

# Executive Summary Backgrounder

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## How to Fix the 100 Hours Homeland Security Bill

*James Jay Carafano, Ph.D., Baker Spring, James Sherk,  
Brian W. Walsh, Lisa Curtis, and Helle C. Dale*

In its final report, the 9/11 Commission made 40 different recommendations for improving America's homeland security. Congress responded by passing the Intelligence Reform and Terrorism Prevention Act of 2004, which implemented the report's most significant proposals.

Recently, the House of Representatives passed the Implementing the 9/11 Commission Recommendations Act of 2007 (H.R. 1) as part of the Speaker of the House's "100 Hours" agenda. H.R. 1 claims to follow the recommendations of the 9/11 Commission's report but is actually filled with flawed proposals.

**Flawed Provisions.** Congress should remove the following flawed provisions:

- **100 percent container inspection.** H.R. 1 calls for 100 percent container inspection, requiring that every container and package shipped from overseas must be inspected and secured with seals to prevent any breach in the container. In addition to not being cost-effective, this requirement will not make the United States any safer.
- **New grant programs.** Two proposals would create new grant programs to fund state and local community projects. As the 9/11 Commission noted, homeland security grants are in danger of becoming vehicles of pork-barrel legislation.
- **New reporting and management requirements for the National Asset Database.** Continued emphasis on the overly inclusive National Asset Database prevents the federal government

from focusing on infrastructure that is truly vital to the nation.

- **Transportation Security Administration (TSA) unionization.** H.R. 1 would revoke the TSA's ability to decide whether or not workers may join unions. The TSA was given this flexibility to ensure that it could respond rapidly to terrorist threats.
- **Expansion of the Broadcasting Board of Governors' role.** Although the focus on public diplomacy is correct, expanding the BBG's role would be a mistake because the BBG has often been the source of problems with U.S. international broadcasting.
- **Conditions on U.S. aid to Pakistan.** Placing conditions on aid to Pakistan could hurt U.S.–Pakistan relations, weaken the Pakistani government, and undermine U.S. objectives in the war on terrorism.
- **Reorganization of the White House Privacy and Civil Liberties Oversight Board.** Title VII of H.R. 1 would reorganize the White House Pri-

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vacy and Civil Liberties Oversight Board and redefine its mission. Yet, in its first nine months, the board has already demonstrated its usefulness by issuing the first-ever set of federal guidelines for interagency sharing of terrorism-related information.

- **Counterproliferation programs and restrictions.** The bill proposes many initiatives to stop the spread of weapons of mass destruction. These initiatives are unnecessary and were not recommended by the 9/11 Commission report.

**Needed Reforms.** Instead, Congress should:

- **Accelerate Coast Guard modernization.** Maritime security means preventing dangers from ever entering a U.S. port, and this is the domain of the U.S. Coast Guard.
- **Establish legislative mandates for specific federal agencies to perform specific tasks.** Legislation would serve not only as a contract between Congress and the Administration on the way forward, but also as a guide to congressional appropriators.
- **Establish federal guidelines for the use of data-mining technologies.**
- **Strengthen the Protected Critical Infrastructure Information (PCII) program.** To encourage private industry to submit information to the PCII program, Congress should clarify to whom and under what conditions the information may be disseminated or used in private litigation.
- **Consider broader reforms of the TSA workforce** to allow for greater flexibility and privatization of aviation security.
- **Restructure the leadership of the U.S. international broadcasting entities** and streamline their functions to maximize effectiveness by avoiding overlap and duplication.

- **Take steps to convince Pakistan that the U.S. is committed to stabilizing Afghanistan** and countering the Taliban until the job is done. Such efforts are more likely to coax greater cooperation from the Pakistani government in dealing with Taliban and al-Qaeda leaders on its territory.
- **Allow the Administration maximum flexibility in implementing the Proliferation Security Initiative.** As currently structured, the PSI allows participating states to focus on interdicting weapons-related shipments instead of building an international bureaucracy.

**Conclusion.** Crafting homeland security legislation that makes America safer, freer, and more prosperous will require stripping the most egregious proposals from H.R. 1 and adding measures that will make homeland security more efficient and effective. America does not need a bill that simply throws money at the problem, implements symbolic programs that add little real security, advances political agendas that have little to do with security, and adds more requirements to the Department of Homeland Security's already overloaded to-do list.

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# Background

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## How to Fix the 100 Hours Homeland Security Bill

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Winning the long war against terrorism requires homeland security policies that will help to keep America safe, free, and prosperous—and do all three equally well. The recommendations of the National Commission on Terrorist Attacks Upon the United States, popularly known as the 9/11 Commission, tried hard to follow those principles. Congress responded by passing the Intelligence Reform and Terrorism Prevention Act of 2004, which implemented the report's most significant proposals.

However, the Implementing the 9/11 Commission Recommendations Act of 2007 (H.R. 1), one of the first acts passed by the House of Representatives in the 110th Congress, arguably does far less than its title implies. Passed as a part of the Speaker of the House's "100 Hours" agenda, it does little to further the agenda set by the 9/11 Commission and instead muddles the mission of providing homeland security with misguided proposals. Rushing the bill to a vote without hearings or floor debate has resulted in a deeply flawed proposal.

To avoid damaging U.S. homeland security operations and wasting taxpayers' money, Congress should replace the most troubling provisions of H.R. 1 with initiatives that are more consistent with the 9/11 Commission's recommendations.

### The 9/11 Commission's Legacy

Congress established the independent, bipartisan 9/11 Commission in 2002 and gave it a mandate to provide a complete accounting of the terrorist attacks

### Talking Points

- The Implementing the 9/11 Commission Recommendations Act of 2007, recently passed by the House of Representatives, does not follow the 9/11 Commission's recommendations and instead contains several misguided proposals.
- Four telltale signs of bad homeland security legislation are checkbook security, feel-good security, checklist security, and false security.
- Congress should remove measures from the bill that would make homeland security less effective and efficient, including those that mandate 100 percent container inspection, create additional grant programs, reorganize the White House Privacy and Civil Liberties Board, and unionize the TSA workforce.
- Congress should not place conditions on U.S. aid to Pakistan. Doing so would weaken the Pakistani government, hurt U.S. interests in the war against terrorism, and further strain U.S.–Pakistan relations.

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on New York and Washington and the efforts to prevent and respond to them. In addition, Congress tasked the commission with making recommendations on preventing further attacks.

In 2004, the commission released its final report, which included over 40 recommendations.<sup>1</sup> In response, Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004,<sup>2</sup> which implemented many of the commission's most significant proposals, including establishing a Director of National Intelligence to oversee the intelligence community. Not all of the commission's recommendations were fully implemented, however, and its members have advocated for further reforms.<sup>3</sup>

A number of factors have militated against additional action on the commission's proposals. For example, progress has been impeded by a clear lack of congressional consensus on some of the most contentious proposals and by disagreements that transcended ideological and party differences, particularly on allocating homeland security grants, reorganizing congressional committees, and establishing costly new programs. In other areas, the government has initiated programs but requires additional time, resources, and technology to implement its homeland security solutions efficiently and effectively.<sup>4</sup> Furthermore, former 9/11 Commission co-chairs Thomas Kean and Lee

Hamilton acknowledge that many of their original recommendations concerning American foreign policy "will take many years, and cannot be accomplished by an act of Congress."<sup>5</sup>

In other cases, even commissioners acknowledge that some of their proposals were inappropriate. For instance, there has been little discussion of implementing the proposal to place responsibility for all paramilitary operations under the Defense Department. Experts have also questioned the value of other recommendations.<sup>6</sup>

Nevertheless, the call to fully implement the 9/11 Commission reforms became a prominent election issue in 2006. The Ensuring Implementation of the 9/11 Commission Report Act (H.R. 5017 and S. 3456) was introduced in the 109th Congress. In the 110th Congress, House Speaker Nancy Pelosi (D-CA) pledged to bring up the 9/11 Commission's recommendations during the first 100 legislative hours, and as one of its first legislative acts, the House passed the Implementing the 9/11 Commission Recommendations Act of 2007.

Despite the controversies and difficulties of acting further on the 9/11 recommendations, the House leadership saw fit to push through the legislation without hearings or floor debate. Regrettably, this tactic has produced a deeply flawed bill. H.R. 1 seeks

1. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (New York: W.W. Norton and Company, 2004), at [www.9-11commission.gov/report/911Report.pdf](http://www.9-11commission.gov/report/911Report.pdf) (January 30, 2007).
2. Public Law 108-458.
3. After the final report was released, former members of the 9/11 Commission set up the privately funded 9/11 Public Discourse Project to assess and motivate progress in implementing the commission's recommendations. Besides issuing written evaluations, the project held a number of open meetings in Washington and other locations to encourage public activism in this area. The project issued a "final report card" on December 2005. See Thomas Kean and Lee Hamilton, *Without Precedent: The Inside Story of the 9/11 Commission* (New York: Alfred Knopf, 2006), pp. 312 and 327-346.
4. One example is the full implementation of the US-VISIT (United States Visitor and Immigrant Status Indicator Technology) program, which requires recording the entry and exit of non-U.S. citizens from the United States. Restructuring the complex network of interlinked immigration databases—often created for different purposes and managed by different U.S. government agencies—into a comprehensive and integrated entry and exit screening system at all U.S. land ports of entry will require considerable time. See David S. Ortiz, Shari Lawrence Pflieger, Aruna Balakrishnan, and Merrill Miceli, "Revisiting US-VISIT: U.S. Immigration Processes, Concerns, and Consequences," RAND Corporation *Occasional Paper*, 2006, at [www.rand.org/pubs/occasional\\_papers/2006/RAND\\_OP140.pdf](http://www.rand.org/pubs/occasional_papers/2006/RAND_OP140.pdf) (January 30, 2007).
5. Kean and Hamilton, *Without Precedent*, p. 318.
6. For example, see David White, "Did the 9/11 Commission Make Us Less Safe?" *The American Enterprise*, September 2005, pp. 38-40, at [www.taemag.com/docLib/20050805\\_3840.pdf](http://www.taemag.com/docLib/20050805_3840.pdf) (January 30, 2007), and Nassim Nicholas Taleb, "Learning to Expect the Unexpected," Edge Foundation, April 8, 2004, at [www.edge.org/3rd\\_culture/taleb04/taleb\\_index.html](http://www.edge.org/3rd_culture/taleb04/taleb_index.html) (January 30, 2007).

to enact measures that have little to do with the commission's report and includes misguided proposals for implementing the 9/11 recommendations.

The House homeland security bill requires far more congressional scrutiny. Crafting legislation that makes America safe, free, and prosperous will require stripping the bill of its most egregious proposals and adding measures that will make homeland security efforts more efficient and effective.

### Identifying Bad Proposals

Any provision in the bill that bears the mark of any one of the four telltale signs of a bad homeland security proposal should be removed.

**Checkbook Security.** Simply authorizing more homeland security spending will not make Americans safer. This is particularly true for measures intended to protect infrastructure, such as bridges, trains, and tunnels. Terrorists thrive on attacking vulnerabilities, looking for the weakest link. The United States is a nation of virtually infinite vulnerabilities, from high schools to shopping malls. Pouring billions of federal tax dollars into protecting any of them may please some constituents and vested interests, but it will do little to stop terrorists, who will just move on to another "soft" target. A far better investment of federal dollars is in counterterrorism programs that break up terrorist cells and thwart attacks before they occur.

**Feel-Good Security.** Some proposals sound compelling but on closer scrutiny make no sense. For example, inspecting every container shipped from overseas is a misallocation of scarce resources. No evidence suggests that this would be more cost-effective than the current cargo screening system as a means of deterring threats. On the contrary, screening everything would be extremely expensive, and the technology is not very effective. Even if the available screening technologies were cheap, fast, and accurate, they would produce so much data from examining tens of thousands of containers bound for U.S. ports every day that the information could not be checked before the containers' contents arrived in stores. Tax dollars should be spent on what offers the most security for the dollar spent, not on initiatives that make good election-year issues.

**Checklist Security.** Legislation that simply demands more reports, adds more mandates, and sets more unrealistic deadlines might allow Congress to check the box for considering every 9/11 Commission recommendation, but it would achieve little else. Any proposed new security measure should be backed up by credible analysis of how it would diminish the threat of transnational terrorism, the likely costs of implementing it, and its suitability and feasibility.

**False Security.** Any measure that pleases stakeholders or promotes a political agenda and that is camouflaged under the false claim that it advances national security should be rejected outright.

### Fixing H.R. 1

Regrettably, the Implementing the 9/11 Commission Recommendations Act as passed by the House contains a number of proposals that exhibit these signs.

**One-Hundred Percent Container Inspections.** Sections 405 and 501 of H.R. 1 require inspection of every package and container shipped to the United States by air or sea. In addition, the bill requires that shipping containers be secured with seals that report any breach of the container. These requirements run counter to the current national strategy, which deters terrorists from exploiting international trade by relying on counterterrorism and intelligence programs combined with risk assessments, random checks, and inspection of suspicious high-risk cargo. The House bill would replace this system with one that mandates "strip searching" every package and container coming from overseas.

This proposal is seriously flawed on three accounts. It is:

- **An ineffective response to the threat.** While terrorists could use a shipping container to smuggle a weapon of mass destruction or other dangerous items into the United States, this is only one of dozens of attack scenarios. Many experts argue that other threats are far more likely and dangerous. Overinvesting in countering one possible tactic when terrorists could easily employ another is dangerously myopic.<sup>7</sup>
- **Not a feasible solution for screening cargo.** It is not clear that technologies for screening and

sealing containers are affordable, effective, and efficient. Even if they were, it is not clear that the data could be evaluated in a timely manner.<sup>8</sup> For these reasons, Congress passed legislation in 2006 requiring further tests of the screening of shipping containers.<sup>9</sup> Notably, the 9/11 Commission also recognized these limitations and did not recommend 100 percent screening of shipping containers.

- **Not cost-effective.** There is no business case for conducting 100 percent screening of cargo. The bill expects the private sector, foreign countries, and the U.S. government to spend billions of dollars on these inspections even though they would likely be no more effective than current programs. It might cost over \$1 billion to screen just the 11 million containers that enter the United States every year. However, this figure may represent only a fraction of the total cost. There are no firm assessments of all the infrastructure and operating costs that might be incurred.<sup>10</sup> Diverting energy and resources into mass screening is a poor strategy that would likely make Americans less safe, not more safe.

While any one these concerns might be sufficient to scuttle the proposal, when taken together, they establish that the 100 percent inspection requirement simply makes no sense. Instead, Congress should:

- **Provide oversight to ensure that the Department of Homeland Security (DHS) first fully implements the provisions of the Port Security Improvement Act of 2006.**<sup>11</sup>
- **Require the DHS to work to develop a new passenger and cargo security system that employs a risk-based model for aviation security.**<sup>12</sup>
- **Authorize more spending on Coast Guard modernization.** Congressional appropriators have doggedly held to the belief that giving money to ports across the U.S. and “container-centric” security is the best way to combat maritime threats. This is incorrect. If threats reach American shores, it will already be too late. Maritime security means preventing dangers from ever entering a U.S. port, and this is the domain of the U.S. Coast Guard. Yet the Coast Guard’s modernization program is seriously underfunded. To make matters worse, the Coast Guard’s increased operational tempo since 9/11 is wearing out its equipment much faster than anticipated. The Coast Guard needs at least \$1.5 billion per year for modernization. A strong statement of support for Coast Guard modernization—arguably the most crucial component of U.S. maritime security—is essential.<sup>13</sup>

7. Alane Kochems and James Jay Carafano, Ph.D., “One Hundred Percent Cargo Scanning and Cargo Seals: Wasteful and Unproductive Proposals,” Heritage Foundation *WebMemo* No. 1064, May 5, 2006, at [www.heritage.org/Research/HomelandDefense/wm1064.cfm](http://www.heritage.org/Research/HomelandDefense/wm1064.cfm), and James Jay Carafano, Ph.D., and Martin Edwin Andersen, “Trade Security at Sea: Setting National Priorities for Safeguarding America’s Economic Lifeline,” Heritage Foundation *Background* No. 1930, April 27, 2006, at [www.heritage.org/Research/NationalSecurity/BG1930.cfm](http://www.heritage.org/Research/NationalSecurity/BG1930.cfm).
8. Susan E. Martonosi, David S. Ortiz, and Henry H. Willis, “Evaluating the Viability of 100 Percent Container Inspection at U.S. Ports,” chap. 12, in Harry W. Richardson, Peter Gordon, and James E. Moore II, eds., *The Economic Impacts of Terrorist Attacks* (Northampton, Mass.: Edward Elgar Publishing, 2006), at [www.rand.org/pubs/reprints/2006/RAND\\_RP1220.pdf](http://www.rand.org/pubs/reprints/2006/RAND_RP1220.pdf) (January 30, 2007). The report concludes that a cost-benefit analysis demonstrates that 100 percent screening is not feasible, although it does not discount that such technologies may be developed in the future. For an argument that risk-based screening is more effective, see Robert W. Poole, Jr., and James Jay Carafano, Ph.D., “Time to Rethink Airport Security,” Heritage Foundation *Background* No. 1955, July 26, 2006, at [www.heritage.org/Research/HomelandDefense/upload/bg\\_1955.pdf](http://www.heritage.org/Research/HomelandDefense/upload/bg_1955.pdf).
9. Chris Strohm, “Homeland Security Seeks Deals on Cargo Screening,” *GovExec.Com Daily Briefing*, October 11, 2006, at [www.govexec.com/dailyfed/1006/101106tdpm1.htm](http://www.govexec.com/dailyfed/1006/101106tdpm1.htm) (January 30, 2007).
10. Christopher Koch, testimony before the Committee on Homeland Security, U.S. House of Representatives, April 4, 2006, at [www.worldshipping.org/testimony\\_house\\_homeland\\_security\\_committee.pdf](http://www.worldshipping.org/testimony_house_homeland_security_committee.pdf) (January 30, 2007).
11. Public Law 109–347.
12. Poole and Carafano, “Time to Rethink Airport Security.”

**Ensuring Interoperable Communications.** Section 201 calls for establishing a new grant category to assist states and communities in building interoperable communications systems. While improving emergency communications is a laudable objective and consistent with the goals of the 9/11 Commission's report, the commission also warned that homeland security grants are in danger of becoming vehicles of pork-barrel legislation, viewed by states as a means to supplant their own obligations to provide emergency services or to purchase capabilities that are not essential for safety and security. Indeed, arguably significant amounts of homeland security grants have been used ineffectively in the past.<sup>14</sup>

While there is nothing wrong with federal assistance for emergency management communications initiatives, they can and should be funded out of existing homeland security grant programs, displacing wasteful and inefficient efforts that have done little to meet national priorities. A recent DHS survey of 75 major cities and urban areas reveals that states and local communities have made much progress since 9/11, in some cases by effectively using federal grants and in other cases without significant federal assistance.<sup>15</sup>

In addition to offering a flawed solution to the problem, the legislation fails to address much more critical issues for improving emergency communications. Instead of just throwing money at the problem, the legislation should promote a set of policies for effective public-private sharing of the emergency management electromagnetic spectrum, create a national capability to deploy a wide-area emergency management communications network for catastrophic disasters, and establish coherent

national leadership for emergency response communications.<sup>16</sup> Specifically, Congress should:

- **Revise federal policies and laws to open dual-use spectrum for commercial and emergency management use** and to facilitate spectrum sharing among local, state, and federal users. This would stimulate private-sector investment, putting cutting-edge commercial technology into the hands of emergency responders faster and at a reasonable cost.
- **Establish legislative mandates for specific federal agencies to perform specific tasks** by setting clear deliverables and reasonable milestones for their achievement. The legislation would serve not only as a contract between congressional leaders and the Bush Administration on the way forward, but also as a guide to congressional appropriators, ensuring that budget priorities match policy priorities.

**Improving Information Sharing.** Section 702 calls for establishment of a Fusion and Law Enforcement Education and Teaming (FLEET) grant program. State and local law enforcement agencies play a key role in preventing terrorist attacks and represent approximately 95 percent of America's law enforcement counterterrorism capability. However, they have only limited resources and therefore need to target their efforts. The solution, as the 9/11 Commission recommended, involves establishing the processes, protocols, and systems to facilitate intelligence and information sharing between those who collect it and those who need it.

In response, the Intelligence Reform and Terrorism Prevention Act of 2004 mandated that the President establish an "information sharing envi-

13. James Jay Carafano, Ph.D., and Alane Kochems, "Making the Sea Safer: A National Agenda for Maritime Security and Counterterrorism," Heritage Foundation *Special Report* No. SR-03, February 17, 2005, at [www.heritage.org/Research/HomelandDefense/upload/74871\\_4.pdf](http://www.heritage.org/Research/HomelandDefense/upload/74871_4.pdf).

14. James Jay Carafano, Ph.D., and Jamie Metzl, "Homeland Security Grant Reform: Congressional Inaction Must End," Heritage Foundation *Background* No. 1971, September 15, 2006, at [www.heritage.org/research/homelanddefense/upload/bg\\_1971.pdf](http://www.heritage.org/research/homelanddefense/upload/bg_1971.pdf).

15. U.S. Department of Homeland Security, *Tactical Interoperability Communications Scorecards: Summary Report and Findings*, January 2007, at [www.dhs.gov/xlibrary/assets/grants-scorecard-report-010207.pdf](http://www.dhs.gov/xlibrary/assets/grants-scorecard-report-010207.pdf) (January 30, 2007).

16. James Jay Carafano, Ph.D., "Talking Through Disasters: The Federal Role in Emergency Communications," Heritage Foundation *Background* No. 1951, July 17, 2006, at [www.heritage.org/Research/HomelandDefense/upload/bg\\_1951.pdf](http://www.heritage.org/Research/HomelandDefense/upload/bg_1951.pdf).

ronment” (ISE) to distribute intelligence regarding terrorism to appropriate federal, state, local, and private entities. Section 1016 of the act requires designating an organizational and management structure to establish and maintain the ISE. In turn, the ISE recently released a comprehensive plan for improving information sharing in which state and regional intelligence and information sharing fusion centers play a critical role.<sup>17</sup> Federal funding of these efforts is appropriate. However, as with interoperable communications, federal contributions to state and local governments should be made through existing grant programs.

In the meantime, improving the ability of state and local law enforcement need not wait until the ISE becomes fully operational. Some shortfalls can be addressed right now. Enhanced information analysis capabilities are critical for counterterrorism operations. Often, the challenge in investigations is to make sense of the available information and to see how the pieces fit together. The right data analysis tools can assist an investigator in assembling a complete picture. Such tools could allow more effective and efficient searches of government databases (e.g., a federated search engine or automated search agent); graphically display links among various pieces of information; and/or apply algorithms to selected data to find patterns. Data analysis capabilities could enable investigators to sort through the deluge of information and to organize the relevant bits into a coherent mosaic.<sup>18</sup>

Congress can speed this effort by:

- **Establishing federal guidelines for the use of data-mining technologies.**<sup>19</sup>
- **Authorize states and localities to establish regional systems to share information and**

**data analysis capabilities under the existing grant program.** The federal government should also pay for the services used to support federal counterterrorism investigations that are approved by the relevant Joint Terrorism Task Force.

#### **Improving Critical Infrastructure Security.**

Sections 901 and 902 establish a plethora of reports and management requirements for the National Asset Database. Other provisions call for reorganizing the critical infrastructure and intelligence offices within the DHS. These initiatives perpetuate a flawed post-9/11 effort to make U.S. infrastructure more resilient against terrorist attacks. In fact, the 9/11 Commission recommendations for the most part followed this mistaken course.

A large part of the problem is that the definition of critical infrastructure is too broad and sweeping. Overly inclusive programs prevent the federal government from focusing on infrastructure that is truly vital to the nation. According to the DHS Inspector General, over 32,000 assets in the database (over one-third of those listed) are not of national significance, including a popcorn factory and petting zoo.<sup>20</sup>

The DHS has made a good-faith effort to correct the most egregious abuses and focus its efforts on a much smaller catalogue of assets. However, continued emphasis on the National Asset Database only reinforces an inefficient and ineffective approach to critical infrastructure protection. Likewise, further reorganizing the critical infrastructure and intelligence offices within the DHS would simply create more turmoil and achieve little in better focusing the department’s programs.

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17. Information Sharing Environment, *Information Sharing Environment Implementation Plan*, November 2006, at [www.ise.gov/docs/ISE-implplan-200611.pdf](http://www.ise.gov/docs/ISE-implplan-200611.pdf) (January 30, 2007).
18. James Jay Carafano, Ph.D., Paul Rosenzweig, and Alane Kochems, “An Agenda for Increasing State and Local Government Efforts to Combat Terrorism,” Heritage Foundation *Background* No. 1826, February 24, 2005, at [www.heritage.org/Research/HomelandDefense/upload/74937\\_1.pdf](http://www.heritage.org/Research/HomelandDefense/upload/74937_1.pdf).
19. James Jay Carafano, Ph.D., “Promoting Security and Civil Liberties: The Role of Data Mining in Combating Terrorism,” testimony before the Committee on the Judiciary, U.S. Senate, January 10, 2007, at [www.heritage.org/Research/HomelandDefense/tst010907a.cfm](http://www.heritage.org/Research/HomelandDefense/tst010907a.cfm).
20. U.S. Department of Homeland Security, Office of Inspector General, “Progress in Developing the National Asset Database,” OIG-06-04, June 2006, at [www.dhs.gov/xoig/assets/mgmttrpts/OIG\\_06-40\\_Jun06.pdf](http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_06-40_Jun06.pdf) (January 30, 2007).



The federal government should instead target resources toward the critical infrastructure in which it has a vested interest. The current list of critical infrastructure is too expansive, including sectors that are not truly vital to the federal government's functioning. The federal government has a vested interest in only the most critical assets in the energy, finance, telecommunications, and transportation sectors. With a more limited list of vital critical infrastructure, the responsibility for protecting that infrastructure should be divided according to vulnerabilities and threats. The private sector should work to reduce the vulnerabilities (weaknesses) in its infrastructure; the federal government should address outside threats to the infrastructure.

Congress can foster this process by helping to eliminate obstacles to effective information sharing and cooperative action. To this end, Congress should:

- **Strengthen the Protected Critical Infrastructure Information (PCII) program.** This program encourages the private sector to share sensitive and proprietary business information about critical infrastructure with the federal government. While the program is a good start, it is not yet clear how widely the federal government will disseminate the information. To encourage private industry to submit information to the PCII program, Congress should clarify to whom and under what conditions the information may be disseminated or used in private litigation.
- **Address liability concerns.** The Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act)<sup>21</sup> is one tort reform measure that is already in existence. However, it remains underutilized, and many in industry consider it complex and confusing. The legislation limits liability for tort claims that arise out of, relate to, or result from a terrorist act in which a qualified anti-terrorism technology has been deployed. The act does not limit liability if a terrorist act has not occurred. The Adminis-

tration and Congress should clarify the SAFETY Act as necessary and push for its use where appropriate.

**Unionizing the Transportation Security Administration.** When Congress created the Transportation Security Administration (TSA), it gave the agency the authority to decide whether or not airport baggage screeners should belong to a union. To ensure its ability to respond to terrorist threats rapidly and with maximum flexibility, the TSA decided that they should not unionize. Section 408 of H.R. 1 would revoke this authority and allow government unions to organize the 56,000 airport screeners who work for the government. This is a high priority for organized labor but was not among the 9/11 commission's recommendations. This provision would actually weaken America's national security by imposing on TSA:

- **Less flexibility to respond to threats.** The TSA needs maximum flexibility to respond to potential threats by using the latest information available. Following the attempted airline bombings in the summer of 2006, the TSA rapidly overhauled its procedures to prevent terrorists from smuggling liquid explosives onto any U.S. flights. However, government unions frequently resist both changing established procedures and flexibility in personnel management. The TSA needs the ability to move personnel rapidly and change screening procedures without first consulting with union officials. Collective bargaining with unions would introduce a layer of bureaucracy and resistance to change that America cannot afford.
- **Less opportunity for merit promotions.** Government unions routinely push for seniority-based promotions and fight efforts to promote workers primarily on the basis of merit. Unions have already sued the TSA to prevent it from laying off screeners for doing poorly on performance tests instead of putting greater emphasis on retaining workers with more seniority.<sup>22</sup> Senior-

21. Public Law 107-296, Subtitle G.

22. Tom Ramstack, "Unions Aim to Halt Layoffs of Airport Screeners," *The Washington Times*, July 9, 2003, at [www.washtimes.com/business/20030708-094836-4179r.htm](http://www.washtimes.com/business/20030708-094836-4179r.htm) (January 30, 2007).

ity-based promotion systems are popular with government unions and may make life easier for many workers, but they would harm national security. America needs the best workers on the job in the most sensitive positions, not those who have simply been on the job the longest.

- **Increased risk of leaking sensitive information.** If TSA officials need to change procedures rapidly or move personnel in violation of a collective bargaining agreement, they would first have to negotiate with union officials. These officials are unlikely to agree without understanding why the government wants to ignore the union contract. In many cases, the government could not tell them without divulging sensitive information on terrorist plans. Few union officials have security clearances for this information. Revealing it to individuals without security clearances increases the risk that the intelligence could be leaked, jeopardizing national security.

Instead, Congress should:

- **Remove the issue of TSA labor rules** from a bill concerned with national security.
- **Consider broader reforms of the TSA** to allow for greater flexibility in employing its workforce and privatizing aviation security.<sup>23</sup>

**Public Diplomacy.** In accordance with the 9/11 Commission's recommendations, the bill would mandate additional funding for international broadcasting, specifically to the Arab world. H.R. 1 would also authorize the President to furnish the Broadcasting Board of Governors (BBG) with whatever resources from other agencies or entities outside the United States it needs to provide international broadcasting activities whenever surge capacity is needed, up to \$25 million in funding. Additionally, Section 1432 of the bill requires the Secretary of State to make recommendations to Congress on expanding scholarships, exchanges, and library programs in Arab and predominantly Muslim countries.

The focus on improving and properly funding U.S. public diplomacy toward the Arab world is

well directed. Ever since the dissolution of the United States Information Agency (USIA) in 1999, U.S. public diplomacy has lacked funding and focus, both of which are sorely needed in the struggle "for hearts and minds" in the Muslim world. International broadcasting has languished, and competition for funding is intense among the Voice of America and the numerous semi-autonomous entities, including Al Hurra (Arab television) and Radio Sawa and Radio Farda, which broadcast in Arabic and Persian. There is also a strong need for scholarships and exchanges geared toward students from the Arab world to expose them firsthand to American life and values. Storefront libraries were defunded after the USIA functions were folded into the State Department, but the libraries should be reconstituted as a cost-effective way to reach foreign audiences, specifically young people, who otherwise may not have access to American or Western books.

Where the bill goes wrong is by entrusting the BBG with the responsibility to increase and revitalize broadcasting to the Arab world. In many ways, the bipartisan BBG has been a source of problems with U.S. international broadcasting, not a solution. In some cases, its board members have acted like individual executives, each with his or her own fiefdom, dictating policy and running programs sometimes at cross purposes and in ways that are highly counterproductive.

To improve U.S. public diplomacy with the Arab world and the Middle East, Congress should:

- **Not entrust further responsibility and funding to the BBG.** Instead, the BBG should be made a purely advisory body, and executive power should be handed to a chairman who would be responsible for strategic planning and execution. Furthermore, additional funding should not be given to broadcasting services that show no promise of reaching the intended audiences, as reflected in audience numbers. In such cases, funding should be terminated and redirected to other public diplomacy efforts.
- **Establish a semi-governmental entity to conduct public opinion research** in individual

23. Poole and Carafano, "Time to Rethink Airport Security."

countries throughout the region to give U.S. public diplomacy doctrine a solid factual foundation.

- **Mandate creation of a U.S. national strategy for public diplomacy** to coordinate the efforts of the multitude of U.S. government agencies that have public diplomacy responsibilities.
- **Provide funding for training and support of independent journalists.**
- **Restructure the leadership of the U.S. international broadcasting entities** and streamline their functions to maximize their effectiveness by avoiding overlap and duplication.

**Working with Pakistan.** The 9/11 Commission report highlighted the serious truth that U.S. policy toward Pakistan over the next few years will increasingly determine whether the U.S. ultimately succeeds or fails in the global war on terrorism. The Pakistan–Afghanistan border area is one of the most dangerous terrorist safe havens in the world. President Pervez Musharraf’s assistance in apprehending key al-Qaeda leaders has contributed to a strong U.S.–Pakistan partnership since the 9/11 attacks and has helped to prevent terrorist attacks that could have killed thousands. However, the continued presence of Taliban and al-Qaeda terrorists along the Afghanistan border and the growing belief in Washington that the Pakistani government could do more to crack down on these elements are straining U.S.–Pakistan ties.

Section 1442 of H.R. 1 refers specifically to this problem and calls on the U.S. to condition military assistance to Pakistan on Islamabad’s “making all possible efforts to prevent Taliban from operating in areas under its sovereign control.” While the Karzai government and coalition forces are responsible for meeting the Taliban challenge in Afghanistan, the international community relies on Pakistan to deal with Taliban and al-Qaeda leaders on its territory. It is politically risky for Musharraf to crack down on the Taliban, who received assistance from the Pakistani security services in the mid-1990s to influence events in Afghanistan and who still have close ties to Pakistani intelligence officers and the mainline religious parties.

Given the enormous implications of dealing effectively with the Taliban challenge in regard to

stabilizing Afghanistan and achieving U.S. goals in the global war on terrorism, it is tempting to support H.R. 1’s provisions on conditioning aid to Pakistan. The House bill, however, creates more problems than it solves.

In the past, the U.S. has found that simply cutting off, or even threatening to cut off, assistance to Pakistan does not further U.S. foreign policy objectives. For example, most U.S. policymakers now acknowledge that halting U.S. aid to Pakistan in 1990 because of concerns over its nuclear program was a mistake that cost the U.S. valuable leverage and contributed to the strong anti-U.S. sentiment that still exists in the country. Furthermore, the threat to cut off aid could undermine the government and make it more vulnerable to radical influences.

Instead, Congress should:

- **Recognize that a more effective strategy** to coax greater cooperation from the Pakistanis is to convince them that the U.S. will remain committed to stabilizing Afghanistan and to countering the Taliban until the job is completed. The Taliban and elements of the Pakistani security establishment may have interpreted the recent transfer of command of military operations from the U.S. to NATO as a sign that the American commitment to Afghanistan was waning and that the situation in the country would return to its pre-9/11 status. The U.S. must defeat this perception by maintaining—or even increasing, if necessary—its troop commitments in Afghanistan.
- **Support maintaining economic assistance to Afghan reconstruction** and encourage the international community to prioritize assistance to the country. If Pakistan’s military leaders are convinced that the U.S. is fully committed to Afghanistan’s rehabilitation, they are more likely to take the necessary steps against the Taliban, such as arresting key leaders, closing down their offices, and preventing them from meeting and raising money.
- **Encourage the Administration to take a more direct role in mediating differences between Kabul and Islamabad** and helping them to

overcome their mutual mistrust and to open channels of communication. Washington should continue to pursue the development of cross-border tribal jirgas (assemblies) and greater economic and trade links between Pakistan and Afghanistan so that each develops a vested interest in the other's stability.

**Privacy and Civil Liberties.** Title VII of H.R. 1 would reconstitute and redefine the White House Privacy and Civil Liberties Oversight Board a little more than nine months after its members were sworn in and just a few weeks after the board fulfilled its key role in achieving a major milestone. The board was authorized by the Intelligence Reform and Terrorism Prevention Act, but it did not become operational until after Congress had confirmed its chairman and vice-chairman and the remainder of its members were sworn in during March 2006.<sup>24</sup>

After giving the board less than one year to organize itself, to develop a comprehensive agenda for fulfilling its unprecedented and far-reaching authority to review the operations of all executive branch agencies, and to meet its initial milestones, it would be foolhardy and counterproductive for Congress to reorganize and redefine the board, this time in a more partisan mold. In fact, none of the 9/11 Commission's recommendations merits this approach. Overhauling the board is unnecessary and unwise because:

- **The board has already demonstrated its worth.** With the board's advice, the ISE program published in December the first-ever set of mandatory federal guidelines for the inter-agency sharing of terrorism-related informa-

tion. These guidelines apply to all sharing of terrorism-related information by federal offices, departments, and agencies. Yet during the board's public meeting at Georgetown University on December 5, 2006, a representative of the American Civil Liberties Union (ACLU) accused the board of accomplishing little in its first nine months.<sup>25</sup> Without citing support, she admonished the board on the ground that most of the meetings that it claimed to have held consisted "mainly of phone calls or teleconferences with administration insiders."<sup>26</sup>

In response, the board promptly clarified that it had held all or almost all of its meetings in person, with all board members present, and cited a list of executive branch offices, agencies, and departments with which it had met, in some cases multiple times.<sup>27</sup> These ranged from the National Security Agency and National Security Council to the Departments of Justice and the Treasury to the White House itself. In fact, the board has met regularly and worked closely with senior White House staff and senior Administration officials.<sup>28</sup> The board has also met with numerous Members of Congress and has extended requests to meet with others.

- **The proposal is designed to please stakeholders, not to solve problems.** H.R. 1 tracks the key provisions of the proposal advocated by the ACLU's representative at the Georgetown University meeting.<sup>29</sup> Specifically, H.R. 1 would remove the board from the Executive Office of the President and purport to make it an independent agency with expansive responsibilities to report directly to Congress. Apparently dissatis-

24. As one well-known privacy advocate noted last fall, the Board's "slow start" was due to "delays in nominations, appointments, and confirmations." Marc Rotenberg, Electronic Privacy Information Center, "The Sui Generis Privacy Agency: How the United States Institutionalized Privacy Oversight After 9-11," Social Science Research Network, September 2006, p. 42.

25. Caroline Frederickson, Director, Washington Legislative Office, American Civil Liberties Union, in White House Privacy and Civil Liberties Oversight Board, transcript, meeting and public forum at Georgetown University, Washington, D.C., December 5, 2006, p. 23.

26. *Ibid.*

27. Theodore Olson, in White House Privacy and Civil Liberties Oversight Board, transcript, pp. 79-80.

28. Carol Dinkins, in White House Privacy and Civil Liberties Oversight Board, transcript, p. 9.

29. Frederickson, in White House Privacy and Civil Liberties Oversight Board, transcript, pp. 26-27.

fied with the cooperative, nonpartisan approach that the board has pursued to date, the House leadership wants to require that two board members be chosen with the “help” of whichever party is in opposition to the President. H.R. 1 would also give the board subpoena power.

- **The measure undermines constitutional checks and balances.** The House leadership wants to have it both ways and seemingly forgets (as has become increasingly common over the past six years) that the President *presides* over an independent, co-equal branch of government. Congress can be directly involved in selecting the members of an executive branch board or agency if that board or agency acts in a purely advisory capacity. However, whenever Congress creates a board or agency with authority to exercise the power of the executive branch, the Constitution limits congressional involvement in the appointment of the board or agency’s officers to confirming (or refusing to confirm) those persons who are nominated by the President.
- **The measure imposes unnecessary changes.** The board’s experience to date belies the alleged need to invest it with subpoena power. The board reports that the Administration has provided excellent cooperation with its requests for information.<sup>30</sup> One board member reported without contradiction that the board has had access to every Administration official that it wanted.<sup>31</sup> Members have asked Administration officials every question that they have wanted to ask, and their questions have been answered.<sup>32</sup>

Board members have uniformly reported that Administration cooperation has been excel-

lent. Clothing the board with subpoena power would add one more political incentive to a board that has been developing relationships and achieving milestones in a nonpartisan fashion.

In light of the excellent cooperation that the board has obtained from the executive branch and its results after only nine months in operation, Congress should:

- **Not grant the board subpoena power.** If the board is given subpoena power (as H.R. 1 would do) and other powers and authority that are inappropriate to an executive branch agency, and if its composition becomes more political, that casts serious doubt on its constitutional standing and raises the potential for executive privilege claims based on national security concerns. In addition, an activist federal judge with an axe to grind against the Bush Administration would be empowered to grant even those requests for information that are politically motivated. Granting subpoena power would change the calculus of department and agency officials tasked with responding. Instead of a reasonable dialogue between the board and Administration officials, the existence of subpoena power would transform every information request made by the board into a potential adversarial process.

**Combating the Spread of Weapons of Mass Destruction.** Section 1221 proposes having the United Nations sanction the Proliferation Security Initiative (PSI), a key U.S. program that the Administration established after 9/11 to combat the smuggling of dangerous and banned weapons, technologies, and

30. Board Chairman Carol Dinkins stated that the board “is very pleased with the level of support that we have received from the Administration on all these efforts.” Board Vice-Chairman Alan Charles Raul stated: “Our statutory mandate includes providing advice and oversight on the privacy and civil liberties issues implicated in both the development and the implementation of anti-terrorism policies. We have had, to date, good access to the most sensitive information about how those policies are being implemented. So far, we have seen that senior officials, lawyers, inspectors general and program operators seem to be highly sensitive about [how] they handle and protect the information they target, acquire and retain about U.S. persons.” White House Privacy and Civil Liberties Oversight Board, transcript, pp. 9–10 and 12.

31. Olson, in White House Privacy and Civil Liberties Oversight Board, transcript, p. 80.

32. *Ibid.*

materials. Other provisions would create a U.S. Coordinator for the Prevention of Weapons of Mass Destruction Proliferation and Terrorism and a Commission on the Prevention of Weapons of Mass Destruction. Each of these initiatives is misguided, and none of them were proposed by the 9/11 Commission.

- **The 9/11 Commission did not recommend that the U.S. and other free nations outsource their responsibilities to the U.N. or other international bodies**, although it did propose that the U.S. seek greater international cooperation in the war on terrorism. The PSI is perfectly legitimate under existing U.S. laws and treaties and does not require U.N. sanction. In addition, the U.N. Security Council passed a resolution in 2004 supporting activities like the PSI.<sup>33</sup>
- **Creating a U.S. Coordinator for the Prevention of Weapons of Mass Destruction Proliferation and Terrorism is unnecessary.** It would simply add more government and another layer of bureaucracy to government efforts.
- **Establishing a Commission on the Prevention of Weapons of Mass Destruction is unnecessary.** The congressionally chartered Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction, commonly known as the Gilmore Commission, largely fulfills this mandate. The advisory panel assessed capabilities for responding to terrorist incidents in the United States involving weapons of mass destruction. It examined response capabilities at the federal, state, and local levels as well as the nature of the threat. The commission has issued five reports, the most recent one in 2003.<sup>34</sup>

Instead, Congress should:

- **Resist the temptation to build cumbersome international bureaucracies.** As the PSI matures, pressure to institutionalize it will likely grow. This pressure should be resisted. Building an international bureaucracy will only distract the states participating in the PSI from performing the essential function of interdicting weapons-related shipments. The same bias against institutionalization should be applied to any future PSI-related initiatives.
- **Allow the Administration maximum flexibility in implementing the PSI.** The PSI is completely dependent on the determination and assets of its participating states to interdict weapons-related shipments. This is a source of strength, not weakness. This approach, along with a relatively select membership, allows the PSI to avoid the least-common-denominator decision-making process associated with the treaty-based non-proliferation regime. It also allows the PSI to take best advantage of the capabilities of its participating states.<sup>35</sup>
- **Create an Under Secretary for Policy in the DHS.** To integrate its activities more effectively in support of PSI and other counterterrorism programs, the DHS needs a central senior policy office within the department.<sup>36</sup> Secretary of Homeland Security Michael Chertoff rightly sought to establish an Under Secretary for Policy within the DHS to conduct program analysis, perform long-range strategic planning, and undertake net assessments. He has already established a Directorate of Policy under an Assistant Secretary for

33. U.N. Security Council, Resolution 1540, April 28, 2004, at [www.daccessdds.un.org/doc/UNDOC/GEN/N04/328/43/PDF/N0432843.pdf](http://www.daccessdds.un.org/doc/UNDOC/GEN/N04/328/43/PDF/N0432843.pdf) (January 30, 2007).

34. For its charter and annual reports, see Gilmore Commission, Web site, at [www.rand.org/nsrd/terrpanel](http://www.rand.org/nsrd/terrpanel) (January 30, 2007).

35. Baker Spring, "Harnessing the Power of Nations for Arms Control: The Proliferation Security Initiative and Coalitions of the Willing," Heritage Foundation *Backgrounder* No. 1737, March 18, 2004, at [www.heritage.org/Research/NationalSecurity/upload/59315\\_1.pdf](http://www.heritage.org/Research/NationalSecurity/upload/59315_1.pdf).

36. James Jay Carafano, Ph.D., Richard Weitz, Ph.D., and Alane Kochems, "Department of Homeland Security Needs Under Secretary for Policy," Heritage Foundation *Backgrounder* No. 1788, August 17, 2004, at [www.heritage.org/Research/HomelandDefense/upload/67952\\_1.pdf](http://www.heritage.org/Research/HomelandDefense/upload/67952_1.pdf).

Policy. Congress should elevate this position to the under-secretary level and ensure that this office is fully staffed and funded.

### America Needs a Better Bill

The Implementing the 9/11 Commission Recommendations Act of 2007 requires far more congressional scrutiny. Crafting legislation that makes America safer, freer, and more prosperous will require stripping the most egregious proposals from H.R. 1 and adding measures that will make homeland security more efficient and effective. In particular, Congress should:

- **Eliminate** the requirement for 100 percent screening of international commerce,
- **Reject** calls for new grant programs,
- **End** ineffective critical infrastructure programs,
- **Not undercut** TSA workforce flexibility,
- **Not undermine** the ability of the U.S. and Pakistan to cooperate in the war on terrorism,
- **Not cripple** the effectiveness of the White House Privacy and Civil Liberties Oversight Board, and

- **Not establish** unnecessary counterproliferation programs and restrictions.

America does not need a bill that simply throws money at the problem, implements symbolic programs that add little real security, advances political agendas that have little to do with security, and adds more requirements to the Department of Homeland Security's already overloaded to-do list.

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