

**Hearing of the  
Subcommittee on Commercial and Administrative Law of the  
Committee on the Judiciary of the United States House of  
Representatives**

**February 10, 2004**

**Testimony of  
Governor James S. Gilmore, III  
President of USA Secure**

**Former Governor of the Commonwealth of Virginia**

**&**

**Former Chairman  
Advisory Panel to Assess the Capabilities for Domestic  
Response to Terrorism Involving Weapons of Mass Destruction**

**Topic: "Privacy in the Hands of Government: The Privacy  
Officer for the Department of Homeland Security"**

Chairman Cannon, Ranking Member Watt, and members of the Subcommittee on Commercial and Administrative Law. The Committee on the Judiciary and the Subcommittee have played a major leadership role in including privacy considerations in the overall development of the Department of Homeland Security. I applaud the Committee for its leadership in this key area. It has been my privilege to serve as the Chairman of the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction for the past five years. In my private business and law practice I represent clients in homeland security matters. I also am President of USA Secure, a group of private sector companies and non-profit organizations that come together to deal with significant homeland security issues. USA Secure's primary focus has been on bioterrorism issues to this date. My main attention in homeland security over the past five years has been as Chairman of the Advisory Panel on behalf of this Congress.

***Congressional Mandate***

The Advisory Panel was established by Section 1405 of the National Defense Authorization Act for Fiscal Year 1999, Public Law 105–261 (H.R. 3616, 105<sup>th</sup> Congress, 2nd Session) (October 17, 1998). That Act directed the Advisory Panel to accomplish several specific tasks. It said:

The panel shall--

1. Assess Federal agency efforts to enhance domestic preparedness for incidents involving weapons of mass destruction;
2. Assess the progress of Federal training programs for local emergency responses to incidents involving weapons of mass destruction;
3. Assess deficiencies in programs for response to incidents involving weapons of mass destruction, including a review of unfunded communications, equipment, and planning requirements, and the needs of maritime regions;
4. Recommend strategies for ensuring effective coordination with respect to Federal agency weapons of mass destruction response efforts, and for ensuring fully effective local response capabilities for weapons of mass destruction incidents; and
5. Assess the appropriate roles of State and local government in funding effective local response capabilities.

That Act required the Advisory Panel to report its findings, conclusions, and recommendations for improving Federal, State, and local domestic emergency preparedness to respond to incidents involving weapons of mass destruction to the President and the Congress three times during the course of the Advisory Panel's deliberations—on December 15 in 1999, 2000, and 2001.

The Advisory Panel's tenure was extended for two years in accordance with Section 1514 of the National Defense Authorization Act for Fiscal Year 2002 (S. 1358, Public Law 107-107, 107<sup>th</sup> Congress, First Session), which was signed into law by the President on December 28, 2001. By virtue of that legislation, the panel was required to submit two additional reports—one on December 15 of 2002, and one on December 15, 2003.

### ***Advisory Panel Composition***

Mister Chairman, please allow me to pay special tribute to the men and women who serve on our panel.

This Advisory Panel is unique in one very important way. It is not the typical national “blue ribbon” panel, which in most cases historically have been composed almost exclusively of what I will refer to as “Washington Insiders”—people who have spent most of their professional careers inside the Beltway. This panel has a sprinkling of that kind of experience—a former Member of Congress and Secretary of the Army, a former State Department Ambassador-at-Large for Counterterrorism, a former senior executive from the CIA and the FBI, a former senior member of the Intelligence Community, the former head of a national academy on public health, two retired flag-rank military officers, a former senior executive in a non-governmental charitable organization, and the head of a national law enforcement foundation. But what truly makes this panel special and, therefore, causes its pronouncement to carry significantly more weight, is the contribution from the members of the panel from the rest of the country:

- Three directors of state emergency management agencies, from California, Iowa, and Indiana, two of whom now also serve their Governor’s as Homeland Security Advisors
- The deputy director of a state homeland security agency
- A state epidemiologist and director of a state public health agency
- A former city manager of a mid-size city
- The chief of police of a suburban city in a major metropolitan area
- Senior professional and volunteer fire fighters
- A senior emergency medical services officer of a major metropolitan area
- And, of course—in the person of your witness—a former State governor

These are representatives of the true “first responders”—those heroic men and women who put their lives on the line every day for the public health and safety of all Americans. Moreover, so many of these panel members are also national leaders in their professions: our EMS member is a past president of the national association of emergency medical technicians; one of our emergency managers is the past president of her national association; our law officer now is president of the international association of chiefs of police; our epidemiologist is past president of her professional organization; one of our local firefighters is chair of the terrorism committee of the international association of fire chiefs; the other is chair of the prestigious national Interagency Board for Equipment Standardization and InterOperability.

Those attacks continue to carry much poignancy for us, because of the direct loss to the panel. Ray Downey, Department Deputy Chief and chief-in-charge of Special Operations Command, Fire Department of the City of New York, perished in the collapse of the second tower in the September 11 attack on the New York World Trade Center.

### ***Panel Reports***

In the history of the Panel, we have produced five advisory reports to the Congress and to the President of the United State. The first report in 1999 assessed threat. The second report in 2000 developed the fundamentals of a national strategy for combating terrorism. The third report, dedicated to Ray Downey who lost his life in the World Trade Center, filled out a national strategy in five key subject areas: state and local response capabilities, health and medical capabilities, immigration and border control, cybersecurity, and use of the military. Our fourth report in 2002, issued in the year following the 9-11 attacks, further made recommendations on how to marshal the national effort towards a national strategy. It paid special attention to the needs of intelligence sharing and the proper structure for counterterrorism activities inside the United States. Our last report was issued about one and a half months ago, on December 15, 2003. That final report sought to express some end-vision and direction for the United States as it develops its national strategy and makes the country safer.

#### ***Fifth Report (2003) – Forging America’s New Normalcy: Securing our Homeland, Preserving Our Liberty***

Mister Chairman, the Advisory Panel released its fifth and final report on December 15, 2003. In that report, the strategic vision, themes, and recommendations were motivated by the unanimous view of the panel that its final report should attempt to define a future state of security against terrorism—one that the panel has chosen to call “America’s New Normalcy.”

That *strategic vision* offered by the panel reflects the guiding principles that the panel has consistently enumerated throughout its reports:

- It must be truly national in scope, not just Federal.
  - It should build on the existing emergency response system within an all-hazards framework.
  - It should be fully resourced with priorities based on risk.
- It should be based on measurable performance.
  - It should be truly comprehensive, encompassing the full spectrum of awareness, prevention, preparedness, response, and recovery against domestic and international threats against our physical, economic and societal well-being.
- It should include psychological preparedness.
- It should be institutionalized and sustained.
- It should be responsive to requirements from and fully coordinated with State and local officials and the private sector as partners

throughout the development, implementation, and sustainment process.

- It should include a clear process for strategic communications and community involvement.
  - It must preserve civil liberties.

In developing the report, panel members all agreed at the outset that it could not postulate, as part of its vision, a return to a pre-September 11 “normal.” The threats from terrorism are now recognized to be a condition that we must face far into the future. It was the panel’s firm intention to articulate a vision of the future that subjects terrorism to a logical place in the array of threats from other sources that the American people face every day—from natural diseases and other illnesses to crime and traffic and other accidents, to mention a few. The panel firmly believes that terrorism must be put in the context of the other risks we face, and that resources should be prioritized and allocated to that variety of risks in logical fashion.

The panel has proffered a view of the future—five years hence—that it believes offers a reasonable, measurable, and attainable benchmark. It believes that, in the current absence of longer-term measurable goals, this benchmark can provide government at all levels, the private sector, and our citizens a set of objectives for readiness and preparedness. The panel did not claim that the objectives presented in this future view are all encompassing. Neither do they necessarily reflect the full continuum of advances that America may accomplish or the successes that its enemies may realize in the next five years. The view is a snapshot in time for the purpose of guiding the actions of today and a roadmap for the future.

The panel said that America’s new normalcy in January of 2009 should reflect:

- Both the sustainment and further **empowerment of individual freedoms** in the context of measurable advances that secure the homeland.
- Consistent **commitment of resources** that improve the ability of all levels of government, the private sector, and our citizens to prevent terrorist attacks and, if warranted, to respond and recover effectively to the full range of threats faced by the nation.
- A standardized and effective process for **sharing information and intelligence** among all stakeholders—one built on moving actionable information to the broadest possible audience rapidly, and allowing for heightened security with minimal undesirable economic and societal consequences.
- Strong **preparedness and readiness across State and local government and the private sector** with corresponding processes that provide an enterprise-wide national capacity to plan, equip, train, and exercise against measurable standards.

- Clear definition about the roles, responsibilities, and **acceptable uses of the military domestically**—that strengthens the role of the National Guard and Federal Reserve Components for any domestic mission and ensures that America’s leaders will never be confronted with competing choices of using the military to respond to a domestic emergency versus the need to project our strength globally to defeat those who would seek to do us harm.
- Clear processes for engaging academia, business, all levels of government, and others in rapidly developing and implementing **research, development, and standards** across technology, public policy, and other areas needed to secure the homeland—a process that focuses efforts on real versus perceived needs. Well-understood and shared process, plans, and incentives for **protecting the nation’s critical infrastructures** of government and in the private sector—a unified approach to managing our risks.

The panel’s *Future Vision 2009* included specifics details involving:

- ***State, Local, and Private Sector Empowerment***
- ***Intelligence***
- ***Information Sharing***
- ***Training, Exercising, Equipping, and Related Standards***
- ***Enhanced Critical Infrastructure Protection***
- ***Research and Development, and Related Standards***
- ***Role of the Military***

To support its strategic vision, the panel offered a “Roadmap for the Future,” in which it made 20 substantive recommendations in six areas. (Advisory Panel recommendations are highlighted below in ***bold italics***).

### **Civil Liberties at the Foundation**

The panel addressed the on-going debate in the United States about the tradeoffs between security and civil liberties. It concluded that history teaches, however, that the debate about finding the right “balance” between security and civil liberties is misleading, that the traditional debate implies that security and liberty are competing values and are mutually exclusive. It assumes that our liberties make us vulnerable and if we will give up some of these liberties, at least temporarily, we will be more secure. It concluded that civil liberties and security are mutually reinforcing. The panel said that we must, therefore, evaluate each initiative along with the combined effect of *all* initiatives to combat terrorism in terms of how well they preserve all of the “unalienable rights” that the founders believed were essential to the strength and security of our nation—rights that have become so imbedded in our society and ingrained in our psyche that we must take special precautions, take extra steps, to ensure that we do not cross the line. It is

more than the clearly defined protections in the Constitution—protections against unreasonable search and seizure; and against self-incrimination. It is also that less well-defined but nevertheless exceptionally important “right to privacy” that we have come to expect and that our judicial system has come increasingly to recognize. ***We recommend that the President establish an independent, bipartisan civil liberties oversight board to provide advice on any change to statutory or regulatory authority or implementing procedures for combating terrorism that has or may have civil liberties implications (even from unintended consequences).***

## ***The Privacy Officer***

With the leadership of this Committee and Subcommittee, the Department of Homeland Security has established the position of Privacy Officer in accordance with statute. The foundation of the Congress's thinking was the protection of privacy will enhance the protection of American freedom. As such, the primary responsibility for the privacy policy includes an oversight of the use of technologies to make sure that they sustain and do not erode privacy protections relating to the collection and disclosure of personal information. It places special emphasis on the Privacy Act of 1974 and empowers the Privacy Officer to evaluate legislative and regulatory proposals involving the disclosure of personal information.

In its drive to make the country secure, the United States is applying all of its managerial and technological expertise to the creation of national security in the homeland. These are enormously powerful forces because of the highly managerial society that the United States is today. The United States is also the greatest technologically developed society in the history of mankind as has been demonstrated by our gigantic war-making capacity. These twin forces of management and technology, applied to the homeland security issue, can be applied to create a very secure society, but without institutional checks and balances, may override our traditional Constitutional protections.

Many might quickly argue that our traditional values of privacy, anonymity, and freedom are out of date and rendered obsolete by the terrorist threat. As Chairman of the Advisory Panel, and as a private citizen, I could not more emphatically disagree with the concept that our freedoms must take second place as against the goal of creating greater security in the United States. The Congress, through this Committee and Subcommittee, has agreed by enshrining the Privacy Officer within the statute establishing the Department of Homeland Security.

I congratulate Secretary Ridge and his Department for supporting the Privacy Officer and empowering her so greatly. Through its first Privacy Officer, Nuala O'Connor Kelly, the Department contains an instinct towards the creation of a "culture of privacy" that will allow the personal data of people to remain as confidential as possible with an environment of trying to weed out stealth attacks by anonymous terrorists. We have laws to protect the confidentiality of private information of the American citizen; but, how does the American citizen know that his confidential and private information will not be made public or even disseminated to other governmental agencies or other organizations to disempower him by impinging upon his private information. We live in the culture of the anonymous leak, but we cannot continue the society of the empowered individual if government has the ability to take all of their private information and then to handle that information in such a way that citizens' private information is exposed.

We have a long tradition of the independence of the American citizen. This, too, cannot continue without systematic thinking and advocacy by someone in government to preserve the freedoms and values of the American people. This is fundamentally and primarily the duty of the United States Congress—the elected representatives of the people and the members of the Executive Branch who are so clearly dedicated to those freedoms. To provide that check institutionally within the Executive Branch, the Congress has provided for the Privacy Officer. In the course of my official capacity and my private capacity I have had ongoing communications with Nuala O'Connor Kelly and the Department of Homeland Security on these issues. Ms. Kelly and her Office's dedication to the privacy of the American people is extraordinary and solid. Her proactive ability to inject herself into these issues and the policy formation process within the department is essential. The very existence of her Office provides a check against bulling ahead to create security while running over the privacies and freedoms of the American people, and I congratulate the Committee, the Subcommittee, and the United States Congress and the Department of Homeland Security for the foresight to build in this institutional check and balance.

I urge upon the Congress that we may be entering into a historic time in which bad decisions now may have consequences to the freedoms of the American people throughout their future. Privacy is an essential element of American liberty. The ability to keep personal information secure from prying eyes gives the mental empowerment to people to live as free citizens. Without that security American citizens are vulnerable and insecure, never knowing whether their personal information will be put into the hands of someone who will use that information against their interests to make them weaker or to destroy their individuality. This debate, now, goes to the fundamental relationship between citizens and government, and should, and ultimately will, go far beyond just the issue of privacy.

We are now engaged in a debate of the American citizen's role in his own society within the context of terrorism and security. Some societies have always been much more comfortable with the citizen fitting into the entire community and being subject to the entire community or the state. As such, identification cards, reporting requirements, stops by police, the presentation of papers, subjecting citizens to interrogation, checkpoints, frisking, and prying into the personal business of citizens has always been much more accepted in many countries of the world than in the United States.

The fundamental question the Congress must ask is whether this view of the individual is the future of the United States. The American tradition has been much more focused on the individual and his role in society. The individual has never been a creature of the government or the entire state, but relies upon the state to create an environment in which he can grow on his own, establish his independence, and exist without the permission of the government or of the overall state.

Did the enemy fundamentally redefine the American relationship because of its attacks on September 11, 2001? This is the policy debate for the years ahead as we reach for further security inside the homeland. In the meanwhile, the Privacy Officer and her office represent a fundamental protection while this debate is going on. By virtue of her official duty and position, she facilitates this dialogue with the American people and helps to safeguard their liberties in this highly risky moment in American history. It is my pleasure to be here today to endorse the role of the Privacy Officer and the offices established within the Department.