

## **BRIAN HOOK**

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Mr. Hook received his B.A. in marketing from the College of St. Thomas, and an M.A. in philosophy, with honors, from Boston College. He obtained his J.D. from the University of Iowa College of Law, with distinction, and was a member of the *Iowa Law Review*.

TESTIMONY OF  
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BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES  
PERMANENT SELECT COMMITTEE ON INTELLIGENCE  
REGARDING

“SECURING FREEDOM AND THE NATION:  
COLLECTING INTELLIGENCE UNDER THE LAW”

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Good afternoon Mr. Chairman, Congresswoman Harman, and Members of the Committee. I appreciate this invitation to discuss the balance between enhancing national security and protecting individual privacy.

A tension between order and liberty is a recurring theme in our nation's history. The degree to which this tension is felt is driven more by circumstance than anything else. The circumstance we face today is one of war, which compels the engagement of all three branches of government to calibrate -- or to recalibrate -- the scales to suit the circumstance. So I commend the Committee for holding this hearing, which is as important as it is timely.

I have written on the subject of information sharing with my co-authors Peter Welsh and Margaret Peterlin. In a published white paper we addressed information sharing between intelligence and law enforcement, both historically and within the Patriot Act itself. The paper also considered the various oversight tools that can be applied to protect individual privacy.

I would like to make three broad points today. First, the historical data suggests that the sharing of information between intelligence and law enforcement is something to be encouraged - - with the proper oversight. Second, the Patriot Act's FISA provisions facilitated increased sharing, which has improved coordination. Third, the Bush administration's plan to create a new Terrorist Threat Information Center builds on the success of the Patriot Act and contemplates even greater coordination among intelligence and law enforcement.

### **Brief History of Interagency Information Sharing**

Although often plagued by bureaucratic friction, there is a long history of cooperation and information sharing between the CIA and the FBI.

The initial separation between the law enforcement and intelligence communities was established partly out of a concern for protecting civil liberties, but more significantly as a result of bureaucratic compromises. In 1946, J. Edgar Hoover attempted to persuade President Truman to place the Central Intelligence Group under Hoover's direct control. Truman, however, refused. The President explained to others, at the time, that he did not want to place one man (particularly Hoover) in charge of law enforcement and domestic and foreign intelligence.

Although concerns about placing such powers under one man account, in part, for the modern day division of authority between the FBI and the CIA, those concerns do not suggest that information sharing or coordination between the FBI and the CIA pose necessarily any threat to civil liberties.

And this was recognized by two congressional commissions that critics of information sharing point to in support of curtailing such sharing. During the turmoil of the 1970s, the Rockefeller Commission and Church Committee both issued reports detailing a number of activities characterized as abuses of the CIA's statutory authority. What is often forgotten by some (or overlooked by others) is that both reports recommended *greater* coordination between the FBI and the CIA.

The Church Committee noted that there has been a long history of coordination between the CIA and FBI and recommended still closer coordination between the agencies, especially in their counterintelligence efforts.

The Rockefeller Commission observed that the National Security Act of 1947, “was intended to promote coordination, not compartmentalization, of intelligence between government departments.” The report goes on to state that “legitimate domestic CIA activities occasionally cross the path of FBI investigations. Daily liaison is therefore necessary between the two agencies.”

### **Information Sharing and the PATRIOT Act**

The PATRIOT Act promoted greater cooperation and information sharing between intelligence and law enforcement. In doing so, it did not overturn the *status quo ante* with respect to coordination between the two communities.

A few key provisions of the Patriot Act that facilitate closer coordination are worthy of brief mention.

- Prior to the Act, law enforcement officials were generally restricted from sharing information provided to a grand jury with members of the intelligence community. The Patriot Act changed this and permitted disclosure of matters involving foreign intelligence occurring before a grand jury to law enforcement. While it is important to prevent evidence presented to a grand jury from leaking to the general public, there is little reason to prevent intelligence officials from gaining access to such information on a strictly confidential basis.
- Another section of the Patriot Act amends the National Security Act to permit the Attorney General to disclose to the CIA Director foreign intelligence acquired by DOJ in the course of a criminal investigation.
- Significantly, and not without controversy, the Patriot Act also modified FISA’s “primary purpose” requirement for surveillance and searches to allow FISA to be used where “a significant” purpose is to gather foreign intelligence.
- And, lastly, Section 504 authorized intelligence officers using FISA to consult with law enforcement to “coordinate efforts to investigate” foreign terrorist threats.

My co-authors and I supported the changes to FISA because the national security threat has changed dramatically since enactment of FISA in 1978. The statute worked reasonably well during the cold war for spying on people who were either foreign nationals employed by a foreign government, or U.S. citizens in this country recruited to spy by foreign intelligence agencies. Both classes were clearly “agents of a foreign power”, and gathering intelligence on their activities was generally the “primary purpose.”

But Al Qaeda and the like have no embassy. They have no diplomats. They are roaming terrorist cells who engage in criminal activities. FISA’s “primary purpose” requirement impeded information sharing and the coordination of tactical strategies to disrupt these cells. The Patriot

Act's less stringent standard eliminated the need to continually evaluate the relative weight of criminal and intelligence purposes, and it facilitated information sharing.

I would point out that the FISA amendments did not and cannot change whom the government may monitor. Domestic criminals such as corrupt Enron officials, Jack Kevorkian, or John Gotti cannot be FISA targets because they are neither agents of a foreign power nor does a significant foreign intelligence attach to the investigation. So the government may not monitor today whom it could not monitor before passage of the Patriot Act.

### **Terrorist Threat Information Center**

The third and last point I would make involves the President's Terrorist Threat Information Center, or "TTIC". TTIC, as the committee knows, is scheduled to be operational on May 1 under the direction of John Brennan, a 23-year CIA veteran. It is an interagency joint venture involving the FBI, the CIA, and DHS that will purportedly become the central repository for information from these agencies. The stated goal of TTIC is to permanently eliminate the seam between foreign and domestic intelligence on terrorism. It plans to do this by collapsing bureaucratic barriers and sharing information across departmental lines in one location. The plan, if successful, would ensure, among other things, that the next Phoenix memo from the field makes its way into the right hands, and not into a file cabinet.

It is significant that TTIC does not have any authority to collect intelligence or enforce the laws. Whatever domestic intelligence makes its way to TTIC must still be obtained lawfully under FISA or other existing law. This fact alone should give some comfort to those who are concerned about the potential threat that TTIC poses to civil liberties. But it is still important to press the administration on how privacy concerns will be addressed. I think some of the more important questions involve other matters such as the following:

- Will TTIC will become one more CIA agency that only further confuses an already confusing intelligence structure. Do we need yet another layer of bureaucracy?
- It is also unclear why after the creation of the Department of Homeland Security TTIC is necessary. DHS has a statutory responsibility to analyze intelligence, and yet we are now presented with a new center that seems to have been given an identical mission.
- By locating TTIC within the CIA, it risks becoming captured by the CIA, which could very well impede TTIC's stated goal of closing the gap between analysis of foreign and domestic intelligence on terrorism.
- Will TTIC risk creating situations where the intelligence community is dragged into investigations by law enforcement?

I think the Administration is doing its best to force information sharing through the vehicle of TTIC, but whether this is the best or only route is something for this and other committees to question and probe in due course through oversight hearings and the like.

In addressing the concerns of overreaching by the intelligence community brought about either by the Patriot Act or by an entity like TTIC, a wide variety of oversight methods exist to vet the collection of intelligence. At issue is whether the combination of power granted to the intelligence and law enforcement communities and the oversight applied have resulted in the proper balance between liberty and security in that same area. The paper that I submitted for the record talks about the various oversight tools that were built into the Patriot Act, including congressional oversight, judicial involvement, and sunset provisions. The costs and benefits of these tools are addressed in some detail therein. The paper also examines other oversight tools such as FOIA requests, the exclusionary rule, monetary penalties for violating privacy, and a vigilant press.

### CONCLUSION

I would say to conclude that although the method by which the government collects intelligence has significant implications on civil liberties, the simple sharing of information between the intelligence community and the law enforcement community, does not necessarily implicate civil liberties. Information can be shared in a manner consistent with the protection of civil liberties. It is the nature and techniques of the surveillance that matters. In the end, the focus of attention should be principally on the techniques by which intelligence is gathered domestically, and not on whether other members of the intelligence community are permitted to view the intelligence gathered as a result of those operations.

Thank you, Mr. Chairman, and I would be glad to answer any questions following the period for testimony.