

Written Testimony of

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“The Future of Fusion Centers: Potential Promise and Dangers”

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Chairwoman Harman, Ranking Member McCaul, and distinguished Members of the Subcommittee: Thank you for providing me the opportunity to testify today. As fusion centers across the country mature, ensuring a strong respect for civil liberties will improve public trust and broaden support for their mission. The U.S. Department of Homeland Security's (DHS) Office for Civil Rights and Civil Liberties (CRCL) will continue to work with this Subcommittee to examine our Nation's fusion centers and continue to provide methods for proper guidance and oversight.

*Mission of the Office for Civil Rights and Civil Liberties*

In accordance with existing statutes, 6 U.S.C. § 345, and 42 U.S.C. § 2000ee-1, the mission of the Office for Civil Rights and Civil Liberties is to assist the dedicated men and women of the Department of Homeland Security to secure our country while preserving our freedoms and our way of life. We assist our colleagues in four ways:

- We help the Department to shape policy in ways that are mindful of civil rights and civil liberties by providing proactive advice, evaluation and review of a wide range of technical, legal and policy issues.
- We investigate and resolve complaints filed by the public regarding Departmental policies or actions taken by Departmental personnel.
- We provide leadership to the Department's equal employment opportunity programs, seeking to make this Department a model Federal agency.
- We are engaged with the public regarding these issues.

In providing advice to our colleagues, we work closely with every DHS component and have been involved in most of the critical issues facing the homeland security effort – from disaster preparedness and recovery, to immigration programs, to screening procedures, to the training of our workforce. Other DHS elements support our work as required by law, and because they recognize that respect for rights and liberties is essential to their mission. Through frequent collaboration and engagement with the public and with leading civil rights, immigration, and community organizations, we have helped the Department maintain openness while tackling complex issues in innovative and constructive ways.

Just over two years ago, this Subcommittee received testimony from both DHS' Officer for Civil Rights and Civil Liberties and its Chief Privacy Officer on fusion centers and how they might advance information sharing and safeguard civil liberties. At the time, we were just coming to understand the centers and how the Federal government could play a productive role. Much has changed since then. Now, the Office for Civil Rights and Civil Liberties has visited numerous fusion centers across the country, provided training and other support to fusion centers. We have also cemented ourselves as a partner with the DHS Office of Intelligence and Analysis' State and Local Program Office and the DHS Privacy Office, both of whom actively work with us. We have come to understand the facts relating to fusion centers, the challenges they face, and also the myths surrounding them. I want to provide CRCL's perspective on some of the challenges faced by fusion centers, and dispel some of the myths.

## *Dispelling Myths*

Fusion centers have been labeled in press accounts and other reports as “mini-spy agencies” and “domestic intelligence apparatus[es].” Some say they have too much military involvement, too many private sector partnerships, ambiguous lines of authority, and untenable policies for suspicious activity reporting and the use of open source information. Some of these charges are simply myths or exaggerations while some criticisms are helpful, and point out where we still have work to do.

One myth is that the armed forces are prominent players in the fusion centers. While some armed forces service members participate in a handful of fusion centers, the presence is nominal, not pervasive, and their role is to provide support to civilian law enforcement and other non-Federal agencies with homeland security responsibilities, not to lead, direct or participate in it. They provide a liaison to Federal military installations, and also provide State and local personnel access to military sources of information when appropriate. This is consistent with laws directing the Federal (Title 10) Armed Forces to share certain categories of relevant information with the States. It is up to the governor of a State to determine what fusion center role, if any, National Guard troops in Title 32 status, under State command, should play.

Another myth involves inappropriate sharing of information with the private sector. Some fusion centers have incorporated advice from Sector Coordinating Councils and leverage the expertise of local sector associations or coalitions in identifying critical infrastructure and how to secure it. Fusion centers share information when it relates to protection of critical infrastructure, or upon learning of a threat to a particular company or business. These activities are squarely within DHS’ mission and the mission of State and local law enforcement. While this potentially poses some concerns, our Office has not seen civil liberties problems arising out of the relationship between fusion centers and the private sector.

Finally, like some other law enforcement activities, fusion centers in general could invoke civil liberties issues, but the reality has not borne out the theories that have been advanced by some concerning fusion centers’ actual activities. In almost all cases, fusion center activity involves exactly what the 9/11 Commission recommended – Federal, State, local and tribal personnel sitting elbow-to-elbow, sharing information and connecting the dots to ensure homeland security and public safety. Lack of public knowledge about their purpose and operations has magnified the mystery of fusion centers and helped perpetuate these myths. We believe that engagement with the public is important for any law enforcement agency, because it lets the agency know what the public’s concerns are, and keeps the agency mindful of its proper mission: serving the community it protects. The Office for Civil Rights and Civil Liberties has thus encouraged the fusion centers to engage in community outreach to demystify their operations to the extent it can be done without jeopardizing enforcement and security activities. We have also encouraged fusion centers to reach out to prominent advocacy groups, such as the American Civil Liberties Union, and to engage in dialogue both to explain how a fusion center operates and to listen to any valid criticism to determine if it suggests ways that things could be improved.

## *Challenges for Fusion Centers*

Myths aside, fusion centers face a number of challenges that could impact civil rights and liberties.

Fusion centers are comprised of representatives of multiple Federal, State, local and tribal governments, and therefore lack single, one-size-fits-all structures or identical chains-of-command. Instead they are more like task forces, formed under one State or local agency's legal authority, but comprised of representatives of many agencies. They are typically led by a State Police or State homeland security equivalent, or possibly under the management of the local Anti-Terrorism Advisory Council established by the United States Attorneys. Collaborative agreements then are used to integrate partners who work within the fusion center. With few exceptions, Memoranda of Agreement or Understanding do not exist, though many are being negotiated between states and the Department of Homeland Security. These MOUs are needed to govern the roles and responsibilities of deployed DHS analysts in fusion centers, and their absence could lead to a lack of clarity of institutional roles within fusion centers.

Oversight of the fusion centers also poses a challenge. Because fusion centers are run by the States, direct oversight by the Federal government presents real federalism issues. While some fusion centers are closely overseen by State government offices, such as the State's attorney's office, the precise extent of close supervision by State, local and Tribal governments at each fusion center is not always clear due to varying State government structures. At the Federal level, however, we can establish certain expectations through Federal grant funding and guidance documents, such as the Baseline Capabilities document released in September 2008. In partnership with the fusion centers, DHS and its Federal partners have established expectations and guidelines on fusion center operations through the Fusion Center Guidelines and the Baseline Capabilities for State and Major Urban Area Fusion Centers. The Guidelines are intended to be used to ensure that fusion centers are established and operated consistently, resulting in enhanced coordination efforts, strengthened partnerships, and improved crime-fighting and antiterrorism capabilities. By achieving a baseline level of capability, fusion centers will have the necessary structures, processes, and tools in place to support the gathering, processing, analysis, and dissemination of terrorism, homeland security, and law enforcement information. Most fusion centers are in the process of achieving the capabilities, though it may take up to five years to achieve all of the capabilities.

Oversight also may be applied to the extent that a State, local or Tribal entity is participating in a Federal program, such as criminal intelligence information sharing systems governed by 28 C.F.R. Part 23. General oversight of the State, local and Tribal assets should be maintained by State, local and Tribal government officials. Though the Department's scrupulous observation of State sovereignty does not allow for direct oversight, we believe that observing vertical separation of powers consistent with the U.S. Constitution is a safeguard of liberty. Where a State, local or Tribal government objects to a fusion center's activities, particularly those activities affecting the rights of citizens of a State, those government entities have a say in altering those operations, or they can decline to participate in the center's activities. Paradoxically, the lack of direct

Federal supervision and oversight may thus also function as a safeguard.

By the same token, we must closely monitor our own Federal presence and actions at the fusion centers, which is squarely within the purview of the Federal Government. In December 2008, our Office and the DHS Privacy Office issued its initial impact assessments of DHS' role in the fusion center initiative, as required by the *Implementing Recommendations of the 9/11 Commission Act of 2007* ("9/11 Act"). These assessments are publicly available on the DHS website. Applying this check and balance approach, these assessments were an important step in evaluating DHS' role in the fusion centers and its potential impact on civil rights and civil liberties. In its Privacy Impact Assessment, the DHS Privacy Office urged fusion centers to develop their own privacy impact assessments and is prepared help them do so by providing "PIA Intensive" training to interested fusion centers, leveraging its own PIA process as well as material developed by the GLOBAL Initiative. Both Offices are currently working on a more detailed follow-up impact assessment, which will combine what we have learned through visiting fusion centers throughout the country and our participation in the Federal-level fusion center support initiative. I will highlight some of the issues discussed today.

Moreover, our Office has a Review and Compliance Division dedicated to investigating possible abuses of civil rights, civil liberties, and/or racial, ethnic, or religious profiling. We have recently received our first three complaints regarding fusion centers. Another mechanism for providing oversight and compliance lies within the jurisdiction of the DHS Inspector General, who just recently issued a report on fusion centers. And outside of the DHS realm, Congress, U.S. Attorney's Offices, and the ODNI Program Manager for the Information Sharing Environment have all played some role in oversight concerning fusion centers. The Privacy and Civil Liberties Oversight Board will also have a role too once it is stood up. Despite the challenges posed by this array of unique partnerships, I believe that by working together we can have coordinated and effective oversight of fusion centers to the extent possible.

One specific area that has been much in the media involves the difficulty in sharing information and providing threat assessments where protected activities, such as First Amendment free speech and assembly, are involved. Security personnel at all levels of government often struggle with this problem. For example, if a demonstration is going to occur at a Federal facility, those charged with securing the facility would be negligent if they failed to ensure the safety of the facility and those within. Yet "right-sizing" security measures would be impossible without knowing the nature of the protest, and whether it is likely to cause security or operational problems. This necessarily requires at least a limited inquiry into the nature of a group planning a protest, and whether it espouses violence, civil disobedience, or other potentially disruptive tactics. At the same time, we must be very careful to ensure that the Government is not infringing or chilling an individuals' right to speak freely and to protest. Intelligence personnel at the Federal level are not authorized to collect information regarding U.S. Persons solely for the purpose of monitoring activities protected by the U.S. Constitution, such as the First Amendment protected freedoms of religion, speech, press, and peaceful assembly and protest. If information has some connection to constitutionally protected activities, it may be collected only where such collection is incidental to the authorized purpose. Procedures are in place that require intelligence personnel to consult with counsel or

I&A's Intelligence Oversight Officer when any initiative may impact constitutionally protected activities. These consultations have proven very helpful to the Department's intelligence personnel in identifying and addressing potential concerns related to inappropriate or unauthorized collection and reporting. At the State level, however, policies relating to these topics are often less clear and uniform. The question of how State, local and Tribal governments handle these issues is often decided by State, local or tribal agencies other than the fusion centers. The well-publicized struggles with this problem, particularly at the State level, demonstrate a need for continued policy development and training.

Now I would like to discuss open source information in the context of fusion centers. As described in "Giving a Voice to Open Source Stakeholders," a report published by this committee last September, open source information is "publicly-available information that can be disseminated quickly to an appropriate audience to meet a specific intelligence requirement ... derived from aggregated and analyzed information available from sources such as newspapers, periodicals, the Internet, scientific journals, and others."

Fusion centers are receiving open source products and creating their own. The challenge for all fusion centers depends greatly on the laws and policies in place at the State and local level. For Federal involvement there is a framework in place to protect privacy and civil liberties. Even though information is publicly available, that does not mean the information loses all protection. Part two of Executive Order 12333 imposes restraints on the Intelligence Community and also provides specific protections for United States Persons. At the Federal level, these U.S. Person rules cover "a United States citizen, an alien known by the intelligence element concerned to be a permanent resident alien, an unincorporated association substantially composed of United States citizens or permanent resident aliens, or a corporation incorporated in the United States, except for a corporation directed and controlled by a foreign government or governments." Collection, retention and dissemination of open source information must match a mission approved for the agency involved. Members of the Intelligence Community typically must also disclose their affiliation when interacting with domestic organizations, the media, and open forums. So in the context of fusion centers, we have a host of restrictions on some of the Federal participants.

In relation to the protected activities I alluded to earlier, there is still a significant challenge in determining whether and to what extent it is appropriate for fusion centers to use open source information that involves First Amendment-protected activities. If the collection, retention and use of information - even publicly available - involves protected speech, assembly or other activities, it could be viewed as unlawful monitoring by government. As we have seen in recent months, the collection of open source information about protected activities may result in scandal when government is perceived to be keeping tabs on protest groups for political purposes.

The "Giving a Voice to Open Source Stakeholders" report also stated that there are currently only minimal guidelines to protect the personally identifiable information of Americans in the open source context. It called on DHS to develop processes covering collection and use of open source, accessing non-Intelligence Community databases, how to determine the status of U.S. Persons, and what rules apply to social media like chat rooms, blogs and Twitter. Ultimately, all of these processes should also be examined and

addressed by non-IC partners in fusion centers who are not subject to E.O. 12333. The Office for Civil Rights and Civil Liberties agrees with the recommendations contained in the report and intends to work with its partners in the Department to ensure these activities are in compliance with the laws respecting individual rights.

On a related note, there has been much concern voiced over fusion centers' role in Nationwide Suspicious Activity Reporting (SAR) initiative. To a large degree, the SAR initiative is a coordinated approach that builds upon activities that law enforcement and other agencies do within the lawful boundaries of their daily duties, which is gathering information concerning behaviors, incidents, and activities associated with crime. However, different fusion centers may operate under different standards and capture different information in their intake of SARs. For example, while sharing within a federally funded criminal intelligence database will attach 28 C.F.R. Part 23 protections, there are many tips, leads and other data accessible to fusion center partners that may fall short of the reasonable suspicion standard, which is a predicate for retention in a 28 C.F.R. Part 23 system. To date, there have been no specific incidents alleging violation of civil rights and civil liberties, but this is an area we will continue to monitor, and in which we will work with DHS I&A to ensure appropriate safeguards are put in place.

### *Civil Liberties and Privacy Training and Other Support*

Now let me further explain what our Office has been doing to resolve these and other challenges. One of the ways in which we have leveraged our capabilities, both within and outside the Department, has been the creation of the "Civil Liberties Institute." This entity is a program that provides high quality training on issues at the intersection of homeland security and civil rights and civil liberties. By law, we are required to provide training on civil liberties for all DHS officers or intelligence analysts before they deploy to State, local and tribal fusion centers and to support the training of all fusion center personnel. To deliver this training and to fulfill our obligations under the 9/11 Act, we have created a three-pronged program targeted to the DHS State, local and regional Fusion Center Initiative.

First, we have partnered with the DHS Privacy Office and the DHS I&A State and Local Program Office to provide privacy and civil liberties training to the 34 I&A analysts currently deployed to the fusion centers. As each new analyst is hired, we provide individualized training and periodic refresher training for the entire cadre of analysts. In fact, the most recent refresher training was held last month at the National Fusion Center Conference.

Second, we have involved the DOJ Office of Justice Programs in the creation of a multifaceted privacy and civil liberties training program to support the more than 70 fusion centers around the country. To maximize the impact of our limited resources in this area, we are taking a "toolkit" approach, where we leverage existing materials with new materials to create customized training that covers the core issues, but also responds to the needs of individual centers. As part of the training, we use scenarios adapted from recent events to illustrate the need for transparency and, among other things, how to handle the issues that have arisen around protected activities, such as public protests or religious affiliation. We will offer modules on cultural competence for law enforcement and analysts, as well as engage the community and work to dispel myths that have arisen

about fusion centers. As the result of our outreach to fusion center personnel, we identified a clear need for a single on-line “roadmap” to all the Federal materials on civil rights and civil liberties issues and resources in the information sharing environment. To address this need, we partnered with the DOJ Bureau of Justice Assistance and the GLOBAL Justice Information Sharing Initiative to create a web portal, phase one of which was launched just yesterday. Many of the privacy and civil liberties training materials will ultimately be posted on this website.

The third prong of the training program is the Training of Trainers (ToT) program, created to assist local fusion center staff in providing on-going training in these important areas. We will pilot this newly expanded training program in approximately ten states this year. We will also present ToT sessions at the upcoming regional fusion center conferences. Fusion center privacy officers will be invited as the key potential trainers on these topics back at their home fusion centers.

The training is in various stages of completion but in total covers a broad range of issues, and also reflects the expertise of our partners in the DHS Privacy Office and the Department of Justice (DOJ). We cover how to handle reports of protected activities, such as: protests; exercise of religious freedom or freedom of association; the capture and retention of video feeds that have identifiable persons on the tape; and the use of materially inaccurate or misleading information (addressing the associated potential “search and seizure” and “due process” issues). Our training encourages sufficient redress mechanisms and discourages the targeting of communities based on the use of overly broad demographic information and the collection of information on individuals that perpetuates racial or ethnic stereotypes. Above all, we emphasize the need for a clear understanding of operating statutes and authorities and connecting every action to these authorities. We also highlight problems that fusion center staff need to address, such as problems with requests to vet private sector personnel associated with critical infrastructure, or tensions between Federal and State laws and issues of data tracking and criminal record expungement. We recommend implementing a privacy and civil liberties policy on which staff are thoroughly trained, and discuss the usefulness of community engagement to provide a level of governmental transparency. Finally, in coordination with our partners, we also offer training on 28 C.F.R. Part 23 – guidance on multi-jurisdictional criminal intelligence systems; the proper use and protection of personally identifiable information; and Fair Information Practice Principles as well as other privacy practices.

Over the past two years, prior to the development of the formal initiative, the Office for Civil Rights and Civil Liberties actively trained on civil liberties issues in the information sharing environment, which can apply to fusion centers. We visited a variety of fusion centers and conducted classroom training on cultural competence and civil liberties in Connecticut, North Carolina, Maryland, Massachusetts, Indiana, and Los Angeles. We have also provided training through regional fusion center conferences. At the national fusion center conferences, we have disseminated training materials and presented at panel discussions. At the most recent national conference, we, along with the DHS Privacy Office, conducted “learning labs” on civil liberties and privacy issues, where state and local officials could ask questions and discuss issues with subject matter experts.

In addition to our training efforts, we have worked closely with our colleagues at



the I&A State and Local Program Office to provide subject matter expertise in the areas of civil rights and civil liberties. For example, when policies, guidance, and requests for information templates have been developed for field personnel, both our Office and DHS Privacy have been invited to the table to contribute to these documents and ensure proper safeguards are in place.

The Office for Civil Rights and Civil Liberties has also provided on-site support in recent months to address civil rights and civil liberties concerns. For example, last year, CRCL provided support to the fusion centers in Denver and Minnesota during the Democratic National Convention and Republican National Convention to review I&A products and homeland security information reports to ensure civil rights and civil liberties were protected. We consistently review reports to ensure civil liberties issues are addressed and increase analysts' awareness of potential issues. Most recently, through an effort coordinated by the I&A State and Local Program Office, our Office deployed a staff member - a former Assistant U.S. Attorney - to the Northern Central Texas Fusion Center to address civil liberties concerns that arose after the state issued a product. At the time, there was no DHS presence at the center (an analyst has been hired to deploy to the center in the near future); however, DHS wanted to address the issue proactively. The fusion center was very receptive to concerns raised and has invited us back to conduct further in-depth training on cultural competency as well as other civil rights and civil liberties topics.

### *Conclusion*

In closing let me emphasize that we have enjoyed a strong working relationship with our fusion center partners and our DHS colleagues who support them. DHS has emphasized protection of civil rights and civil liberties ever since it began to support fusion centers. We will continue to honor our responsibility to ensure a strong respect for civil liberties. I thank you for inviting me to share our thoughts on fusion centers today, and I look forward to working with this Subcommittee to address these issues.