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GOVERNMENT OF GUJARAT

SPEECH OF

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Conference of Chief Ministers on
National Counterterrorism Center (NCTC)
at New Delhi on 5th May, 2012

- ***Creation of NCTC in IB has far reaching consequences.***
- ***A need to approach the issue with an open mind and not through the prism of political expediency.***

Respected Prime Minister Shri Manmohan Singhji,
Hon'ble Union Home Minister Shri Chidambaramji,
Hon'ble Chief Ministers and Ladies and Gentlemen.

We meet today to discuss a crucial issue of recent formation of National Counter Terrorism Centre (NCTC) under the Intelligence Bureau. This move to create an agency by an Office Memorandum of MHA dated 3rd February, 2012 with a 'bare minimum power' to conduct search and effect arrest raised eyebrows in many quarters. In this context I wrote to the Hon'ble Prime Minister on 17th February, 2012 and thereafter on 9th March, 2012 and 28th March, 2012. I had requested the Prime Minister to recognize the gravity of this issue and organize a separate meeting to thrash out all issues relating to NCTC rather than relegating it to a sundry agenda item in a routine meeting. Similar apprehensions were expressed by my colleague Chief Ministers from some other states as well. I am happy that the request has been acceded to and hope that this august forum will deliberate on different issues concerning the manner, objective and propriety of creation of NCTC. I further hope that the Union Government will approach the matter with an open mind and not through the prism of political expediency.

To begin with, most humbly I would like to mention to this august gathering that I am not here to make any legal argument; neither do I wish to dwell upon the finer aspects of the issue on hand. Perhaps, there are eminent lawyers present in this gathering, who would be better placed to dwell upon such aspects with more articulate arguments. I take this opportunity to pose here a question as to what kind of atmosphere are we building up? **Have we lost faith in our constitutional arrangements and the centre-state relationship in a federal structure?** Do we want to fight the menace of terrorism and extremism with such trust deficit? I think it is the faith in our Constitutional supremacy and system of governance which gives us strength to march ahead. It is the same trust and faith which forms the guiding spirit of the forces defending our borders and maintaining internal security. Therefore let me request all of you not to evaluate today's discussions just on the basis of legalistic arguments; let us rise above technicalities and see the larger picture of rebuilding the confidence between the Centre and states.

- ***Not a courtroom-case but a case of confidence-building.***
- ***Piecemeal approach and disjointed efforts lead us nowhere.***
- ***Constantly creating agencies that fail their purpose.***

At this juncture may I also add that **fight against terrorism and extremism requires clear vision and strong political will.** In our federal polity and governance, we need to carry along all constituents and build a conscious view in finalising strategy to fight these menaces. Piecemeal approach with disjointed efforts will not lead us to desired goal. Without comprehensively reviewing our past efforts and actions we would go on creating agencies and organizations and yet fail to achieve the purpose.

I may mention that NIA was created to deal with scheduled offences affecting different states. Within a short span we are coming out with NCTC. Similarly, MAC and SMAC were set up to strengthen our intelligence system and now we feel that these mechanisms are inadequate and want that all the Intelligence agencies be subsumed in IB.

During the last twenty-five years this country has witnessed series of terror incidents and yet we have not been able to deal with the problem comprehensively. **As the states bear the brunt of the menace the call of the day is to enhance their capacities.** The forces fighting terror at the forefront need strong support and legal backing.

- ***Post 9/11 response in other countries - strong anti-terror laws.***
- ***Whereas GoI's contrary approach was to repeal POTA.***
- ***GoI unable to enact comprehensive anti-terror legislation for the nation.***

In this context, I regret to state that though we claim to draw inspiration from initiatives in USA and UK to form NCTC, we have failed to notice post - 9/11 enactment of strong anti-terror laws across the world. I may draw your attention to some examples like Canada Anti-terrorism Act, 2001, Terrorism Suppression Act, 2002 of New Zealand, Anti-terrorism, Crime and Security Act, 2001 of UK, Anti-terrorism special measures law 2001 of Japan and Anti-terrorism Law, 2002 of Indonesia. Countries like USA which already had a strong legal framework found it appropriate to enact special laws like the USA PATRIOT Act, Homeland Security Act, SAFETY Act and so on to rise up to the new challenges. However, while these nations were strengthening themselves and sending a strong signal of robust will to fight terror, we were busy repealing existing Anti-terror Acts like POTA.

The erstwhile Acts like TADA (P) Act and later POTA were greatly successful in tackling the problem as these enactments specifically targeted organized crimes and terrorism. The Unlawful Activities (Prevention) Act, 1967 was originally meant to provide for prevention of certain unlawful activities of individuals and associations and was not a law to deal effectively with terrorism. The UPA Government of 2004 repealed POTA depriving the country of the legal shield to fight terror and today it seeks to use the Unlawful Activities (Prevention) Act to create NCTC through back door, thereby depriving states their rightful role.

- ***UA (P) Act used to bring NCTC through back-door.***
- ***States being deprived of their rightful role.***
- ***Gujarat's GUJCOC not approved due to partisan considerations.***

The Union Government has not been able to create a comprehensive anti-terrorism legislation as suggested by the Second Administrative Reforms Commission's 8th report titled 'Combating Terrorism-Protecting by Righteousness'. At the same time, the GUJCOC Bill despite being in consonance with the 2nd ARC's recommendations has not been approved.

In this background, I would like to submit a few observations on the creation of NCTC. Also I take liberty to show as to how institutional equilibrium is affected.

NCTC: A Grievous Assault on Federalism

- ***GoI's systematic attempts to weaken States.***
- ***Centralising powers in GoI without commensurate accountability.***
- ***Amendments to RPF and BSF Acts, LCE: disturbing sequence of events that reveal GoI's autocratic mindset.***

Fight against terror in all forms has always been the top priority of my government. The state has achieved considerable success in this regard and remained peaceful all these years. Yet we cannot afford to remain complacent especially when the state shares international land border and has longest vulnerable sea coast. In a vast and diverse country like ours the state governments must be strengthened and supported in the fight against terror. However what we have witnessed is a systematic attempt to weaken the State Governments and to centralize powers in the Union Government, without commensurate accountability. It is observed that whenever a serious incident takes place in any state, considering the party in power in that state, different statements are issued. Often it is said that the state government was warned of the ensuing event or sometimes it is stated that it is the responsibility of the state government to deal with the situation. I may say that the **Sarkaria Commission** has aptly observed that ***"There is considerable truth in the saying that undue centralisation leads to blood pressure at the Centre and anaemia at the periphery. The inevitable result is morbidity and inefficiency. Indeed, centralisation does not solve but aggravates the problems of the people".***

I would also like to draw your attention to a disturbing sequence and pattern of events in the recent past which reveals centralist and

autocratic mindset that militates against all canons of Federalism. It must be such a mindset that unilaterally envisages wide-reaching changes in the well-defined and Constitutionally-mandated boundaries of Centre-State relations. Be it the proposed amendments to the Railway Protection Force Act, the Border Security Force Act, and the Limited Competitive Examination issue and so on, the Union Government has behaved in a manner which reminds us of the **Viceroys of yore**.

- ***NCTC built on shaky foundations; an intrusion into state's jurisdiction.***
- ***NCTC Order violates letter and spirit of Article 73 of Constitution.***
- ***GoI has overlooked provisions of 7th Schedule to Constitution.***

The NCTC is created and arrogated powers not by a proper legislation but by an Executive order under Article 73 of the Constitution of India in gross violation of not just the spirit, but even the express provisions in the Constitution. Article 73 of the Constitution of India which delineates "Executive Power of the Union" unambiguously states that the Union Government's power "shall not extend in any state to matters with respect to which legislature of the state has also powers to make laws".

I would like point out that Union Government has conveniently overlooked the fact that provisions of the 7th Schedule to the Constitution (Article 246) vests the responsibility for public order, police and criminal administration on the states and thereby make the State Governments answerable to the people for their safety and security from internal threats.

NCTC: Union Government's attempt to misuse executive mechanisms

- ***NCTC not discussed in earlier CM conferences on Internal Security.***
- ***Reported differences within GoI regarding NCTC issue.***
- ***Assertions that are highly derogatory to states and contrary to current political realities.***

Though the NCTC was originally conceived nearly four years back in the aftermath of 26/11 Mumbai attacks, it did not form part of the agenda of Chief Minister's conferences exclusively called to discuss internal security issues on January 06, 2009, August 17, 2009, February 07, 2010, and February 01, 2011. It is learnt that in April 2010, the MHA prepared a detailed discussion paper specifying the composition, structure and empowerment of the NCTC, and sent it to the PMO. Even within the Government this move was strongly opposed and despite best efforts by the MHA this proposal remained dormant for more than two years.

The creation of NCTC may look like just a hasty and ill-conceived move but when seen in the backdrop of recent events in our body-politic assumes significance as a **conscious strategy to pursue certain hidden goal.** The assertions and assumptions on which the NCTC order has been crafted, **casts the Central Government in the role of the omnipresent, omniscient ruler with the states portrayed like dependant vassals;** belittling the states which are today the real engines of India's progress. I would strongly urge the Union Government to come to terms with current political realities and change its mindset of seeking to capture political space through devious executive mechanisms.

NCTC: An attempt to give backdoor entry to concept of Federal Crime

NCTC reportedly gets its nomenclature and inspiration from its namesake in the USA. Even in these countries such organizations have not been given operational powers though these nations had created comprehensive anti-terror legislations, like the USA PATRIOT Act and Homeland Security Act in the USA.

- ***Even in USA and UK, similar organisations not given operational powers.***
- ***Concept of 'Federal Crime' given back-door entry to bypass Constitutional requirements.***

The Union Government failed to create a comprehensive anti-terrorism legislation as suggested by the Second Administrative Reforms Commission. Now an attempt is being made to introduce a concept of Federal crime though such concept has not yet been constitutionally validated in this country. An insidious interpretation of sec. 43A r/w sec. 2(e) of the Unlawful Activities (Prevention) Act to situate an agency with police powers in the IB is an attempt to secure a back-door entry for this concept of Federal crime, by-passing the rigorous scrutiny envisaged for any measure that modifies the Constitutional scheme.

NCTC vs. NIA- Another instance of incoherent strategy

- ***Why a brand new organisation called NCTC and that too within the Intelligence Bureau ?***
- ***Why NCTC when there is NIA ?***

The Union Government has taken a highly legalistic stand that Unlawful Activities (Prevention) Act in its amended form provides for an officer of the rank of Joint Secretary to the Government of India as the 'Designated Authority'. It has, however, conveniently side-stepped the core issue as to why has a brand-new organization called the NCTC been created and that too within the Intelligence Bureau? The normal practice with regard to 'Designated Authority' is to vest a pre-existing official post with this nomenclature and inherent powers. In the NCTC, we see a curious case wherein an entirely new organization is sought to be created in the guise of operationalising the provision for a 'Designated Authority'. This goes against the spirit, if not the letter, of the legislation as well as established practices.

I would like to draw the attention to the fact that The Unlawful Activities (Prevention) Act, 1967 and its subsequent amendments cannot be viewed in isolation. There are collateral developments like the enactment of The National Investigation Agency Act, 2008 (Act 34 of 2008) which have substantially altered the situation by creating an investigation agency at the National level to investigate and prosecute offences affecting the internal security of India. NIA has been conferred powers to investigate a wide range of offences, including those under The Unlawful Activities (Prevention) Act, 1967. It is therefore pertinent to ask the question that if Union Government

felt something more needed to be done, why did it not approach Parliament and move an amendment to the NIA Act or seek to confer powers of "Designated Authority" on the Director, NIA?

The fact of the matter is that the ground situation had altered with the emergence of the NIA as an independent entity and for the Union Government to hark back to an earlier provision of the Unlawful Activities (Prevention) Act is **devoid of logic** and cannot be taken at face value. The justifications offered by the Central Government in the NCTC matter has largely consisted of convenient interpretations of highly selective portions of the 2nd ARC Report, the Unlawful Activities (Prevention) Act and so on and therefore its sincerity of purpose has come under a cloud in public opinion.

- ***GoI ignores 2nd ARC report on anti-terror law.***
- ***GoI uses selective portions of same ARC report in a bid to justify NCTC.***

NCTC: Union Government's move to arrogate powers and relegate responsibilities

- ***NCTC preceded by insiduous process of mutating UA (P) Act.***
- ***Proposed SOP is another misleading move.***
- ***An attempt to subsume state ATS within NCTC.***

A cursory look at the NCTC shows that it is preceded by a slow and insidious process of grafting certain terms and concepts onto the Unlawful Activities (Prevention) Act, 1967.

The amendment done vide Act 29 of 2004 provided for, among others, a "Designated Authority" who was given powers with regard to forfeiture of proceeds of terrorism. Thereafter another amendment, vide Act No. 35 of 2008 had expanded the scope of 'Designated Authority' to include police powers which are in the purview of states as per the constitutional scheme. The 'designated authority' is supposed to be an officer not lower than the rank of Joint Secretary to the Government of India. However, this provision of Unlawful Activities (Prevention) Act, 1967 does not mean that designated authority should be from IB which is subsequently converted as NCTC.

In fact the provisions introduced in the Unlawful Activities (Prevention) Act through amendments as a means to sharpen our defences against the forces of terror have been conveniently interpreted to arrogate unprecedented powers to an Operational Agency in the IB. Also, the proposed SOP to give the powers of the 'designated authority' to the local ATS is another misleading move. **It is another backdoor move to subsume even the ATS of the state government within NCTC.**

I am afraid that NCTC is likely to be incapable of operating and delivering results in such a vast and diverse country unless the local police are

fully co-opted. Further, in such operations there is a high probability of collateral damages, causing deaths or injuries to innocent persons, having political overtones. How will the NCTC tackle these consequent situations if their actions lead to counter violence, protests, agitations and problems of public order? **It would be like the Union Government agencies coming and disturbing a bee-hive and leaving the state agencies to bear all the bee-stings.**

- ***NCTC will cause collateral damages and disturb public order in states.***
- ***GoI's agencies will disturb bee-hives forcing states to endure bee-stings.***

NCTC - Subsuming MAC or attempt to Subsume State Governments?

- ***Inadequacies of MAC / SMAC structure used to justify NCTC.***
- ***Non-transparency regarding GoI's review of MAC / SMAC.***
- ***MAC experience needs thorough evaluation and a White Paper.***

It has been stated that the NCTC would subsume MAC and SMAC but I wonder whether under the garb of NCTC the intention is to subsume the state government machinery as well.

The MAC mechanism has been under the direct control of the Union Government since there is a preponderance of Central agencies in its structure and IB had been given a pre-eminent role in coordinating its functions. Though the states are so-called partners in their capacity as members of SMAC, the Union Government has been less than transparent regarding the evaluation of MAC/SMAC and steps taken to remedy the problems and strengthen the MAC mechanism.

I would like to point out that repeated reviews of MAC / SMAC by the Union Government itself has revealed that its performance has not at all been satisfactory. But instead of revamping these institutions, the inadequacies of MAC / SMAC have been put forward as one of the justifications for NCTC. There has been no attempt to discuss and understand the reasons for the non-performance or under-performance of MAC / SMAC, with all stake-holders. I would urge the Union Government to come out with a detailed **'white paper'** on the entire MAC / SMAC experience so that we may correctly identify the lacunae and take **palliative steps on the basis of a considered debate rather than pre-conceived notions and personal whims and fancies.**

NCTC: A move to disrupt Intelligence Bureau's equilibrium

- ***Counter-terror requires strong Intelligence agency.***
- ***GoI distorting basic character of IB and weakening it.***
- ***'Gupt-char vibhag' being made 'Open-char vibhag'.***

There has been a lot of academic discussion on nature and characteristics of Intelligence apparatus. Let me describe it as per the raw wisdom and understanding of a common man. Traditionally, intelligence has always been associated with ***'Guptchar'*** and as the very connotation suggests, its essential quality is of being secret. History tells us about kingdoms across civilisations, where the intelligence operatives were unknown to even members of the royal court. The strength of intelligence drew from the fact that it was unheard and unseen though it was perceived to be all pervasive. Whether in the Armed forces or outside, intelligence has been a secret service carved out within the setup with extreme caution.

Thus, in almost all civilisations and forms of governance, ***'Guptchar vibhag'*** had its own distinct 'tradecraft' and had occupied a special place. The IB being such a ***'Guptchar Vibhag'*** has been the premier and nodal intelligence agency of the country. Does the Union Government want to break this system and make intelligence an ***'Openchar vibhag'*** which will be on display at every junction like a police chowkey?

Almost every terror incident in our country is predictably followed by a discussion about 'intelligence failure' and the Union Government has also accepted on several occasions that its intelligence agencies had not generated precise, actionable intelligence inputs that could have pre-empted the incident. It is well known that in the entire

security architecture, it is the preventive intelligence that needs to be strengthened so that terror conspiracies are nipped in the bud and incidents are averted.

The IB's role is similar to that of **oxygen in the human body** - the invisible element that energizes the life forces. The Intelligence Bureau should be forward-looking with a futuristic perspective rather than being mired in the nitty-gritty's of the present. Only such a futuristic perspective will enable it to sniff out budding conspiracies, detect dormant terror modules and thus provide broad as well as precise inputs for operational agencies to act and neutralize these imminent threats.

- ***IB needs futuristic perspective and not fire-fighting mentality.***
- ***IB will be entangled in court-work and exhausted in routine duties.***
- ***GoI's cure for cancer of terror will amputate the limbs of IB.***

An intelligence agency that gets involved in operations will be doomed to spend most of its time running from court to court. Thus, at a time when intelligence needs to be strengthened, it is diverted to everyday fire-fighting duties severely eroding its resources and capacities. I would like to ask the Union Government whether it has just diagnosed the problem of the current security architecture wrongly or is it a case of applying the wrong cure? I regret to point out that **Union Government's move seems to be one that will amputate the limbs to cure a cancer.**

The Office Memorandum says that "it is considered necessary and desirable that the proposed NCTC should not duplicate the roles of other agencies". The order has gone on to do exactly the opposite - it has not only generated **role-confusion among the various agencies** but created a situation where IB may go from being a

"mother intelligence agency", which feeds and nurtures executive agencies, to a "sibling agency" which shares the same operational space.

The NCTC as envisaged by Union Government has been granted powers of search, seizure etc and is symbiotically connected to the Central Intelligence Bureau. In the progressive, democratic comity of nations to which India proudly belongs, there would hardly be any other instance of a covert intelligence agency being granted such police powers. Even, NCTC in USA and JTAC in the UK do not have executive powers of search, seizure etc and does not exist in the folds of a covert intelligence agency.

- ***NCTC will create a draconian covert agency with police powers.***
- ***Increases possibility of violation of democratic rights.***
- ***Revives memories of Emergency (1975-77).***

The involvement of IB in operational matters like arrest, search, seizure etc. would keep it preoccupied in defending arrests before courts of law and also allegations of violations of Human Rights. Moreover, the **IB as an organizational entity will be in the spotlight** for each counter-terror move. Such a situation will be extremely undesirable for the organization because, among other reasons, its tradecraft involves use of confidential sources and informants who desire anonymity.

If IB functions as the 'nodal intelligence agency within the country' it is necessary for it to secure the co-operation of all sister agencies. Involving IB in the same operational sphere as these agencies can be counter-productive in a vast and diverse nation like ours and this would only weaken the fight against terror.

I would also like to point out that the IB, though placed under the Ministry of Home Affairs, is outside the scope of Parliamentary oversight

and the RTI Act. The creation of NCTC increases the possibility of violation of democratic rights due to co-existence in a single Agency of covert capabilities and direct operational capacities. The creation of an omnipotent covert agency would revive the memories of the dark days of Emergency in 1975-'77 when intelligence agencies were misused to subjugate popular movements and intimidate political rivals.

NCTC will do a signal disservice to the IB by distorting its original mandate; what may emerge is a mutated version which could be like **Frankenstein's monster.** At this point, the question needs to be asked: has the Union Government studied in depth the various implications of its move? Has Union Government thought about the consequences for the structure and functions of a hitherto low-profile organisation like the IB and its nameless, faceless operatives working behind the scenes?

- ***An institution nurtured over years is being destroyed.***
- ***Disservice to IB by distorting its core mandate.***
- ***Creating a Frankenstein's monster that will devour democracy.***

NCTC: Eroding status and strength of state police

- ***State police best placed to fight threats involving civil society.***
- ***State agencies at the cutting-edge of war against terror.***
- ***NCTC makes state units totally subservient and kills local initiative.***

The framers of the Constitution, while making law and order as a state subject, understood the reality that local police conversant with the lay of the land and the people, were best placed to fight threats involving civil society. In the name of revisiting the security architecture, the Union Government has been systematically eroding the capabilities of State police forces and particularly the State Intelligence and Special Branches which are at the cutting-edge of the war against terror.

The Office Memorandum creating the NCTC is replete with provisions which will make local and State Intelligence totally subservient to the distant body, thus killing local initiative.

You will appreciate that Human intelligence [HUMINT] is at the core of any effective counter-terrorism strategy and **it is the local police which is the fulcrum for generating and gathering useful HUMINT.** The tendency to centralize the counter-terror apparatus at the expense of local formations can only weaken the structure at its foundations. If the states lack certain capacities and competencies in terms of intelligence, equipment, training, trade craft, resources, communications etc. the Centre should come forward to meet these infirmities. It will build up the national security capacities to the last police station and the village and enhance security of the last man.

The duty under sec. 43 B of Unlawful Activities (Prevention) Act to produce the person or article without unnecessary delay before the nearest police station and the implicit duty cast upon the SHO of that police station to take further action will put the State police forces in the precarious position of having to deal with the consequences of the unilateral acts of the NCTC. It will not be an exaggeration to state that **State police will be tasked to clean-up the post operation mess.**

- ***Central agencies as fly-by-night Rambos; states to clean the mess.***
- ***Contradictory stands on Batla house; inability to identify the enemy.***
- ***GoI's weak-kneed response - stopping searches post - Mumbai attack in 2006.***

There is strong doubt even of operational effectiveness of the NCTC. In the absence of clear vision and strong political will we may be condemned to again witness confused and contradictory approaches as in the case of the Batla House encounter of 19th September 2008 wherein even years after the incident the Union Government seems uncertain whether or not it is a genuine encounter between terrorists and the Delhi Police, which functions under MHA, GoI.

Moreover, the country is still not sure whether the Union Government sheds tears for the slain martyrs like Inspector Shri Mohan Chand Sharma or for the Indian Mujahideen terrorists who were behind a series of terror incidents across the country. **If the Union Government is unable to even properly identify and recognize the enemy how does it propose to conduct a decisive war against it?**

This is the same Union Government which puts pressure on the investigating agency to stop its search and seizure operations in the aftermath of the Mumbai train attacks of 2006 due to perceived political compulsions. I wonder that if this is the response in the

aftermath of a dastardly attack like the Mumbai train blasts what would be the approach of the Union Government when the proposed NCTC would conduct routine searches and make preventive arrests in less challenging situations?

I would urge the Hon'ble Prime Minister to take a statesman-like approach in the matter and prevent actions vitiating the atmosphere and upsetting the Constitutional equilibrium. It is high time that we **re-establish a bond of confidence** which will be our true shield against the forces of terror. I strongly urge that the NCTC be rolled back. The Union Government should instead collaborate with all stake-holders and come out with **a comprehensive action-plan** for strengthening intelligence capabilities, operational preparedness and synergies.

- ***Need for statesman-like approach.***
- ***Not a time for court-room arguments but an occasion for restoring confidence.***
- ***Roll-back NCTC and devise concrete action-plan to combat terror.***

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