling, which is unnecessary for operational purposes, misleadingly implies that the rules and protections for Americans and for foreigners overseas are the same. The civil liberties protections in the Bill of Rights limit government surveillance in the United States, but have not been extended to foreigners overseas. Nevertheless, the claim is now made that Americans communicating

with foreigners overseas, somehow lose their constitutional privacy protections because their correspondents do not enjoy any such protections.

The first step toward restoring the full measure of these protections is to require a fulsome accounting of when homeland security intelligence includes collection or analysis of information about Americans.

An objective threat assessment is needed of the terrorist threat inside the U.S. An assessment of the likelihood, magnitude, scope and source of terrorist threats inside the United States is crucial to any examination of what kind of domestic intelligence makes sense. This is perhaps the area that has been most subject to political and partisan grandstanding and least subject to rigorous analysis. Officials in the last administration regularly warned of “sleeper cells”, while wrongfully jailing hundreds of individuals who were innocent of terrorist activities. The public needs a clear understanding of the true nature of the threats from within and without the country. When the Commission on Prevention of Weapons of Mass Destruction Proliferation and Terrorism announced that a WMD attack on the U.S. is likely in the next five years, the headline coverage gave the impression that the Commission had concluded that there are terrorist cells in the U.S. plotting such, when the report focused mainly on threat activities overseas. When officials talk about a new enemy operating in a networked world requiring a networked response, they do not distinguish between al Qaeda in Iraq and would-be terrorists in the United States. The impression gained from following the terrorism cases brought in the U.S. in the past seven years, is that the alleged “home-grown terrorists” were by and large discovered not through network analysis, but through the old-fashioned use of undercover informants.

Assessment of the specific kinds of threats, including an evaluation of how much is known and unknown is essential for evaluating any program for homeland security intelligence. To date, there has been no such assessment available for rationale examination and discussion. Instead, there has been a constant drumbeat to the effect that the threat is an existential one.

But as Secretary Chertoff acknowledged, it is not possible to prevent all acts of terrorist violence and keep everyone safe. It is crucial to acknowledge that such incidents are not likely to constitute existential threats to the nation and that we must take account of the magnitude of the actual threat. It is misleading, for example, to compare the world-wide convulsions and horrors of World War II with the activities of the homegrown terrorists arrested in the U.S. since 9/11 or even with the attacks in Madrid, London or Mumbai, terrible as those were. Moreover, recognizing the true extent of the domestic threat is important in order to avoid playing into terrorists' hands who recognize the asymmetry of the power confronting them and hope to provoke a disproportionate response by sowing fear through terror.

Current domestic intelligence capabilities create the risk of a mismatch between the domestic threat and the government response. There is no doubt that information is key to preventing terrorism and crime and that analysis of information is even more important. But it does not follow that current domestic intelligence activities are necessary or the most effective means of prevention. The term "intelligence" itself has a variety of meanings, including "criminal intelligence" referring to the analysis of information by police and law enforcement for prevention of crime and terrorism. But the more usual meaning of the term implies that the collection and analysis of

information is not necessarily tied to law enforcement. Rather it refers to all the secret collection and analysis activities undertaken by government agencies to counter threats to the national security. By definition it enjoys a high degree of secrecy and it is seen as the province of experts, both of which make difficult any informed examination of its reliability and usefulness.

In 2003, I wrote an analysis of domestic intelligence and counterterrorism arguing that domestic intelligence should be closely tied to law enforcement in order to protect civil liberties and to insure the most effective counterterrorism. See Kate Martin, "*Domestic Intelligence and Civil Liberties*" SAIS Review, Vol. 24, No. 1, Winter-Spring 2004. At that time, I wrote in part to argue against the creation of a new domestic intelligence agency rather than tasking the FBI to improve its counterterrorism activities. Since then, no new stand-alone agency has been created, but there has been an unprecedented increase in the number of agencies and entities engaged in domestic intelligence and the scope of their activities. The legal authorities permitting collection of information on Americans have been expanded and the limitations and safeguards against abuse have been weakened. Over the past seven years, government agencies have collected enormous amounts of data on enormous numbers of Americans, which is stored in electronic data-bases virtually forever, and is accessible to enormous numbers of government employees. Advances in technology have meant that information about individual Americans is no longer "practically obscure" by being hidden within enormous data sets, but instead can be quickly, easily and cheaply retrieved, analyzed and disseminated to a wide range of federal, state, local, and tribal officials and employees.

Such developments pose enormous challenges to the balance of power between the government and the citizens. As Senator Sam Ervin explained in 1974:

[D]espite our reverence for the constitutional principles of limited Government and freedom of the individual, Government is in danger of tilting the scales against those concepts by means of its information gathering tactics and its technical capacity to store and distribute information. When this quite natural tendency of Government to acquire and keep and share information about citizens is enhanced by computer technology and when it is subjected to the unrestrained motives of countless political administrators, the resulting threat to individual privacy makes it necessary for Congress to reaffirm the principle of limited, responsive Government on behalf of freedom.

Each time we give up a bit of information about ourselves to the Government, we give up some of our freedom: the more the Government or any institution knows about us, the more power it has over us. When the Government knows all of our secrets, we stand naked before official power. Stripped of our privacy, we lose our rights and privileges. The Bill of Rights then becomes just so many words.<sup>1</sup>

Senator Ervin is not describing the risks of individual misuse and wrongdoing, such as identity theft or other illegal uses of personal information by unauthorized government officials. Rather, he is describing a systemic danger to our form of government.

Indeed, domestic intelligence activities—the secret collection of information by a government on its own citizens and residents—have always posed a serious threat to individual liberty and to constitutional government. There is virtually no domestic intelligence agency, including MI5 in Great Britain, untainted by scandal, political spying and dirty tricks, activities that threaten not only individual rights, but the proper functioning of democratic government. Risks to civil liberties are inherent in the very nature of domestic intelligence. This is because intelligence necessarily operates in secret and, as a result, it is exceedingly difficult to subject intelligence activities to the

---

<sup>1</sup> Senator Sam Ervin, June 11, 1974, *reprinted in* COMMITTEE ON GOVERNMENT OPERATIONS, UNITED STATES SENATE AND THE COMMITTEE ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES, LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974 S.3418, at 157 (Public Law 93-579)(Sept. 1976).

checks and balances that the Framers of the Constitution understood as essential to prevent abuses of power. Secrecy operates to make congressional oversight less vigorous than usual, even though it is more needed in this case to compensate for the lack of the usual forms of public scrutiny over government activity. In addition, the Executive Branch has been very successful in arguing that judicial review of intelligence activities should be extremely deferential and limited, even when constitutional rights are at stake. Perhaps the greatest barrier to strong oversight and accountability is the always-present notion that the interest served by intelligence —national security—is of paramount concern and always outweighs other interests.

While the 9/11 attacks are a reminder of the extent of national security threats to the United States, the response by the last administration confirmed the insights of the Founders concerning the temptations of power and the ever present need to defend the principles of democratic government. In the name of national security, the President claimed the authority to violate the laws passed by Congress protecting individual liberties and to keep such claims a secret not only from the American public, but even from the Congress. While the warrantless surveillance and illegal interrogations are well known, the administration also rounded up and jailed without due process hundreds of individuals in the United States because of their religion or ethnicity. We can have no confidence that such claims will not again be made by an administration in the name of necessity when faced with inevitable future crises.

It is against this backdrop, that Congress should examine homeland security intelligence. A specific threat assessment is needed that is targeted to the specific missions tasked to such intelligence. Equally important a comprehensive understanding

and public report is needed concerning domestic surveillance authorities and the potential uses of intelligence information against individuals, *e.g.*, to place them on watchlists, to deny them security clearances, jobs, legal residency, or to prosecute them. Intelligence information also gives the government the power to pressure unwilling individuals to become government informants. Finally, the American public is entitled to metrics concerning the amount of data that has already been collected on them; how many individuals are referenced in how many government data-bases; how much information is stored in those data-bases; and how many requests is the government making to how many entities for more information about Americans. What kind of information is the government collecting on how many Americans concerning their lawful political or religious activities?

There is no doubt that all such data will be available to the government to be used as has happened repeatedly in the past, against political, racial or religious minorities, against dissenters or against political opponents. We count on this Committee and others to examine how to prevent this, to consider whether more narrowly targeted collection programs may be more effective in preventing terrorism while posing fewer risks to constitutional government and individual liberties.

We are grateful for the opportunity to do so with less fear-mongering and partisanship and more public dialogue and discussion.

Thank you for considering our views.