



THE

# Commission

A pair of prominent Penn alumni recently served on two presidential panels that probed some very sensitive national issues. Now they discuss the process, and their findings.

BY STEPHEN MARMON



ILLUSTRATION BY JONATHAN BARTLETT

**In** the early 1970s, two red-headed Penn undergraduates stepped forward as campus leaders. One was Richard Clarke C'72, who headed the University's student government and co-wrote the 1971 Student Committee on Undergraduate Education white paper that led to significant curricular reforms. The other was Ben Ginsberg C'74, who rose through the ranks of *The Daily Pennsylvanian* to become its editor-in-chief.

Since then, both men have played key behind-the-scenes roles in the nation's governance and election process, at times stepping into the national spotlight; along the way both have acquired massive expertise in their respective fields. As a result, President Barack Obama asked them last year to play key parts in separate bipartisan panels, whose findings and recommendations will guide federal action in the critical areas of intelligence communications and election administration. The reports by the groups they spearheaded are now the basis for a range of proposals and legislation in these important areas of public policy.

Since leaving Penn some four decades ago, their careers and political worldviews have evolved in very different ways. Clarke, to the surprise of many who remembered him leading campus protests against the Vietnam War, worked first for the Defense Department as an analyst specializing in nuclear weapons and European security. In 1979 he joined the State Department, becoming deputy assistant secretary for intelligence analysis under President Ronald Reagan and assistant secretary for politico-military affairs under President George H.W. Bush. After moving to the National Security Council staff in 1992, he ran the White House's Counter-terrorism Security Group for three presidents during the following decade and became known as the cabinet-level "counter-terrorism czar" under presidents Bill Clinton and George W. Bush (though the position was downgraded during the latter administration). He became famous for both his tenacious efforts to stop al Qaeda and for coordinating the US reaction on September 11, 2001; he later attracted the

national spotlight for his high-profile criticism of the Bush administration's approach to terrorism. After resigning from the government in 2003, testifying before the 9/11 Commission, and writing a devastating book, *Against All Enemies*, Clarke turned his attention to the growing threat of cyber warfare ["National Insecurity," Nov/Dec 2008].

Now chairman of the Washington-based cyber-risk consulting firm Good Harbor LLC, Clarke also serves as a broadcast consultant for ABC News and has written four more nonfiction books—*Your Government Failed You*, *Defeating the Jihadists*, *The Forgotten Homeland*, and *Cyber War*—as well as three novels: *The Scorpion's Gate*, *Breakpoint*, and *Sting of the Drone*. He made several campaign speeches for the Obama campaign in 2008 and has confirmed that he discussed taking a key intelligence position in the administration. Last August President Obama named him one of the five members of the Presidential Review Group on Intelligence and Communication Technologies, which made its report last December.

Ginsberg, whose first five years after graduation were spent in newspaper journalism, evolved in a very different political direction. After interning with US Representative George Brown Jr. (D-California) as a Georgetown law student, he served for eight years as counsel for such key GOP organizations as the Republican National Committee, the National Republican Senatorial Committee, and the National Republican Congressional Committee. Having been national counsel to the Bush campaign in 2000, he played a leading role in the Florida recount and the court cases that resolved that presidential election; he also served as national counsel for Mitt Romney's 2008 and 2012 presidential campaigns. As counsel to the Republican Governors Association and having worked on redistricting efforts after both the 1990 and 2000 Census reports, he has become the pre-eminent lawyer for GOP politicians facing electoral controversies, serving as counsel for senators Norman Coleman of Minnesota and Lisa Murkowski of Alaska. Three years ago *The New Republic* included him in its list of Washington's "most powerful, least famous" people. He is currently a partner with the Washington law firm of Patton Boggs LLP, and like Clarke, is often seen on TV newscasts, where he is an expert on election law.

In January 2013 Ginsberg and Obama campaign counsel Bob Bauer were asked to co-chair the 10-member Presidential Commission on Election Administration, which issued its report a year later.

## Reforming Intelligence

**Richard Clarke talks about his experience with The Five Guys, better known as the Review Group on Intelligence and Communication Technologies.**

**T**he massive leak of documents last June by Edward Snowden, a former National Security Agency contract employee, contained the unsettling revelation that, unknown to the American public, US intelligence agencies were conducting widespread telephone and Internet surveillance programs. The media and political firestorm sparked by those disclosures prompted President Obama in August to order James Clapper, director of National Intelligence, to create the five-man Review Group on Intelligence and Communication Technologies.

Joining Richard Clarke in the panel's four-month study were Michael Morell, former deputy and acting director of the CIA; Geoffrey Stone, University of Chicago Law School professor and former dean, who has written extensively on government secrecy; Cass Sunstein, Harvard Law School professor and former White House regulatory czar; and Peter Swire, who coordinated privacy policy for government agencies during the Clinton administration.

"We only met in person; at least once, usually twice, a week," recalls Clarke. "We had a secret, secure vault in downtown Washington, and we each had an office in the vault. Those guys who lived in other cities—Atlanta, New York, and Chicago—were given classified working spaces at CIA or FBI facilities there so they could work if they wanted to during the week.

"Everything was kept inside the vault and we couldn't do anything at home," he adds. "But we worked in the vault and then we also went to NSA, CIA, FBI, Treasury, and State to interview people, as well as staff at the White House. The Pentagon people came to us instead of we going over there."

The panel's report last December won praise from the media and many politicians. *The New York Times* noted that the panel's proposals would "impose major oversight and some restrictions on the National Security Agency" and change how "the agency collects the telephone data of Americans, spies on foreign leaders, and prepares for cyber attacks abroad." In *The New Yorker* John Cassidy described the report as "lengthy and thoughtful," adding: "Its forty-six recommendations are, in some ways, surprisingly far-reaching. If fully enacted, they wouldn't put an end to domestic surveillance. Far from it. But they would change how the NSA operates, and, especially, how its activities are overseen ... [and] they have performed a valuable service in confirming that the electronic spooks have overstepped their bounds and need reining in, at least somewhat."

Key among the group's recommendations were its calls for ending the program to store domestic telephone-call data on government computers and access those records without a warrant; establishing stronger oversight from congress, the executive branch, and the court that oversees intelligence wiretapping requests; requiring that there be a "public-interest advocate" in hearings before that court; letting companies publish additional data about the court orders they get demanding information; and forcing the FBI to get judicial approval before it orders telecommunications companies to hand over personal data. The panel also recommended that the position of director of the NSA be opened up to civilians (it has always been a military officer), subject to senate confirmation, and that the director no longer run the Pentagon's Cyber Command forces. In addition, the group recommended that only federal-government employees should vet people for access to classified material, not private contractors (as was the case with Snowden).

While congressional leaders and President Obama endorsed some of the panel's key proposals, others, like the suggested changes in the NSA directorship, did not get his approval. But many of the panel's recommendations are moving ahead; in March the president proposed a legislative plan that would bring about a far-reaching and significant overhaul of the NSA phone-records surveillance program.

In February we spoke by a (presumably) secure phone about the panel, its directives, and its findings.

**How did you find out that the president wanted you to work on this review group?**

National Security Advisor Tom Donilon called me. He said that it would be a small, part-time group, like one day a week, though it turned into a bit more than that. We would have all the clearances we needed; we could see anything we wanted; we could write anything we wanted.

**Did you know the other four members of the group before you started working together?**

No, I had met [Michael] Morell, from the CIA, but I really didn't know any of them.

**You spent many years working in the White House; what was it like to be back in your stomping grounds? Did you get to see staff and others that you knew from those years?**

Yeah, there were a few—a communications guy from the Situation Room and a Secret Service agent both greeted me and said, "Oh, shit. You're back." It felt quite natural being there, even though they have remodeled the Sit Room and substantially expanded its footprint. But it's still across the hall from the White House Mess, which still has the best coffee in town, and I can't go by the Mess without stopping for coffee.

**Where and exactly how did you all get started on the review?**

We first all met together, since we wanted to make some decisions before we met with the president for about an hour in one of the conference rooms down in the White House Situation Room. We decided a couple of things—first, that we would have no chairman. It turned out the president and his advisors thought it was kind of funny to see who would emerge as the chairman when they asked these five alpha males to pick one of themselves. They really were entertained by the prospect of each of us vying for that spot. But we came back and said, "We don't need no stinkin' chairman," which they thought was remarkable.

We also told the president in the first meeting that, given the lack of public trust on these issues, we were only going to write an unclassified report and there would be no secret annex, everything that we wrote we would release not just to him, but to the public, there would be no redacted version; this was going to be an unclassified result of a classified effort. As he thought about that, all of the president's advisors started to signal—*No, no, no, you can't do that!* And he looked at his advisors and said, "No, I think they're right. This should be unclassified." And it was.

**You received several hundred public comments as part of your process. What range of individuals and groups submitted comments? Were there any that you found particularly insightful or helped you all move the process forward?**

We did get some wackos on the website that we put up, but we got a lot of seriously helpful and constructive comments. We read all of the non-wacko comments and we actually took them into account. We got very good input from the ACLU and the librarians' association; from Microsoft and Google and Apple—it was a pretty wide spread of people that commented, with some serious work from them. We actually met with a number of those folks as well in unclassified settings.

**Was it a smooth path to getting a unanimous report on all your recommendations? Once you all had reached agreement on your recommendations, how did you divide up the work of actually writing the report?**

Well, we had decided that we didn't want a unanimous report. We thought that in the 9-11 Commission, for example, their attempt to get unanimity had resulted in watering down and papering over some things. So we decided on the three-man rule—that if three of us agreed on a recommendation it would be the recommendation, and then the others could footnote a dissent. By the way, we called ourselves The Five Guys, after the hamburger joint. I've never been there. The other guys assured me it's good, but I don't eat hamburgers.

When we were getting to the end, we wrote all the recommendations down and had five columns for each of us to vote, without knowing what the others would be doing. Then the staff came back into the room with the results on the 46 recommendations and they were all laughing. We said, "What's the problem?" They said, "You are unanimous—on everything." It was kind of hard for us to believe, but we were. It's particularly interesting because we were such a diverse group of people in terms of background and expertise. We deferred a lot to each other's expertise in areas where it was clear that person was the expert. It really was unusual in that we had a group that really didn't know each other and that had to deal with a set of difficult, contentious questions, but somehow we managed to respect each other, even like each other, and still come up with a set of unanimous though controversial recommendations. I think the thing we were proud of was that when we were named to the panel, a lot of writers, particularly on the Left, said that we were just hoodies for NSA, and when we released our report, those same writers said, "Oh my God. What a surprise." Even our critics were surprised at how significant our recommendations were.

**What do you think are the most important findings?**

Well, one was that we found no evidence of criminality or wrongdoing by NSA. They really are not a rogue agency and they do have a lot of checks and balances in place. But the bad news we found was that they didn't have very good internal security, obviously. Also there was a bit of a disconnect between the senior agency people who wanted intelligence and the collection people who went about collecting it. But that has been fixed.

The thing that bothered us most, though, was the lack of transparency, the lack of oversight from people outside NSA. Our fear was that [with] the technology, if you had an evil administration, the abuses could be enormous because of the growth in surveillance capabilities. As Senator Frank Church said back in the '70s, once you get a police-surveillance state with advanced technology, you can't undo it.

**Did one of you write an initial version of the report or did you each do a section? How did you handle the comments back and forth?**

Once we had the recommendations, the staff looked at us and said, "OK, we'll start writing." And we looked back at them and said, "We're writing it." And they said, "Really? You guys are actually going to write it?" One of our guys then said, "Wait a minute, let me add this up. Four out of the five of us have written books, and together we have written 46 books. We're going to write it."

So each of us then took a section and wrote it, and then we physically handed them back and forth around in the vault, since they had to stay in the classified environment. We wrote and edited on a closed computer network that we had in the vault. But everybody wrote something. Probably a month of writing.

Our report now has been released as a book from Princeton University Press, called *The NSA Report: Liberty and Security in a Changing World*.

**When the report was completed did you send it to the White House for review before actually meeting with the president?**

No, we didn't ask them for comments on it. We didn't want to be in the position of the White House asking to modify anything. So we did not give it to them in advance, although we did give it to a CIA declassification reader, who would agree that everything that we had written was unclassified. We had a little back and forth there about some sections—it turned out that there actually were some classified things that we had put in that we had to take out—but we never allowed anybody to edit or even comment on it before we turned it in.

**How did you present your report to President Obama? Did he have questions on specific points and did he give you any sense of how he planned to move forward on your recommendations?**

We did give it to the president to read before we met with him, in the Sit Room again, for about an hour and a half. So when he met with us he had a lot of comments, though he said he wanted to read it again on his Christmas break in Hawaii before he made any decisions. He did say, "There are some areas where it will be easy for us to accept your recommendations, there are a couple that have been overtaken by events, and there are eight or so where I need further study about how to implement them."

**Are you optimistic that your proposals in this report will be adopted in fairly short order?**

Some were adopted almost immediately. Others require congressional action, and the president has been negotiating with the intelligence committees in both houses to see if he can get them to come around to our recommendations. There may be something that can be enacted this year.

## Fixing Votes

**Ben Ginsberg, co-chair of the Presidential Commission on Election Administration, discusses how its members examined the process of voting in America—and how that process should be reformed.**

**A**fter President Barack Obama was reelected in November 2012, he used the occasion of his victory speech to thank everyone who cast a ballot—"whether you voted for the first time, or waited in line for a very long time."

"By the way," he quickly ad-libbed, "we have to fix that."

Long lines and waits of up to nine hours at polling places in Florida, Virginia, and Ohio that year weren't an entirely new sight. But it was clear that the problem was getting worse.

The president returned to the topic in his second Inaugural

Address. "Our journey is not complete," he said, "until no citizen is forced to wait for hours to exercise the right to vote."

The following month, in his State of the Union speech, he announced the creation of the 10-member, bipartisan Presidential Commission on Election Administration. The panel's co-chairs were Ginsberg and Bob Bauer, counsel to Obama's 2008 and 2012 campaigns. The other members were Brian Britton, head of operations at Disney World; Joe Echevarria, CEO of the accounting firm Deloitte LLP; Trey Grayson, director of the Politics Institute at Harvard's Kennedy School and former Secretary of State of Kentucky; Larry Lomax, registrar for the Las Vegas region of Nevada; Michele Mayes, general counsel of the New York Public Library; Ann McGeehan, former director of elections for Texas; Tammy Patrick, an elections compliance officer in Arizona; and Christopher Thomas, director of elections for Michigan. Nathaniel Persily, a Stanford Law professor, was its senior research director.

Like the intelligence panel, which also received hundreds of public comments during the course of its study, the election commission reached out for input from interested groups and individuals and held public meetings to gather testimony in Washington, Philadelphia, Cincinnati, south Florida, and Denver, as well as offering a toll-free conference call.

When Ginsberg's group reported to President Obama this past January, its call to ensure that no voter would have to wait more than 30 minutes at a polling place drew the most media attention. But the panel had dozens of other recommendations, including online voter registration, electronic poll-books, improved coordination with state motor-vehicle departments, and access to voting before election day in all jurisdictions. In an innovative section of its report, the commission created a massive "best-practices" website where election officials could see and adopt the best practices of other states and localities.

The report received a good deal of praise from the media and little political opposition. But given that its recommendations need adoption by officials in 50 states and must be implemented in thousands of locations, it may take a while before the work of Ginsberg's commission goes into effect.

Ginsberg and I voted to meet at an undisclosed location on Penn's campus in February.

**How did you find out that the president wanted you to co-chair this commission?**

Actually Bob Bauer, my co-chair, called and put forward the proposition. Over the years we often have talked about these issues, especially when we would run into each other on opposing sides of campaigns or when we have done recounts against each other. The thing about those recounts is that you get to see the weaknesses in the system and the flaws, since it's the post-election look at how well it performed. He said now we had the chance to actually do something to solve these problems.

**How did you all get started on the review?**

Well, Bob and I made a long list of recommendations to the president about who might serve on the commission. We really found a terrific group of diverse folks to work with on it.

**How did you look at the issue that got the most attention—those long waits to vote in some states?**

First we identified where there were long lines, and we talked to the local officials about why those lines took place. There are many, many different reasons. Some are just the allocation of resources among jurisdictions; sometimes there is just a crush of unanticipated voters; and sometimes the facilities are just inadequate to handle a sudden crush of voters. But we realized that there were a batch of tools that we can provide to help on that and other issues. There was also a lot of help from the academic community, people who gave us a lot of good research and ideas. Plus our members, like Brian Britton from Disney, had solid experience in dealing with this issue.

**You received several hundred public comments, as well as holding four public meetings. Were there any that you found particularly insightful or was there a lot of griping about voting problems?**

No, there were useful ideas; a lot of local officials testified. Plus foundations set up meetings with state and local officials as well as for us.

**What about the issue of technology, especially Internet voting?**

We did hear from some people advocating that. But we heard from a much greater number of security experts who made a pretty compelling case that it's not there yet in terms of Internet voting. Every time that you hear about another hacking incident, it raises questions in the minds of both experts and the public about the security of that process.

**Did you all ever consider whether national standards were needed for US voting practices?**

We were pretty animated by the nature of the system as it has grown up, which is that there are 8,000 different jurisdictions and national standards are just not practicable. It's very much state-by-state control and decisions. There is so much that needs to be done in this area that if we had set up national standards, it would have thrown the train completely off the tracks and not gotten us to the many things that we could agree upon.

**You've been involved in this process for three decades now. Has it gotten better?**

A lot of things have gotten better. There still is a lot of room for improvement. But many of the registration systems are better. After the 2000 election, people became aware of flaws in ballots and voting machines and how important that was. The design of ballots has certainly improved in the past decade.

**Did you meet with the voting-machine manufacturers?**

Yes, that's actually the impending crisis in this country. That really wasn't part of our original charter, but we got so convinced that there is a major problem coming in this area that we added a big chunk about that to our report.

It's a really interesting problem. Virtually every jurisdiction bought new machines in 2003 with federal money that came about because of the Florida recount. But those machines all have a shelf life that will expire in the next decade, and their technology has not kept pace with innovation in our daily lives. The standards basically have not been rewritten since 2005 and the certification for new machines is essentially not working anymore. Why aren't we using software solutions? Why aren't

we able to use technology like tablets that we use day-to-day in our lives? With a federal solution not working these days, we may need to go back to the states to get new standards adopted.

**How often did you and the other commission members meet?**

We got together for the first time in DC at the end of June. Our staff and we were housed in the General Services Administration building, three blocks from the White House. I should note that our research director, Nathaniel Persily, is a former Penn Law professor, and he was a tremendous help in everything we did.

**As you went through your process, how difficult was it to develop a consensus on the issues facing you? Did you divide your work among the various members?**

We did divide up some by topic and then met with almost everyone involved in this area. While we didn't meet with the political parties themselves, we met with groups from the Brennan Center to the Heritage Foundation to the Lawyers Committee for Civil Rights under Law. We probably had three-dozen meetings with stakeholder groups. Our goal was to find the problems that local people had and then to find the solutions that were out there and make them available to everyone.

**How did you go through the process of putting your report together?**

There actually is a federal act that governs how presidential commissions have to work, which says that you can't have private deliberations among a few members. So we made sure to get the views of all the members, and then Bob Bauer, Nat, and I divided up the drafting. It really was a rather collegial process with a lot of good comments, both in person and through emails, back and forth.

**When the report was completed, did you send it to the White House for comments?**

No, we just submitted it to them and then went in to meet with him and Vice President Biden in the Roosevelt Room probably just a couple of days after that. It was a really interesting session with them and the full commission going through all the issues. Both of them had a lot of questions.

**US electoral administration is quite splintered. Are you optimistic that state and local players will act on your recommendations?**

The solutions have to come on the state and local levels, and I do think, though the national press hasn't seen it, that there is a movement out there to deal with these problems.

**Will you be involved in any efforts to ensure the adoption of your commission's proposals?**

Bauer and I have pledged to advocate for the recommendations on the state and local level. We're committed to making sure that this report doesn't fade away and gather dust on a shelf somewhere. It's not that any one jurisdiction has all these problems. But there are best practices that can help solve these problems when they do happen at polling places throughout the country. ♦

**Stephen Marmon C'71 WG'81, who has known Clarke and Ginsberg since their undergraduate days, covered Congress for *The New York Times* from 1971 to 1973. He has written a book, tentatively titled "Reckless: Three Centuries of American Political Sex Scandals," to be published in 2016.**