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## The Intelligence Community and 9/11: Proposals for an Independent Commission

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### Summary

There is significant support for an independent commission to assess the performance of the U.S. Intelligence Community in regard to the September 11, 2001 attacks, despite the fact that a joint inquiry by the Senate and House intelligence committees has been underway since early 2002. In separate legislation, the House and Senate have endorsed proposals for an independent commission. Proponents argue that an investigation by persons without ties to intelligence agencies could provide greater assurance of an impartial assessment that could lead, if necessary, to improvements in the nation's intelligence effort. Opponents argue that it would usurp the responsibilities of congressional intelligence committees, burden senior intelligence officials, and risk exposure of intelligence assets deeply involved in the current struggle against terrorism. This report will be updated as circumstances warrant.

### Introduction

On July 24, 2002, for the second time in two years, the House of Representatives voted to establish an independent commission to investigate the performance of the U.S. Intelligence Community in regard to the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon. In 2001, the House had included a provision to establish a commission on national security readiness in its version of the FY 2002 Intelligence Authorization bill (H.R. 2883), but the provision was dropped in conference. The 2002 vote reflected the concerns of constituents as well as a view among some Members that little progress is being made by the two intelligence committees in determining whether, or not, there had been an "intelligence failure."

The proposal, in the form of an amendment offered by Representative Roemer, to the FY2003 Intelligence Authorization bill (H.R. 4628), was opposed by Representative Goss, the Chairman of the House Permanent Select Committee on Intelligence (HPSCI) and some other Members of the Committee, but was adopted by a 219-188 roll call vote after extended debate in the early hours of July 25. On September 24, the Senate adopted (by a vote of 90-8) an amendment to the H.R. 5005, the Homeland Security bill, to

establish an independent commission to investigate the 2001 terrorist attacks. Thus, since September 2002, there have been two legislative vehicles, the intelligence authorization bill (H.R. 4628) and the homeland security measure (H.R. 5005), to which provisions establishing an independent commission on the 9/11 attacks could be attached.

## Background

Prior to September 11, 2001, the Intelligence Community understood that a serious terrorist threat existed from the Al-Qaeda organization and other international terrorists. However, the nature and timing of attacks and the use of civilian aircraft were not anticipated and no specific warnings had been issued. The Bush Administration quickly launched efforts to eliminate the Al Qaeda infrastructure in Afghanistan and elsewhere—a campaign that required the close involvement of intelligence agencies—but did not initiate a comprehensive assessment of the record of the performance of intelligence agencies. Many in Congress have supported a broader inquiry, questioning why U.S. intelligence agencies could not have provided better and more specific warning of the attacks that cost more American lives than were lost at Pearl Harbor on December 7, 1941.

Some Members favored an independent commission to investigate the performance of intelligence agencies while others believed that Congress itself should undertake an investigation. On October 5, 2001 the House voted to establish a commission to review, with respect to the events of September 11, “the national security readiness of the United States to identify structural impediments to the effective collection, analysis, and sharing of information on national security threats, particularly terrorism.” The Senate did not include a similar provision in its version of intelligence authorization legislation, and conferees did not include the House-passed provision in the final version that was subsequently enacted (P.L. 107-108).

On February 14, 2002 the House and Senate intelligence committees announced the establishment of an unprecedented joint inquiry. The official press release stated that, “Among the purposes of this joint effort is ascertaining why the Intelligence Community did not learn of the September 11<sup>th</sup> attacks in advance, and to identify what, if anything, might be done to better the position [of] the Intelligence Community to warn of and prevent future terrorist attacks and other threats of the 21<sup>st</sup> Century. The Committees may seek to legislate changes to remedy any systemic deficiencies revealed by the joint inquiry.” The House authorized \$1.6 million (H.Res. 359) for the inquiry and the Senate approved a similar amount. House funding extends through January 3, 2003.

The work of the congressional Joint Inquiry has not fully allayed concerns about the performance of intelligence agencies. The Inquiry, which is being undertaken by some 23 professional staff, has kept a low public profile. Public hearings were originally planned for June 2002, but have been postponed. The original staff director, L. Britt Snider, a former counsel of the Senate Intelligence Committee and Inspector General of the Central Intelligence Agency (CIA), resigned in April 2002 amid media reports over controversies surrounding his staffing decisions. His replacement, Eleanor Hill, a former Inspector General of the Department of Defense (DOD), was not appointed until May 2002. It is not clear whether the Inquiry will complete its work by the end of 2002.

The amendment to H.R. 4628 to establish a commission, adopted by the House in July, is focused on intelligence agencies, and does not include law enforcement agencies

(perhaps because of a need to avoid a jurisdictional point of order during floor consideration). The proposed commission would review the implementation by the Intelligence Community of the completed findings and recommendations of the current congressional Joint Inquiry, and other reports and investigations. It would make further recommendations and review resource allocations, and other prioritizations of the Intelligence Community for counterterrorism; it would also review and recommend changes to the organization of the Intelligence Community “in particular the division of agencies under the jurisdiction of the Secretary of Defense and the Director of Central Intelligence.” It would submit reports only after the results of the Joint Inquiry become available. The Commission would be composed of 10 persons, three appointed by the Senate majority leader, two by the Senate minority leader, three by the Speaker, and two by the House minority leader. Not more than five members would be of the same political party and at least two members shall be members of the family or a representative designated by a family or families of an individual who died in the September 11 attacks. It would be in existence for some 18 months.

The amendment to H.R. 5005, sponsored by Senator Lieberman and approved by the Senate on September 19, 2002, is somewhat broader. The commission it would establish would investigate not only intelligence agencies, but also law enforcement agencies, the conduct of foreign policy, immigration and border control issues, financial transactions of terrorist groups, commercial aviation, and related concerns. It would evaluate lessons learned from other inquiries, and submit findings regarding the performance of the Federal Government, state and local governments, and nongovernmental entities, conclusions, and recommendations. The commission would be composed of 10 members—three each appointed by the majority leader of the Senate and the Speaker of the House, two each appointed by minority leader of the Senate and the minority leader of the House. Not more than five of the members would be from the same political party. The Commission would be in existence for 18 months.

Either proposal would establish a commission composed of non-government officials or employees. Both proposals express a sense of the Congress that commission members should be prominent U.S. citizens with national recognition. The House version specifies experience in governmental service and intelligence gathering; the Senate approach also includes provisions suggesting a significant depth of experience in law enforcement, the armed services, legal practice, public administration, commerce including aviation matters, and foreign affairs for commission members. Some observers believe that the rigid requirements for partisan balance assume that the commission might become politicized and do not seem to envision a commission emphasizing professional expertise.

As reflected in the lengthy House debate of July 25, congressional views on the need for an independent commission differ. Advocates of an independent commission argue that, given the magnitude of the losses suffered on September 11, an outside assessment of the performance of intelligence agencies is necessary to maintain the public credibility of the Intelligence Community. Furthermore, they suggest, the close and intimate ties between intelligence agencies and the two intelligence committees will not provide the degree of accountability that the public expects. Some supporters of an independent commission further perceive a need for a major reorganization of the Nation’s intelligence effort, including steps to reduce duplication of effort and reconsider the status of some of the large intelligence agencies as combat support agencies of DOD.

Opponents of establishing an independent commission stress that the basic investigation of the 9/11 attacks can best be undertaken by congressional committees working within oversight responsibilities long established under the rules of the House and Senate. They point out that the ongoing investigation will soon move into a public phase and produce for the public a comprehensive assessment of the record of the Intelligence Community. The intelligence committees, it is argued, are in the best position to undertake investigations of highly sensitive activities, preventing the unauthorized disclosure of classified information and protecting intelligence sources and methods. The Administration has made clear its opposition to a wide-ranging investigation with extensive public hearings that could lead to a media circus and would, in its view, jeopardize the ongoing effort against international terrorism, and burden senior officials with duplicative requests for information and testimony. Some observers note the apparent strength of Administration sentiment on this issue, and suggest that a veto of legislation proposing an independent commission could be difficult to override.

Although there were indications in October that an agreement on an independent commission had been reached, the effort broke down prior to the November 5 elections. Reportedly, there are differences between the Administration and some Members and 9/11 family representatives over the number of commission members that would be required to issue subpoenas and whether the executive branch would appoint the chairman. Observers suggest that pressure to pass an intelligence authorization bill could encourage compromise on provisions to establish an independent commission.

## **Possible Approaches**

Commentators have suggested that, should Congress proceed with legislation establishing an independent commission, there are three different sets of concerns that might be considered. First is the immediate background to the attacks last year; what evidence was collected, what analysis was performed, what warning were given. Second, is the structure of the Intelligence Community; how well is it adapted to the effort against international terrorism? Third is the larger question of the relationship of intelligence agencies to law enforcement, especially in situations involving U.S. citizens/persons.

**Immediate Background of 9/11.** The Joint Inquiry is in the process of gathering vast amounts of data concerning the individuals who carried out the 9/11 attacks, their associations, their efforts to attend flight schools, the sources of their financial support, etc. Most observers acknowledge that the ongoing investigation is very extensive and is likely to encompass most of the documentary records and include interviews with almost all intelligence officials who were responsible for collecting, analyzing, and disseminating information about terrorist attacks. The executive branch reportedly has been forthcoming, albeit after prodding. Although it is possible that some important data will be missed, most observers believe the Joint Inquiry effort will be reasonably thorough. Many observers also acknowledge as legitimate the concerns of the Administration that intelligence officials not be subject to repeated and duplicative interviews and document requests. On the other hand, some observers argue that having a separate set of reviewers, without ties to intelligence agencies or to the congressional committees, assess the collected data and undertake supplementary interviews would serve to reassure the public.

**Intelligence Organizational Issues.** The modern U.S. Intelligence Community was created in the context of the Cold War; it was designed to support military strategies

and operations ranging from limited war to all-nuclear exchanges. Despite considerable attention in recent years to enhancing counterterrorism capabilities, some observers believe that current organizational relationships are not optimized for post-Cold War missions. There were two major reviews of intelligence organization in the mid-1990s—the Aspin-Brown Commission and the Intelligence Community-21<sup>st</sup> Century review undertaken by the House Intelligence Committee in the 104<sup>th</sup> Congress. Both addressed proposals suggesting that the Director of Central Intelligence (DCI) should have direct line control of the major intelligence agencies now part of DOD—the National Security Agency (NSA), the National Reconnaissance Office (NRO), and the National Imagery and Mapping Agency (NIMA). This approach was viewed skeptically by others, including senior Defense Department officials and some members of the congressional armed services committees. In October 1996 Congress passed legislation (P.L. 104-293) that provided greater coordinative authority for the DCI without giving him line control. A Senate-confirmed position of Deputy DCI for Community Management was established and subsequently filled by a longtime DOD official, Joan Dempsey. Little information, however, is publicly available regarding the implementation of this legislation. Some observers continue to argue that the expanded DCI statutory authorities are inadequate.

The incoming Bush Administration established two separate commissions to look into questions of intelligence organization—one composed of current intelligence officials and the other of outsiders, headed by former National Security Adviser Brent Scowcroft. Brief media reports indicate that the latter review has proposed the transfer of the DOD agencies to the control of the DCI, but that the initiative has been put on hold given the intense focus on counterterrorism and the strong opposition of Defense Secretary Rumsfeld. The FY2003 Defense Authorization bill (H.R. 4546), as passed by the Senate, includes a provision to establish an Under Secretary of Defense for Intelligence, a new position intended to ensure a continued strong DOD role in national intelligence.

Some observers believe that only an outside commission could make an objective assessment of the best approach to organizing the Intelligence Community for current and anticipated missions. They note that there is little public information about the management processes of the Intelligence Community, and that, in recent years few open hearings have been held concerning resource management issues. They argue that a commission could make information available about resource allocations in unclassified forms that would enhance congressional and public understanding and could be charged with presenting a plan for reorganization that would serve as the basis for legislation.

Other observers, however, argue that major reorganization of the Intelligence Community is not needed and that a commission would be superfluous. Some note that FY1997 legislation gave the DCI increased statutory authorities to manage intelligence resources throughout the Federal Government, and that not enough time has passed to determine if these provisions are sufficient. Such judgments, they argue, can best be made by congressional intelligence, armed services, and appropriations committees.

**The Intelligence-Law Enforcement Relationship.** One of the most striking phenomena of recent years has been the removal of barriers between intelligence and law enforcement agencies. Increasing concerns with international narcotics smuggling and, more recently, with international terrorism have resulted in removing a number of statutory and administrative barriers to closer cooperation among agencies which gather information on links between overseas groups and criminal acts in the United States.

Some, however, attribute the failure to anticipate the September 11 attacks to an inability or unwillingness by law enforcement and intelligence agencies to share information in their possession. Changes in policies and statutes since September 2001 have encouraged closer coordination among these different sets of agencies, but difficult questions remain.

It is clear to almost all observers that intelligence and law enforcement agencies must routinely share information, given the nature of international terrorism, but some fear that important distinctions are being ignored. They emphasize that intelligence agencies were established to collect, analyze, and disseminate information by virtually any means possible; they were not envisioned as being law enforcement agencies. (The CIA and Defense agencies are denied law enforcement responsibilities by separate statutes.) According to some observers, using intelligence agencies to collect evidence specifically for use in criminal investigations leaves open the possibility for serious erosions of civil liberties. From their perspective, the legal requirements for electronic and physical surveillance, including those established by the Foreign Intelligence Surveillance Act, could be undermined by a more expansive role for intelligence agencies.

Some observers believe that only an independent commission could effectively address the question of balancing the need for intelligence in the war on terrorism with the integrity of the Nation's legal system. They believe there is considerable uncharted legal territory involved, and that the broader constitutional questions involved could benefit from detached consideration by persons without vested political or bureaucratic interests at stake. Since the issues fall within the oversight of a number of different congressional committees—including intelligence and judiciary committees, proponents of an independent commission suggest that a commission would be best able to consider the complex questions involved and provide the understanding of the issues that will be necessary to sustain public support of any needed changes in the functioning of intelligence and law enforcement agencies over the long term.

On the other hand, those skeptical of the need for such a commission argue that many of the necessary adjustments in the roles and missions of intelligence and law enforcement agencies have already been made by the USA Patriot Act of 2001 (P.L. 107-56) and subsequent amendments, and that an independent commission would serve no useful purpose at this time. They suggest that the public fully understands the unique threat posed by international terrorists, and generally accepts steps to modify existing legal procedures when dealing with suspected terrorists. They believe that the Executive Branch could make any further needed adjustments in the relationship between law enforcement and intelligence agencies in consultation with congressional committees.

## **Conclusion**

In considering intelligence authorization bills and homeland security legislation, Congress is addressing proposals for an independent commission to investigate the attacks on September 11, 2001. Different views are held regarding the advisability of such a commission, how any commission's membership should be chosen, and what the terms of reference should be. Some will see an independent commission as duplicating the duties of existing congressional committees; others will see an opportunity for an outside assessment of complex issues of great concern to the public.