

# Policy Analysis

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## *Abolish the Department of Homeland Security*

by David Rittgers

### Executive Summary

After the terrorist attacks of September 11, 2001, Congress created the Department of Homeland Security (DHS), an umbrella organization that would oversee 22 preexisting federal agencies. The idea was to improve the coordination of the federal government's counterterrorism effort, but the result has been an ever-expanding bureaucracy.

DHS has too many subdivisions in too many disparate fields to operate effectively. Agencies with responsibilities for counterfeiting investigations, border security, disaster preparedness, federal law enforcement training, biological warfare defense, and computer incident response find themselves under the same cabinet official. This arrangement has not enhanced the government's competence. Americans are not safer because the head of DHS is simultaneously responsible for airport security and governmental efforts to counter potential flu epidemics.

National defense is a key governmental responsibility, but focusing too many resources on trying to defend every potential terrorist target is a recipe for wasteful spending. Our limited resources are better spent on investigating and arresting aspiring terrorists. DHS respon-

sibilities for aviation security, domestic surveillance, and port security have made it too easy for politicians to disguise pork barrel spending in red, white, and blue. Politicians want to bring money home to their districts, and as a result, DHS appropriations too often differ from what ought to be DHS priorities.

The Department of Homeland Security should be abolished and its components reorganized into more practical groupings. The agencies tasked with immigration, border security, and customs enforcement belong under the same oversight agency, which could appropriately be called the Border Security Administration. The Transportation Security Administration and Federal Air Marshals Service should be abolished, and the federal government should end support for fusion centers. The remaining DHS organizations should return to their former parent agencies.

Terrorism remains a serious problem, but policymakers ought to be more candid with the American public. Instead of pandering to fear and overreacting to every potential threat, policymakers should keep the risk of terrorist attacks in perspective and focus public resources on cost-effective measures.

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## **Introduction**

The terrorist attacks on September 11, 2001, prompted numerous changes in American national security policy, including the creation of a Department of Homeland Security (DHS). The rationale for the new cabinet agency was that it would improve the federal government's counterterrorism efforts. Now that several years have passed since its creation, we have an adequate record to assess how the agency has done in that regard. This paper will begin with a brief review of the birth of DHS, and then summarize its structure and organization. The post-9/11 reorganization has failed for several reasons. First, DHS has too many subdivisions in too many disparate fields to operate effectively. Second, DHS spends millions on pork barrel programs that are disguised as counterterrorism measures. Third, DHS duplicates the work of other police agencies and assumes aviation and airport security responsibilities that ought to be handled by the airline industry. Congress should acknowledge its mistake and abolish the Department of Homeland Security.

## **Creation of the Department of Homeland Security**

The idea of a Department of Homeland Security had been proposed even before the September 11 attacks. In early 2001 the U.S. Commission on National Security/21st Century, chaired by former senators Warren Rudman (R-NH) and Gary Hart (D-CO), recommended the creation of a "National Homeland Security Agency" that would bring together the Federal Emergency Management Agency (FEMA), Customs Service, Coast Guard, and Border Patrol in order to prevent and respond to national security threats.<sup>1</sup> The report was one of several competing proposals to reorganize domestic counterterrorism and disaster response capabilities under a single independent agency or a coordinator within either

the Executive Office of the President or the Department of Justice.<sup>2</sup>

The first step toward what is now known as DHS came about when President Bush formed the Office of Homeland Security following 9/11, an executive branch office intended to facilitate intergovernmental communication to respond to terrorist threats.<sup>3</sup> President Bush appointed former governor Tom Ridge (R-PA) as the first director of homeland security. The same executive order created the Homeland Security Council, a domestic-focused body that would parallel the foreign-oriented National Security Council, with membership to include the president; vice president; attorney general; secretaries of the Treasury, Defense, Health and Human Services, and Transportation; directors of FEMA, the Federal Bureau of Investigation (FBI), and the Central Intelligence Agency (CIA); and the assistant to the president for Homeland Security.

The Homeland Security Council was an unnecessary creation; the National Security Council already had the capability and responsibility to coordinate all of the tasks that have since been delegated to the Homeland Security Council and DHS.<sup>4</sup> The Obama administration's consolidation of the support staff for the National and Homeland Security Councils is a tacit admission of this duplication of effort.<sup>5</sup>

Nevertheless, some members of Congress, led by Sen. Joseph Lieberman (D-CT), believed that the Homeland Security Council provided insufficient government oversight of homeland security and argued for a new cabinet-level position that coordinated and controlled the budget of a number of agencies with terrorism prevention and response capabilities.<sup>6</sup> Though initially resistant to the creation of a new federal agency, President Bush eventually embraced the plan. By mid-2002, White House staffers were meeting to redesign the federal government in what they would later describe as a "rushed and almost random" series of deliberations.<sup>7</sup> In a nod to conservative principles, Bush promised to keep the reorgani-

zation revenue-neutral, a proposition that seems laughable in retrospect.<sup>8</sup>

Even as DHS was being proposed, policy experts and White House staffers predicted a painful growth in bureaucracy. The proposal that would eventually determine the department's scope was the fourth of four options proposed to Secretary Ridge by RAND Corporation expert Michael A. Wermuth.<sup>9</sup> When Ridge chose that option, "Wermuth warned Ridge it was a horrible idea. He spoke of 'train wrecks coming, a clash of cultures . . . you're going to strangle yourself in bureaucracy for years.'"<sup>10</sup>

Harvard security expert Richard Falkenrath played a key role in creating the new bureaucratic structure. He "thought it would be nice to give the new department a research lab" and called a friend to ask which of the three Department of Energy labs would fit the bill. Based on the friend's brief response, the Lawrence Livermore National Laboratory was added to the list, Falkenrath not realizing "that he had just decided to give the new department a thermonuclear weapon simulator."<sup>11</sup> Falkenrath also moved the enforcement duties of the Immigration and Naturalization Service from the Department of Justice to DHS without moving over the immigration judges who presided over deportation hearings, because he did not know there were immigration judges.<sup>12</sup>

### **Congressional Debate**

The congressional hearings that examined the scope of DHS provided indications that lawmakers were moving hastily. Rep. Dan Burton (R-IN), chairman of the House Government Reform Committee, started a hearing by suggesting that DHS would be "a Defense Department for the United States, if you will," seemingly oblivious to the fact that the Department of Defense is the "Defense Department for the United States."<sup>13</sup> While proponents of DHS made claims that the consolidation of agencies would be more efficient and could save money in the long run, Rep. John Duncan (R-TN) said that past predictions of savings and simplification by

adding new layers of bureaucracy had not come true. Duncan cited past governmental reorganizations that produced ever-greater spending by the federal government, yet "those departments were created with words saying that they were going to increase efficiency and do away with overlapping and duplication of services and so forth . . . the same things we're hearing now."<sup>14</sup>

Rep. Henry Waxman (D-CA) expressed concerns to then-Homeland Security director Tom Ridge about the size of the proposed organization. "The bill you have proposed includes 21 deputy, under, and assistant secretaries. This is more than double the number of deputy and assistant secretaries at Health and Human Services, which administers a budget that is three times bigger than the budget we expect for this agency. If the objective is not to grow government, why does the new department need so many deputy and assistant secretaries?"<sup>15</sup>

Paul C. Light of the Brookings Institution raised the prospect that DHS would simply be too big a ship to steer. Light focused on the largely unconnected tasks that DHS agencies would perform and highlighted the "50 percent rule," the principle that organizations should only be put under the same umbrella of management if at least 50 percent of their responsibilities overlap.<sup>16</sup> The structure of DHS obviously fails to conform with this principle.

Rep. David Obey (D-WI) questioned the wisdom of having two sets of infectious disease researchers on the government payroll—one at DHS and one at the Department of Health and Human Services: it's "as if you set up two fire departments in the same town and assigned one to handle arson and another fires caused by accident."<sup>17</sup>

In spite of the opposition of a few members of Congress, the Homeland Security Act of 2002 passed by large margins, 299–121 in the House and 90–9 in the Senate.<sup>18</sup>

### **Structure of the Department of Homeland Security**

Congress transferred a number of federal

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**Table 1**  
**Current Structure of the Department of Homeland Security (legacy/parent agency in parentheses)**

Original Agency (Department)	Current Agency/Office
The U.S. Customs Service (Treasury)	U.S. Customs and Border Protection (CBP)—inspection, border and ports of entry responsibilities U.S. Immigration and Customs Enforcement (ICE)—customs law enforcement responsibilities
The Immigration and Naturalization Service (Justice)	CBP—inspection functions and the U.S. Border Patrol ICE—immigration law enforcement: detention and removal, intelligence, and investigations U.S. Citizenship and Immigration Services—adjudications and benefits programs
The Federal Protective Service (General Service Administration)	ICE
The Transportation Security Administration (Transportation)	Transportation Security Administration
Federal Law Enforcement Training Center (Treasury)	Federal Law Enforcement Training Center
The Federal Emergency Management Agency (FEMA)	FEMA
Office for Domestic Preparedness (Justice)	Responsibilities distributed within FEMA
Strategic National Stockpile and the National Disaster Medical System (HHS)	Returned to Health and Human Services, July, 2004
Nuclear Incident Response Team (Energy)	Responsibilities distributed within FEMA
Domestic Emergency Support Teams (Justice)	Responsibilities distributed within FEMA
National Domestic Preparedness Office (FBI)	Responsibilities distributed within FEMA
Chemical, Biological, Radiological, Nuclear Countermeasures Programs (Energy)	Science & Technology Directorate
Environmental Measurements Laboratory (Energy)	Science & Technology Directorate
National Biological Warfare Defense Analysis Center (Defense)	Science & Technology Directorate
Plum Island Animal Disease Center (Agriculture)	Science & Technology Directorate
Federal Computer Incident Response Center (GSA)	US-CERT, Office of Cybersecurity and Communications in the National Programs and Preparedness Directorate
National Communications System (Defense)	Office of Cybersecurity and Communications in the National Programs and Preparedness Directorate

Original Agency (Department)	Current Agency/Office
National Infrastructure Protection Center (FBI)	Dispersed throughout the department, including Office of Operations Coordination and Office of Infrastructure Protection
Energy Security and Assurance Program (Energy)	Integrated into the Office of Infrastructure Protection
U.S. Coast Guard (Transportation)	U.S. Coast Guard
U.S. Secret Service (Treasury)	U.S. Secret Service

Source: Department of Homeland Security, "Who Became a Part of the Department?" [http://www.dhs.gov/xabout/history/editorial\\_0133.shtm](http://www.dhs.gov/xabout/history/editorial_0133.shtm).

agencies that had previously been organized under the Departments of Justice, Treasury, Transportation, Agriculture, and Defense to a new umbrella agency, the Department of Homeland Security. Table 1 shows how DHS is currently structured (legacy/parent agency in parentheses).<sup>19</sup>

Consolidating so many agencies and responsibilities creates its own set of problems. As will be discussed below, congressional predictions of unnecessary bureaucracy, duplication of effort, and wasteful spending have come to pass.

## A Morass of Inefficiency and Waste

Congress made a dreadful mistake by consolidating unconnected national security responsibilities under DHS. National security is a whole-of-government responsibility that can only be addressed with a subset of the cabinet and the heads of relevant agencies, such as the National Security Council. Indeed, the failings within the federal government leading up to the 9/11 terrorist attacks lay primarily with the CIA and FBI, neither of which became a part of DHS.

Creating DHS resulted in an unwieldy organization with too many components. To solve the management issues created by the DHS structure, the federal government is now building a new headquarters to house

the capital region components of DHS. And yet DHS headquarters components are too big to fit in the largest D.C.-area government construction project since the Pentagon.

### Creating a New Bureaucracy to Fix Problems in Existing Ones

Among the governmental mistakes leading up to the 9/11 attacks was the poor coordination between the FBI and CIA. The *9-11 Commission Report* notes that the CIA missed multiple "operational opportunities" that might have prevented the attacks. The CIA monitored an al Qaeda planning meeting in Kuala Lumpur, Malaysia, in January 2000 but lost track of several attendees who flew to Bangkok.<sup>20</sup> Two of those terrorists, Nawaf al Hamzi and Khalid al Midhar, later flew to Los Angeles. The mishaps in tracking those terrorists—who would later fly American Airlines Flight 77 into the Pentagon—highlights several shortcomings in the intelligence effort against al Qaeda. First, the CIA did not develop a transnational plan for tracking the al Qaeda members at the Kuala Lumpur meeting. Neither did the CIA put either of the two men on a watch list, notify the FBI when the CIA learned that they possessed valid U.S. visas, nor did the CIA notify any other agency when it discovered that al Hamzi had flown to Los Angeles.

The FBI also suffered from internal agency failures: field agents identified many threats, yet FBI supervisors did not act on those warn-

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ings. An agent in Phoenix, Arizona, identified the tool that al Qaeda would use on 9/11—hijacked airliners. He sent a memorandum to the New York Field Office warning of the “possibility of a coordinated effort by Usama Bin Ladin” to send students to civil aviation schools in the United States.<sup>21</sup> The agent based his warning on the “inordinate number of individuals of investigative interest” attending local flight schools. FBI agents in the Minneapolis Field Office believed that Zacharias Moussaoui, the convicted “20th hijacker,” was an “Islamic extremist preparing for some future act in furtherance of radical fundamentalist goals,” and that his plan might involve hijacking a plane. The FBI National Security Law Unit disapproved the Minneapolis Field Office’s request for a Foreign Intelligence Surveillance Act (FISA) warrant to search Moussaoui’s laptop prior to the 9/11 attacks.

Spending tens of billions of dollars creating the Department of Homeland Security had nothing to do with fixing those errors, but instead created more bureaucracy.

**Span of Control**

The structure of DHS creates waste and inefficiency. The problem stems from a span of control that is too large and spread across too many disciplines. “Span of control” is a term of art from management theory; it refers to the number of subordinates reporting to a supervisor. Traditional models hold that one manager can effectively lead five or six subordinates, but adding subordinates (or subordinate agencies, in the case of DHS) can lead to reduced performance and morale in the organization. “Spans may be limited by where people are and by the problems of control and communication over distance. Also, a supervisor can exercise more effective control over a broader span in a stable situation than under dynamic conditions.”<sup>22</sup> While stable bureaucratic conditions allow for a broader span of control than crisis management, there is a limit to how many organizations can fit under one umbrella and still be effectively managed.

DHS is no stranger to the concept of span of control. Disaster response experts stress that idea when operating the Incident Command System (ICS), a recommended set of emergency management practices:

The general rule is five subordinate units per supervisory position, although allowance is made to vary this ratio under special circumstances. If tasks are relatively simple or routine, taking place in a small area, communications are good, and the incident character is reasonably stable, then one supervisor may oversee up to eight subordinate units. Conversely, if the tasks are demanding, taking place over a large area, and incident character is changing, then the span of control might be reduced to one supervisor per two or three subordinates.<sup>23</sup>

Somewhat ironically, FEMA, a DHS subordinate administration, teaches this theory in its Emergency Management Institute.<sup>24</sup>

The difficulties of management are compounded by the wide variety of tasks that DHS is expected to perform: disaster response, border security, maritime rescue, biological weapons research, and domestic intelligence analysis, just to name a few. Given the wide geographic distribution of DHS offices and the dynamic nature of its mission, it should come as no surprise that the agency is often criticized as being mismanaged, or that DHS consistently ranks near the bottom of employee surveys on satisfaction with management.<sup>25</sup>

If consolidation of unrelated agencies were an effective way to run government, the cabinet would have just one member responsible for all agencies—the secretary of Government—and be done with it. As George Washington University law professor Jeffrey Rosen points out, the unwieldy amalgamation of nearly two dozen legacy agencies into DHS makes little sense in terms of effective government. “Both [political] parties seem incapable of acknowledging an un-

comfortable but increasingly obvious truth: that the Department of Homeland Security was a bureaucratic and philosophical mistake.”<sup>26</sup> The department’s 22 federal agencies operate out of 70 buildings at 40 locations in Washington, D.C., and at the time of Rosen’s observation in 2008, reported to 88 congressional oversight committees. The situation has worsened. There are now 108 congressional committees, subcommittees, and panels claiming jurisdiction over DHS operations.<sup>27</sup>

DHS is now building a consolidated headquarters in an effort to compensate for the difficulties in managing a large number of agencies at different locations across the national capital region. The \$3.4 billion dollar complex in southwest Washington, D.C., will relocate DHS employees to 176 acres at the former grounds of the St. Elizabeth’s hospital, including a new \$435 million, 1.8-million-square-foot headquarters for the Coast Guard.<sup>28</sup>

Remarkably, DHS has so many components that this gigantic new facility—the largest government construction project since the Pentagon—will still be inadequate. The consolidation would reduce the number of DHS locations in the capital region from the current 46 to a range of 7 to 10, but the multibillion dollar project will only house 14,000 of the 35,000 DHS employees in the D.C. area and is projected to save only \$400 million in management expenses over the next 30 years.<sup>29</sup> It seems unlikely that these savings can be projected 30 years out with such certitude.

Costly congressional oversight, employee dissatisfaction, and a new headquarters complex that cannot house all DHS headquarters personnel are not problems that can be addressed with better management or a more efficient staff. The structure of DHS is the problem. Congress should not give DHS a massive portfolio of responsibility and then complain about the resulting oversight nightmare. Congress should instead divide the responsibilities of DHS into more manageable groupings. Keeping border security

in DHS’s successor agency and parceling out preparedness tasks to other cabinet heads (an arrangement that will resemble pre-DHS federal organization) would be a more sensible and workable organization.

### **Waste in DHS Grant Programs**

DHS’s creation spurred a growth in spending as well as an increase in bureaucracy. Federal spending on homeland security has increased from \$19.5 billion in 2002 to \$44.1 billion in 2010.<sup>30</sup> Much of that money was wasted; a recent study by Professors John Mueller and Mark Stewart found that in order to survive a cost-benefit analysis, increased homeland security expenditures “would have to deter, prevent, foil, or protect against 1,667 otherwise successful [attempted Times Square car bomb] type attacks per year, or more than four per day.”<sup>31</sup>

Congress has used homeland security as a way to legitimize pork barrel spending, most evidently in the \$34 billion in DHS grants to states and localities over the last nine years.<sup>32</sup> These grant programs exhibit the pathologies common to other grant programs, such as extravagant overspending, encouraging state and local officials to devote their time lobbying (or hiring grant management personnel to get more grants) instead of solving problems, and unfair redistribution of taxpayer money among states.<sup>33</sup> The amorphous threat of terrorism and aggregation of so many responsibilities under DHS encourages wasteful spending. Economist Veronique de Rugy describes this as “the political effect of the phrase *homeland security*, which tends to short-circuit skepticism. Even DHS activities unrelated to homeland security are apt to see their funding increase, on the assumption that they have something to do with the function indicated by the department’s name.”<sup>34</sup>

DHS grants are structured so that members of Congress from both urban and rural areas end up with pots of money to allocate to certain constituents. The two main grant programs, the Urban Areas Security Initiative (UASI) and the State Homeland Security

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rity Program (SHSP), benefiting urban and rural areas respectively, guarantee a handout to every state.<sup>35</sup> Current statutory language requires a minimum of one quarter of UASI and SHSP funds be devoted to counterterrorism efforts. SHSP funding is doled out regardless of population, giving rural and less populous states higher per-capita expenditures. Budgeting without regard for population density, critical infrastructure, or other potential risk assessment metrics guarantees wasteful spending. After all, al Qaeda has focused its attacks almost exclusively in urban areas.<sup>36</sup>

In the first year of DHS grant funding, SHSP programs took the lion's share of the funds, netting \$2 billion, while UASI funds amounted to almost \$600 million.<sup>37</sup> The SHSP provision of equal funds to all of the states, regardless of population or anticipated threats, proved an easy sell for rural representatives and senators.

Here are some examples of the reckless spending:

- Knox County, Ohio (population 54,500), used over \$100,000 in homeland security grant funds to purchase a hazardous materials trailer and a truck to tow it. The equipment sat unused and was later sold because of high maintenance costs. "I think it was a total waste of taxpayer dollars from the federal government on down," County Commissioner Tom McLarnan said. "A total waste."<sup>38</sup>
- A California urban area acquired 55 large-screen digital televisions costing \$74,394 as part of a new training system for its fusion center. Inspectors discovered that the state had purchased the televisions but not the associated training software. "On the day [the inspectors] visited, all of the televisions were being used to monitor the same television station."<sup>39</sup>
- Bennington, New Hampshire (population 1,273), received \$6,500 for chemical weapons suits.<sup>40</sup>
- Rear Admiral Harvey Johnson, commander of Coast Guard's District Seven in Miami, decided his official residence wasn't stylish enough, opting for a "6,200-square-foot, four-bedroom, four-bath home that costs taxpayers \$111,600 per year in lease payments. Utilities, maintenance, and other upkeep (such as the cleaning service for the backyard swimming pool) are extra."<sup>41</sup>
- Grand Forks, North Dakota (population 52,838), has more biochemical suits and gas masks than police officers to wear them. Mason County, Washington (population 60,699), purchased a \$63,000 hazardous materials decontamination unit, even though it has no hazmat team.<sup>42</sup>
- Members of Congress inserted a \$15 million earmark for a border checkpoint upgrade in the tiny village of Whitetail, Montana (population 71).<sup>43</sup> The border checkpoint in Westhope, North Dakota, which serves an average of 73 people a day, also received \$15 million for an upgrade.<sup>44</sup> The border checkpoints at Laredo, Texas, serving 55,000 travelers and 4,200 trucks daily, and processing \$116 billion in goods annually, were rated the government's highest priority but received no additional money.<sup>45</sup>

Aware of the gold-rush pathology in DHS grant programs, Congress has reduced the amount of state-directed SHSP funding<sup>46</sup> and changed formulas mandating spending ratios to the states.<sup>47</sup>

Congress can do more. If SHSP grants were eliminated, taxpayers would save over \$500 million a year at current funding levels.<sup>48</sup> The case for doing this is strong; the lack of a risk assessment and uniform treatment of all jurisdictions make this program an unequivocal handout to the states. At a minimum, SHSP grants should be restructured in one of two ways: (1) rural terrorism targets should apply for funds and compete based on neutral risk assessments as urban

jurisdictions are required to do; or (2) grants should be reduced to a level of funding that would force states to prioritize public monies toward anti-terrorism efforts that survive a cost-benefit analysis. As an initial benchmark, members of Congress could eliminate all SHSP funding except for the levels required to meet the current law enforcement terrorism prevention activities minimum, which by law must compose a quarter of SHSP funds. Doing so would reduce the federal budget by \$394 million, and lawmakers would be able to defend their fiscal restraint with the honest statement that they had not reduced funds devoted to state and local counterterrorism efforts by a penny.<sup>49</sup>

But even though Congress reduced handouts to the states under SHSP several years after the program's inception, they increased the funding of the urban-oriented UASI program and loosened restrictions on "urban" spending, allowing more areas to qualify for those funds. UASI began in 2003 by providing funds for seven large cities that make obvious terrorism targets but then quickly expanded to provide funds for 23 more urban areas. By FY 2010, the number was up to 64 urban areas and \$832 million. Smaller cities such as Bakersfield, California (population 347,483), qualified for money under UASI, a far cry from the original intent of the program.<sup>50</sup>

The rapid expansion of UASI grants pushed funds to unlikely terrorism targets. A June 2008 Government Accountability Office (GAO) report found that while the Tier I UASI grants (obvious targets such as Los Angeles; New York; and Washington, D.C.) were based on reasonable findings of risk, the Tier II UASI grants (the remaining 50+ cities) were not. "Rather, DHS considered all states and urban areas equally vulnerable to a successful attack and assigned every state and urban area a vulnerability score of 1.0 in the risk analysis model, which does not take into account any geographic differences."<sup>51</sup> A subsequent GAO report in 2009 found that DHS provided few useful metrics to justify the money spent. "FEMA's assessments

do not provide a means to measure the effect UASI regions' projects have on building regional preparedness capabilities—the goal of the UASI program."<sup>52</sup>

Congress has begun to move UASI spending in the right direction. The FY 2011 budget, passed halfway through the fiscal year, reduced funding to \$663 million: \$540 million for the 11 Tier I cities and \$121 million for 20 Tier II cities.<sup>53</sup> This spending reduction is long overdue, but Congress can do better. Proposed grant budgets for FY2012 provide for \$1 billion in total grants, a two-thirds reduction from historical levels, but the cuts face heavy opposition.<sup>54</sup>

If the al-Qaeda network can be defeated by giving federal funds to localities for unused biological warfare equipment, armored vehicles, and extravagant checkpoints at barely-used border crossings, then the United States can declare victory now. Of course al Qaeda can't be defeated this way, and leaders in Congress should stop using homeland security grants as a way to direct money into their home districts. Homeland security grant programs can be significantly reduced without endangering public safety.

## Flying the Unfriendly Skies

DHS expenditures in aviation security deserve particular scrutiny. Most aviation security funds are spent on static defensive measures that are susceptible to waste, questionable in their potential for success, or may be more effectively delivered by the private sector than the government. Moreover, the controversial Advanced Imaging Technology (AIT) units, or "body scanners," fail a cost-benefit analysis. Congress should privatize airport screeners and pass the financial burden of passenger aviation security from the taxpayer to the flying public.

Prior to 9/11, airports and airlines were responsible for airport screening. In the wake of the terrorist attacks, Congress enacted the Aviation and Transportation Security Act, which (1) created the Transportation Se-

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curity Administration (TSA), (2) federalized airline passenger screening, (3) expanded the Federal Air Marshal Service, and (4) mandated the installation of hardened cockpit doors.<sup>55</sup> Since the TSA took over, the number of airport screeners on the federal payroll has grown from 20,000 to 48,000.<sup>56</sup>

Aviation security in the United States is on the wrong track because it is viewed by policymakers as a public good when it is in fact a private good. Aviation security measures continue to escalate in intrusiveness and cost without regard for cost-effectiveness because the American taxpayer is always footing the bill. Once privatized, only cost-effective security programs will be retained, and the flying public will have the level of security that it is willing to pay for.

**From Shoe Checks to Body Scanners**

When terrorist plots directed at commercial aviation became more inventive, aviation security authorities adopted reactive pre-screening procedures. For example, after Richard Reid’s attempted detonation of a “shoe bomb,” the TSA announced new rules requiring airline passengers to remove their shoes for explosive screening or x-ray analysis. And after authorities discovered a plot to bring liquid explosives onto airliners in 2006, the TSA placed restrictions on the quantity of liquids in passengers’ carry-on luggage.

The latest trend in airport security is the use of “body scanner” machines that can see beneath the traveler’s clothing.<sup>57</sup> Current policy allows for the screening of all passengers by either (1) body scanner machines or (2) magnetometer screening supplemented with a “pat-down” search. Advocates of body scanners argue that explosives hidden under clothing, such as the bomb carried by Farouk Abdulmutallab in the attempted Christmas Day bombing in 2009, require expanded use of body scanners.<sup>58</sup>

Yet the case for body scanners has been overstated. In a recent study, academics Mark G. Stewart and John Mueller assumed that body scanner technology had a 50 percent

chance of successfully accomplishing each of the following three tasks: (1) preventing a suicide bomber from boarding an aircraft; (2) preventing detonation of an explosive device because the use of the AIT prevented bomb construction with detectable and reliable materials; and (3) preventing a suicide bomber from getting a bomb past security that was large enough to down an aircraft.<sup>59</sup> The study concluded that to be cost-effective, body scanner machines “every two years would have to disrupt more than one attack effort with body-borne explosives that otherwise would have been successful despite other security measures, terrorist incompetence and amateurishness, and the technical difficulties in setting off a bomb sufficiently destructive to down an airliner.”<sup>60</sup>

The GAO’s review of body scanners found that “it remains unclear whether the [body scanner technology] would have been able to detect the weapon Abdulmutallab used in his attempted attack.”<sup>61</sup> Body scanners are effective in detecting high-density objects (such as guns, knives), and hard explosives (such as C-4), but less so with low-density materials like thin plastics, gels, powders, and liquids. Airplane bombing plots have already focused on liquid explosives.<sup>62</sup> An undercover TSA agent recently snuck a firearm through AIT machines at the Dallas/Fort Worth International Airport several times, showing a weak point of the system—the attentiveness of the officers monitoring the machine, a weakness not shared by the traditional metal detector system.<sup>63</sup>

Another weakness of body scanner technology is that it can be easily defeated by terrorists who are willing to place explosives *inside* their bodies. As one commenter notes, “all males have a body cavity. Females have two body cavities. In prisons, these body cavities are habitually used to smuggle drugs and improvised weapons past body searches, including strip searches.”<sup>64</sup>

Terrorists have already employed explosives hidden in a body cavity, but not yet on an airplane. On August 28, 2009, Prince Mohammed bin Nayef, the Saudi deputy

Interior minister and leader of that nation's counterterrorism efforts, survived an attempted assassination.<sup>65</sup> Abdullah Hassan Taleh al-Asiri, a member of al Qaeda in the Arabia Peninsula, the same organization that sponsored failed Christmas Day bomber Abdulmutallab,<sup>66</sup> detonated a bomb hidden inside his anal cavity while meeting with Prince Mohammed to discuss the terms of Asiri's "surrender" to the Saudi kingdom and entry into an amnesty program. While the attack only injured Prince Mohammed, terrorists might use the same method to smuggle explosives aboard a plane, remove them in the plane's restroom, and place them against the hull of the aircraft.

For all of the above reasons, spending large amounts of money on body scanners is a wasteful use of counterterrorism dollars. Canceling a broader implementation of body scanners will result in some savings: the TSA has installed almost 500 scanners, and hopes to install up to 1,000 by the end of 2011, at a cost of \$150,000 to \$180,000 per unit.<sup>67</sup> The real savings are in personnel costs, where taxpayers can save \$340 million annually by simply not hiring the additional employees that are needed to operate body scanner machines.<sup>68</sup>

Taxpayers should also stop footing the bill for more body scanner machines because they may be paying for another form of the technology within a few years. DHS revealed in July 2011 that al Qaeda in the Arabian Peninsula was interested in surgically implanting bombs in the human body, sparking discussion of the next generation of scanner technology, one that will see *through* the human body.<sup>69</sup> If unsuccessful terrorist attempts to acquire and employ sophisticated technology such as weapons of mass destruction are any indicator, this threat is hyped beyond terrorists' ability to actually deliver such a weapon.<sup>70</sup> In any event, surgically implanted bombs may not prove effective in bringing down an airplane; as the attempted Saudi assassination demonstrates, the bearer of the bomb absorbs a significant amount of the bomb's force. The decision to purchase the

next generation of body scanners should be borne by the aviation industry and the flying public, where it will face more intense scrutiny than in Congress.

### **Constitutional Questions and Mission Creep**

TSA checkpoints were established to thwart terrorists, but that objective does not make all TSA actions proper. Current screening practices—AIT machines or full body pat-downs—push at the boundaries of constitutional principles governing searches and seizures. In some instances, screeners have expanded their searches to discover evidence of *any* crime or wrongdoing, an unconstitutional practice beyond the TSA's limited aviation security authority.

The Constitution bars government authorities from engaging in unreasonable searches and seizures. While the Supreme Court has upheld brief, suspicionless seizures at highway checkpoints to deter drunk driving<sup>71</sup> and to intercept illegal immigrants,<sup>72</sup> checkpoints may not be employed to pursue general crime control.<sup>73</sup> Airport searches, however, are administrative in nature and individuals entering certain areas of an airport have a reduced expectation of privacy.<sup>74</sup> Taking the special needs of aviation security into consideration, federal courts have held that suspicionless searches of all passengers prior to boarding are constitutionally permissible.<sup>75</sup>

AIT scanners were designed as a secondary screening device, but their use as a primary means of passenger screening fails the legal tests set forth by federal courts. Courts have consistently upheld blanket application of a magnetometer—a "metal detector"—as a means of primary screening, with use of a metal detection wand or pat-down for those who set off the magnetometer.<sup>76</sup> As law professor Jeffrey Rosen points out, the language of the decisions upholding the pre-AIT screening regime may lead a court to conclude that the newer (and more intrusive) screening regime is unconstitutional.<sup>77</sup> One federal appellate court held in 2007 that "a

**TSA checkpoints were established to thwart terrorists, but that objective does not make all TSA actions proper.**

**Checkpoint mission creep prompted a policy change after agents harassed Steven Bierfeldt, a staffer for Campaign for Liberty.**

particular airport screening search is constitutionally reasonable provided that it ‘is no more extensive nor intensive than necessary, in light of the current technology, to detect the presence of weapons or explosives.’”<sup>78</sup> In 2006 then-judge (now Supreme Court justice) Samuel Alito likewise ruled that a magnetometer (primary) and wand (secondary) screening regime was “minimally intrusive” and “well-tailored to protect personal privacy.”<sup>79</sup>

The Electronic Privacy Information Center (EPIC) filed suit against DHS on the basis of the primary-secondary screening issue, claiming that “the TSA body scanner rule subjects all travelers to the most invasive search available as primary screening, without any escalation.”<sup>80</sup> While the D.C. Circuit rejected this argument and constitutional objections, it did order the TSA to go through a notice-and-comment rulemaking procedure, which will force that agency to respond to public complaints about the invasiveness and effectiveness of screening procedures.<sup>81</sup>

Ultimately, this controversy may be settled by technology, not a federal court. Software is available that renders a stick-figure image of a person passing through an AIT machine, and a red dot on the image highlights potential threats for secondary screening.<sup>82</sup> This modification greatly reduces privacy concerns for passengers, and implementation of this software may blunt criticism of AIT scanners.

The fact that the federal government is the primary provider of airport screening creates concerns other than revealing body scanner images, particularly when TSA screeners unlawfully detain travelers or look for evidence of crimes outside of the aviation security field.

A consistent body of checkpoint case law bars TSA screeners from looking for evidence of crimes beyond plots against aviation security, a reminder that persons do not surrender all liberties or expectations of privacy while traveling.<sup>83</sup> Courts will exclude evidence obtained by checkpoint searches

that exceed the scope of TSA’s aviation security mission.<sup>84</sup>

Checkpoint mission creep prompted a policy change after agents harassed Steven Bierfeldt, a staffer for Campaign for Liberty, a nonprofit libertarian political organization. Bierfeldt had just left a convention in Missouri and was flying out of Lambert-St. Louis International Airport when he was subjected to an unlawful detention by TSA screeners.<sup>85</sup> Bierfeldt was carrying \$4,700 in a lockbox from the sale of tickets, apparel, and paraphernalia associated with Campaign for Liberty. TSA screeners considered that amount of cash suspicious, and took Bierfeldt to a private screening room to interrogate him, threatening him with arrest and prosecution unless he revealed the source and purpose of the money. Bierfeldt was eventually released, but he surreptitiously recorded the detention and questioning with his cell phone.

The American Civil Liberties Union (ACLU) filed suit on Bierfeldt’s behalf, alleging that “TSA agents are instructed as a matter of standard operating procedure to search for ‘contraband’ beyond weapons and explosives,” a practice that exceeds TSA’s statutory authority.<sup>86</sup> In response to the lawsuit, the TSA revised its screening guidelines in the fall of 2009.<sup>87</sup> The new directives tell TSA employees that “screening may not be conducted to detect evidence of crimes unrelated to transportation security.”<sup>88</sup>

Yet there is reason to suspect that the revision of screening policies has not deterred TSA employees from fishing for contraband or evidence of crimes beyond the agency’s aviation security mandate. TSA screeners scrutinized Kathy Parker, a business manager, in apparent violation of the new guidelines while she was departing from Philadelphia International Airport.<sup>89</sup> Parker was carrying an envelope with a deposit slip and \$8,000 worth of checks made out to her and her husband. As Philadelphia police officers joined the TSA screeners, Parker was told that they suspected her of embezzling the money and leaving town in a “divorce situ-

ation” because the checks were “almost sequential.” Only after police tried unsuccessfully to contact her husband by phone did they decide to release Parker and allow her to leave the security checkpoint. Clearly this detention had nothing to do with aviation security.

Some experts advocate an adoption of Israeli-style interrogations in lieu of body scanners or other technological approaches, an invitation to more TSA mission creep.<sup>90</sup> This methodology could not be scaled up from the relatively small Israeli aviation market and applied in the United States without at least quintupling (probably more) the TSA’s annual budget.<sup>91</sup> In spite of this, the TSA has recently started a pilot program at Logan International Airport in Boston that uses brief interrogations to identify potential threats.<sup>92</sup> This expansion of the preexisting Screening of Passengers by Observation Techniques (SPOT) program seems unlikely to ferret out any terrorists. SPOT has helped arrest 2,000 criminals since 2003, but none have been charged with terrorism.<sup>93</sup> Encouraging behavioral screening may produce more nonterrorism arrests, but it will also produce false positives that burden the flying public with the prospect of detention and law enforcement investigation, all based on the hunch of a TSA screener. And as the Bierfeldt and Parker cases demonstrate, these hunches may be based on poor judgment and exceed the TSA’s limited aviation security mission.

TSA mission creep is not limited to airports, as trains, buses, boats, and subways may soon have airport-style security.<sup>94</sup> Placing checkpoints on these other forms of mass transit also represents a costly reversal of policy. Former secretary of Homeland Security Michael Chertoff opposed expansion of airport procedures to bus and train terminals after the London commuter bombings because of the insurmountable cost of defending an enormous number of transit targets.<sup>95</sup> The trial deployment of a joint DHS team to a Tampa bus station gave a preview of what expanded TSA jurisdiction would look

like.<sup>96</sup> Officers from TSA checked passengers for bombs, Customs and Border Protection (CBP) agents checked the immigration status of travelers, and Immigration and Customs Enforcement (ICE) agents looked for drugs and large amounts of cash. Although those activities are conducted separately on a routine basis, the synergistic effect of surrendering privacy on multiple fronts presents exactly the kind of general law enforcement checkpoint that the Constitution was written to prevent.

### **Privatize Aviation Security**

The clearest way to reduce spending on airport screening and prevent TSA mission creep is to re-privatize airport security. That would save \$3 billion and place financial responsibility for security where it belongs—with the passengers, airlines, and airports, not the taxpayer.<sup>97</sup>

Using private passenger screeners in lieu of TSA employees will provide savings for the taxpayer without reducing aviation security. Contract screeners are already employed at over a dozen airports under the Screening Partnership Program (SPP).<sup>98</sup> BearingPoint, a management and consulting contractor, conducted a study of the SPP airports and found that those screeners performed consistent with or better than TSA screeners, while screening costs were marginally reduced in most cases.<sup>99</sup> TSA has consistently argued that private sector screeners would be more expensive, but the GAO questioned the TSA’s methodology in comparing airport screening costs.<sup>100</sup>

Allowing airports the latitude to organize and manage their own security will further increase performance. The GAO response to the TSA pilot program assessment found that while “TSA officials said they had not granted contract officials more flexibility because they wanted to ensure that procedures were standardized, well coordinated, and consistently implemented throughout all airports to achieve consistent security,” the airports employed practices that “enabled the private screening contractors to achieve

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efficiencies that are not currently available at airports with federal screeners.”<sup>101</sup>

Private passenger screening will also reduce costs because of the two-tier security in place; while TSA employees conduct the bulk of passenger screening, cargo screening and other aviation security duties remain the responsibilities of airports. Removing this artificial separation of responsibility would allow airports to reduce costs further.

### **Unionization Will Not Improve Aviation Security**

Unfortunately, the TSA is limiting the Screening Partnership Program to the 16 airports currently involved,<sup>102</sup> and TSA screeners are unionizing.<sup>103</sup> Unionization of airport security will put a flawed set of incentives in place: if employees know that they can be fired for ineffectiveness in screening, they are more likely to remain alert. The same cannot be said for federal employees, who are notoriously hard to fire.<sup>104</sup> Indeed, a recent analysis by *USA Today* found that some workers are more likely to die of natural causes than get laid off or fired.<sup>105</sup>

Just as it has harmed Customs and Border Protection (CBP), unionization will weaken aviation security. The Federal Labor Relations Authority (FLRA), the appellate authority for collective bargaining arbitrations, has gone overboard in upholding CBP employee grievances on basic issues of performance and discipline. For example, the FLRA upheld an arbitrator’s decision to overturn a three-day suspension for falling asleep on the job.<sup>106</sup> The FLRA also upheld an employee grievance against changing the number of hours of remedial firearms training when a Border Patrol agent is deficient in firearms qualification.<sup>107</sup>

CBP is also required to negotiate with union representatives on the reassignment of employees, a problematic requirement in the aviation security context.<sup>108</sup> Air carriers already move faster than the TSA when changing schedules and volume on routes, creating a local surplus or deficit of screeners until the TSA can shift employees.<sup>109</sup> A re-

cent congressional study highlighted the use of the National Deployment Force, a pool of TSA screeners that deploy to offset seasonal demand and other labor shortages at non-SPP airports, at significant additional cost to cover travel expenses.<sup>110</sup> Allowing TSA screeners to engage in collective bargaining will further hamper the ability of that bureaucracy to adapt to changing circumstances. Congress should privatize airport screening rather than see it burdened by collective bargaining.

### **Real Privatization**

Real privatization would not, however, merely consist of expanding the Screening Partnership Program. In SPP airports, TSA picks the contractor that will provide screening services, pays the contractor, and ensures that the contracted screeners apply TSA screening protocols.<sup>111</sup> Real privatization would allow airports and airlines to decide who will provide passenger screening and pay for security with private, not public, funds.

The biggest obstacle to re-privatization of airport security is that private aviation stakeholders—airlines, airports, and screening contractors—do not want to bear legal responsibility for a terrorist attack. With regard to liability, there are two options facing policymakers. If aviation security liability must be limited in order to move toward a free market model, Congress has already created a path for doing so. Airports and security contracting firms can apply for certification under the Support Anti-Terrorism by Fostering Effective Technologies (SAFETY) Act, a federal law that limits their liability.<sup>112</sup>

The better answer is that airport and airline liability should not be capped. Limiting liability handicaps the market incentives that provide for effective security. The insurance industry and businesses in general have adapted to terrorism. A recent insurance study found that 27 percent of businesses purchased terrorism insurance in 2003, whereas 61 percent purchase it now.<sup>113</sup> Terrorism insurance rates have dropped consistently since the 2001 attacks, and firms can now insure

a \$303 million property for \$9,541 per year, a small fraction of total insurance costs.<sup>114</sup> The commercial aviation industry can—and should—provide its own security.

### **Air Marshals versus Flight Deck Officers: A Cost-Benefit Analysis of Deterrence**

Aviation security funding is often mispent. The federal government allocates funds for armed personnel on passenger flights through two programs: (1) the Federal Air Marshal Service (FAMS), and (2) the Federal Flight Deck Officer (FFDO) program, which arms pilots to repel hijackers.<sup>115</sup> The idea of having an air marshal present to deal with any terrorist attack on passenger aviation is attractive. Unfortunately, the reality is that air marshals cost too much to protect even a small fraction of aviation traffic, and terrorist attacks on aviation have largely moved away from hijacking to bombing. Federal counter-hijacking efforts should focus on arming pilots and abolishing FAMS.

The number of air marshals increased from 33 in 2001 to an undisclosed number in the thousands over the last nine years (the actual number of air marshals is classified). The Federal Air Marshal Service has produced little on such a large investment, and the service can be cut without negatively affecting aviation security. The service averages 4.2 arrests each year, and current appropriations are \$860 million, meaning that each arrest costs an average of \$215 million.<sup>116</sup>

To be sure, arrests are not the only metric that matters; the *potential* of having a police agent trained in rapid close-quarters marksmanship is itself a deterrent to hijacking. But the deterrent achieved must be weighed against the cost. With air marshals covering no more than 10 percent of the passenger flights in the United States, policymakers must consider whether \$860 million is worth (at best) a one-in-ten chance of having an air marshal present to counter any particular terrorist plot.<sup>117</sup> Post-9/11 proposals to place, as Israel has, air marshals on all flights, would prove exorbitantly expensive.<sup>118</sup> Assuming that costs remain pro-

portional, moving from 10 percent coverage to placing air marshals on all flights would cost \$8.6 billion annually—more than is currently spent on the whole of the TSA.

One study, which assumed air marshal presence on 10 percent of all flights, still found that the cost per life saved was \$180 million, far more than the \$1 million to \$10 million that the Office of Management and Budget recommends. Hardened cockpit doors proved more cost-effective, with an estimated \$800,000 spent per life saved.<sup>119</sup>

Arming pilots is a cost-effective alternative to air marshals. Commercial pilots have volunteered in significant numbers for the FFDO program, only to face repeated bureaucratic obstacles.<sup>120</sup> Seventy percent of commercial pilots have military experience with firearms.<sup>121</sup> And while the training requirements for FFDO status are lower than those for an air marshal, the FFDO role is different; he or she is merely trying to prevent terrorist access to the cockpit, a much simpler task than the arrest of hijackers in the passenger compartment. Economist John Lott notes that “terrorists can only enter the cockpit through one narrow entrance, and armed pilots have some time to prepare themselves as hijackers penetrate the strengthened cockpit doors.”<sup>122</sup> The firearm storage policy imposed on FFDOs, which requires them to put a padlock through the trigger guard of the handgun while it is in its holster, creates the foreseeable risk of pressing the trigger against the lock and has already caused one accidental discharge in the cockpit of an airliner.<sup>123</sup> This requirement should be removed and the FFDO program expanded (or the certification for arming pilots simply left to the airlines) to provide additional deterrence to would-be hijackers at significantly reduced expense. TSA spends \$25 million each year on FFDO and crew training and \$860 million on air marshals.<sup>124</sup> Congress should abolish the Federal Air Marshals Service. If airlines believe that this program is worth funding, they should be free to replicate it on their flights, passing the cost on to their passengers—and not the taxpayers.

**Arming pilots is a cost-effective alternative to air marshals.**

**Agencies with new domestic counterterrorism responsibilities have an incentive to over-report potential threats in order to justify their continued existence.**

Arming counter-hijacking personnel is only a small part of the security picture. As security expert Bruce Schneier notes, “only two effective countermeasures were taken in the wake of 9/11: strengthening cockpit doors and passengers learning they need to fight back.”<sup>125</sup> Airline passengers have taken an active part in thwarting terrorist attackers, such as “shoebomber” Richard Reid in 2001, and Farouk Abdulmutallab in 2009. In both instances, passengers quickly tackled the would-be bombers when foul play was suspected. Airline passengers’ heightened alertness post-9/11 is also evident in the many instances where they have subdued unruly or intoxicated fellow travelers.<sup>126</sup> While TSA director John Pistole has called TSA screeners the “last line of defense,”<sup>127</sup> the TSA website actually bestows that honor on the passengers, listing them as the last of 21 layers of aviation security.<sup>128</sup> Airlines recently asked that air marshals be moved out of first-class seats, a tacit recognition that the nature of the terrorist threat to aviation has changed from hijacking to in-flight explosives.<sup>129</sup> Policymakers should go further and simply abolish the Federal Air Marshal Service.

## **Reforming Domestic Counterterrorism**

The post-9/11 increase in funding for counterterrorism intelligence has not necessarily resulted in a proportional increase in security gains. There are two problems. First, the growth of the intelligence community has created considerable overlap in intelligence responsibilities, and that overlap has impeded the identification of national security threats. Second, agencies with new domestic counterterrorism responsibilities have an incentive to over-report potential threats in order to justify their continued existence.

### **Using Constitutional Filters to Focus on Viable Leads**

When police investigative methods are

used within our constitutional framework, they can be effective against terrorists in the United States. Individuals engaging in terrorist acts will invariably violate criminal laws. In that sense, domestic counterterrorism is domestic law enforcement.

The Code of Federal Regulations provides a definition for “terrorism” with two components: an act, “the unlawful use of force and violence against persons or property,” united with an intent, “to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.”<sup>130</sup> The simple expression of political views, however bizarre or vile, does not fall within the parameters of the terrorism statute. The law does not require a successful terrorist attack before an arrest can be made; conspiracies to commit a crime of violence are also unlawful, and can be investigated in order to prevent attacks from occurring in the first place.

The Constitution provides a filter for identifying worthwhile leads. That filter is probable cause.<sup>131</sup> The probable cause requirement is a help, not a hindrance, to effective law enforcement and domestic counterterrorism. As former undercover FBI agent Mike German puts it, “requiring the police to present evidence of probable cause to a neutral arbitrator before a search or arrest simply ensures the police will not waste time searching for nonexistent evidence and bothering innocent people.”<sup>132</sup>

Each terrorist attack is followed by a predictable lament that intelligence officials were unable to “connect the dots.” The problem may be increasingly one not of internal hurdles that prevent officials from talking to each other to connect the dots, but an obsession on collecting as many dots as possible, making effective analysis impossible. Collecting the dots is a necessary part of police work and counterterrorism, but without a filter to determine which dots add up to an indication of terrorist intent, collecting more dots will be counterproductive.

Many investigations begin with the gathering of information on otherwise lawful

activity that, when aggregated and analyzed, seems to give an indication of criminal intent or action. Buying a ski mask or a gun is lawful, but government surveillance of all of those with guns or ski masks would be an absurd way to try to identify potential bank robbers. Millions of false positives would be produced. So too with purchases of box cutters and airplane tickets. The 9/11 hijackers were more readily identifiable by an indicator more closely connected with an intent to do harm—an interest in flight schools.

The FBI organizes domestic counterterrorism efforts under Joint Terrorism Task Forces (JTTFs), which are partnerships between local, state, and federal law enforcement agencies. DHS subordinate agencies, such as the Secret Service and Immigrations and Customs Enforcement, provide agents to JTTFs.

Good police work has produced hundreds of terrorism convictions since 2001.<sup>133</sup> Police officers have successfully infiltrated or conducted surveillance of suspicious groups to prevent attacks, and investigated attacks after they have happened in order to prosecute terrorists. Domestic counterterrorism is a law enforcement function, and keeping government within the bounds dictated by the Constitution is both more likely to apprehend real terrorists and avoid labeling large portions of the American public as threats to national security.

### **Adding More Hay to the Haystack Does Not Help the Government Identify Terrorists**

The growth in intelligence spending since 2001 has resulted in such a massive amount of intelligence reporting that no one in government can make serious use of it.<sup>134</sup> Intelligence officials readily admit that the amount of information gathered is unwieldy. As one senior official has said, “I’m not going to live long enough to be briefed on everything.”<sup>135</sup>

The attempted Christmas Day bombing of an international flight by Farouk Abdulmutallab in 2009 demonstrated how a massive collection of intelligence can actually be

counterproductive. Before the attack took place, President Obama ordered a secret military task force to Yemen to track down leaders of al Qaeda in the Arabian Peninsula. The task force began to collect information about the terrorist organization for analysis, hoping to pinpoint the threat and then preempt it. As the *Washington Post* reported, “that was the system as it was intended. But when the information reached the National Counterterrorism Center (NCTC) in Washington for analysis, it came buried within the 5,000 pieces of general terrorist-related data that are reviewed each day. Analysts had to switch from database to database, from hard drive to hard drive, from screen to screen, just to locate information that might warrant further study.”<sup>136</sup>

As terrorist activity increased, “the flood of information into the NCTC became a torrent.” Vague clues about a “Nigerian radical who had gone to Yemen” and the “report of a father in Nigeria worried about a son who had become interested in radical teachings and had disappeared inside Yemen” were lost in the deluge of information. Abdulmutallab left Yemen, boarded a plane in Amsterdam bound for Detroit, and was fortuitously tackled by a passenger as he tried to detonate explosives hidden within his pants. In this case, as in many others, the last line of defense—airline passengers—succeeded where government had failed.

### **Case Study: The Rise of Fusion Centers**

Fusion centers are state, local, and regional information- and intelligence-sharing institutions that were created to improve the flow of information between law enforcement agencies. Federal guidelines published by the departments of Justice and Homeland Security define them as “a collaborative effort of two or more agencies that provide resources, expertise, and information to the center with the goal of maximizing their ability to detect, prevent, investigate, and respond to criminal and terrorist activity.”<sup>137</sup>

Local officials created fusion centers in order to work around the problem of FBI

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policies that precluded sharing information with local and state agencies. Local officers working in a JTTF are barred from sharing information with their parent organization. Fusion centers, formed initially as partnerships between state and local entities, do not have these information-sharing restrictions, and so they grew in number and scope as a result.

Traditional law enforcement standards of investigation, intended to comply with constitutional requirements, filter out bad information and narrow investigations down to productive leads. Fusion centers, however, exemplify the trend in overspending and duplication of effort in counterterrorism intelligence.

Fusion center supporters have difficulty demonstrating the need for continued funding for their operations. When asked by the *Washington Post* for some examples of fusion center successes, one state official cited the arrest and detention of a Muslim man for videotaping the Chesapeake Bay Bridge.<sup>138</sup> The man, an American citizen, was ultimately released and was not charged with a crime.

Another case frequently cited as a fusion center success did not even require fusion center involvement.<sup>139</sup> In 2005 four men were arrested for a plot to bomb buildings in the Los Angeles area. Los Angeles police officers tracked a cell phone left behind at an armed robbery, then arrested the man and an accomplice after the pair conducted another stickup. The search of the primary suspect's apartment revealed knives, bulletproof vests, jihadist propaganda, and documents outlining a plan for a terrorist attack. A phone call to federal counterterrorism authorities led to two additional arrests. In this instance, the advertised "benefit" of fusion centers was really the ability of a local police officer (who was not working in a fusion center) to *call the FBI*. Repeating that sort of success does not require an additional layer of bureaucracy—all that is needed is the training of local and state police officers as to what may constitute evidence of a terrorist plot.

Although local and state authorities play a key role in preventing and responding to terrorist threats, the FBI already has a "no terrorism lead goes unaddressed" policy that makes fusion centers a bureaucratic redundancy.<sup>140</sup> The burden should be on DHS to show why claimed fusion center successes are a result of their unique duplication of FBI effort, and why coordination of counterterrorism information should not be centered in JTTFs or FBI Field Intelligence Groups instead.<sup>141</sup>

In 2007 the ACLU published a report that highlighted several bureaucratic realities underlying the creation of fusion centers.<sup>142</sup> First, it would be expensive for police officers who do not work for the federal government to get and maintain security clearances.<sup>143</sup> Second, state and local agencies correctly surmised that they have a role in preventing terrorist attacks and created fusion centers to share information and fill this role. Third, it also seems likely that DHS officials felt a need to create a domestic intelligence capability in order to be taken seriously by the Department of Justice and FBI on counterterrorism matters.

A good example of this duplication of effort is the Los Angeles fusion center, the Joint Regional Intelligence Center (JRIC). The JRIC maintains a squad known as CT-6, which vets all but the obviously worthless tips. Since the FBI Joint Terrorism Task Forces have an identical procedure, it seems wasteful to have a JTTF and the JRIC in the same city, possibly pursuing the same leads. If the two entities coordinate which of them will pursue individual tips, something that seems likely with the presence of FBI agents in the JRIC, then this undermines the argument for creating fusion centers in the first place. One fusion center expert likens a lack of FBI-fusion center coordination to a reinstatement of the bureaucratic barriers that left America vulnerable to al Qaeda's attack: "Without [an FBI-fusion center] loop, we're operating the way things were before 9/11, where we uncovered the dots, but don't connect them in time."<sup>144</sup> Eliminating fusion

centers would route terrorism information into one pipeline instead of two.

The use of local officers affiliated with a JTTF to screen tips is a sensible employment of resources; if the FBI were to modify some of its classification policies so that local agencies would have the benefit of information from such squads within the JTTF, then it seems unlikely that fusion centers would be able to justify their continued existence. Many fusion centers advertise the fact that they are co-located with JTTFs to demonstrate their information-sharing utility. However, that is not a reason to maintain fusion centers—it is instead a reason to merge their responsibilities into the JTTF itself.

As the ACLU report points out, the gap that the fusion centers sought to fill was not big enough to justify their existence. As a result, fusion centers have expanded their workload to “all-crimes, all-hazards” in order to qualify for a broader range of grant monies. “This expansion of the articulated mission of fusion centers reflects an evolving search for purpose, bounded on one side by the need not to duplicate the mission of existing institutions such as federal agencies and state Emergency Operations Centers, and on the other by the desire to do something that is actually useful.”<sup>145</sup>

Perhaps the most controversial things associated with fusion centers are the threat reports that they produce. Many reports make blanket assertions that do little to identify real threats. Some amount to counterterrorism by demographics. For example, the police-run Virginia Fusion Center (VFC) described the commonwealth’s universities as potential hotbeds for terrorist recruiting, taking special note of historically African American postsecondary schools and student groups: “While the majority of individuals associated with educational institutions do not engage in activities of interest to the VFC, it is important to note that University-based student groups are recognized as a radicalization node for almost every type of extremist group.”<sup>146</sup> Citizens cannot obtain information about the VFC; the Virginia General As-

sembly enacted a law in 2008 exempting the center from transparency laws.<sup>147</sup>

The North Central Texas Fusion System produced a report in February 2009 suggesting that state law enforcement agents should monitor the lawful lobbying activities of Islamic groups.<sup>148</sup> That report singles out communities that have made accommodations for Muslim residents, such as the installation of footbaths in the Indianapolis airport, then notes, somewhat ominously, that “tolerance is growing in more formal areas” when discussing the expansion of Islamic finance.<sup>149</sup> “Given the stated objectives of these lobbying groups and the secretive activities of radical Islamic organizations, it is imperative for law enforcement officers to report these types of activities to identify potential underlying trends emerging in the North Central Texas region.”<sup>150</sup> This report seems tailor-made to encourage surveillance and reporting that has more to do with left-right culture wars than aiding the police in identifying activities that produce a reasonable suspicion that crime is afoot.

The Missouri Information Analysis Center, another fusion center, produced a report that labeled anyone with minority-party political paraphernalia as a potential terrorist. “Political Paraphernalia: Militia members most commonly associate with 3rd party political groups. It is not uncommon for militia members to display Constitutional Party, Campaign for Liberty, or Libertarian material. These members are usually supporters of former presidential candidates Ron Paul, Chuck Baldwin, and Bob Barr.”<sup>151</sup>

Fusion centers represent an unfortunate return to treating lawful dissent as a threat to society. The FBI’s Counter Intelligence Program (COINTELPRO) and “red squads” of urban police departments that infiltrated innocuous student groups and peace activists during the Cold War have their heirs in today’s fusion centers. In the 1960s the decision to spy on communists, anti-war protesters, and the civil rights activists was a conscious one. In contrast, fusion centers’ search for purpose and the “all-crimes, all-

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hazards” approach stems from a make-work incentive. There are not enough terrorists to go around; the police and the FBI already identify and prosecute potential terrorists whenever possible, so fusion centers seem to be treating mere political dissent as a threat without any indication of violent intent in order to justify their continued existence.

Instead of limiting investigation and prosecution to real threats, police surveillance of lawful political activity is evident across the nation. At its Spy Files website, the ACLU has compiled dozens of accounts of political surveillance by local, state, and federal law enforcement officials, military organizations, and private corporations over the last decade.<sup>152</sup> Most recently, the Pennsylvania State Homeland Security Office suspended funding for a contractor after it came to light that the contractor had conducted surveillance on and reported the activities of a broad swath of peaceful protest groups.<sup>153</sup> One of the contractor’s reports is long on beliefs but short on threats to public safety: it provides dates and information about upcoming local rallies or planned protests associated with anarchist, Irish, Muslim, anti-war, anti-gas drilling, anti-nuclear power, anti-Muslim, Tea Party, anti-Tea Party, environmental, anti-rodeo, and anti-deportation organizations—yet only reports one prior instance of civil disobedience associated with any of those groups.<sup>154</sup>

### **DHS Supervision of Fusion Centers Will Compound Their Problems**

Because of the remarkable growth of fusion centers nationwide, DHS has created a unit to oversee them, the Joint Fusion Center Program Management Office (JFC-PMO).<sup>155</sup> The aggregation of fusion center reporting and the creation of a national network will only amplify the faults that fusion centers have. Fusion centers looking for larger data pools may now have access to other states’ information, making it easier to publish overblown and unfounded conclusions.

Interstate information-sharing agreements may also make it easier for fusion

centers to race to the bottom with respect to oversight and transparency laws, storing data in jurisdictions where it is least likely to face scrutiny. DHS seems an unlikely agency to provide more accountability for civil liberties in fusion center practices: in July 2010 an internal DHS e-mail obtained by the Associated Press revealed that political appointees at DHS deflected Freedom of Information Act (FOIA) requests by seeking information about requesters above and beyond what is required by law, such as finding out the individuals’ political affiliations and leanings in order to assess potential political blowback from the release of documents.<sup>156</sup>

DHS officials have repeatedly made the case that federal oversight will help fusion centers “respect and protect the privacy, civil rights, and civil liberties of American citizens.”<sup>157</sup> Indeed, the DHS privacy office issued a report finding potential problems with fusion center mission creep and a “lack of guidance on privacy while sharing or storing information.”<sup>158</sup>

Past DHS treatment of dissent as a stand-alone indicator of terrorist threat ought to concern people across the political spectrum. In a May 2003 advisory, DHS warned local law enforcement agencies that terrorists may include those who “expressed dislike of attitudes and decisions of the U.S. government.”<sup>159</sup> More recently, a DHS official assigned to the Wisconsin Statewide Information Center, issued a “threat assessment” warning about both pro-life and pro-choice groups present at a February 2009 rally. An internal review found that the report had violated intelligence-gathering guidelines.<sup>160</sup>

In 2009 DHS released its most publicly criticized threat assessment, *Rightwing Extremism: Current Economic and Political Climate Fueling Resurgence in Radicalization and Recruitment*, which labeled millions of innocent Americans potential terrorists.<sup>161</sup> The report detailed how “rightwing extremists” could be motivated by political issues such as “immigration and citizenship, the expansion of social programs to minorities, and restrictions on firearms ownership and use.”<sup>162</sup>

The report adopted a sweeping definition for “extremism”: “Rightwing extremism in the United States can be broadly divided into those groups, movements, and adherents that are primarily hate-oriented (based on hatred of particular religious, racial or ethnic groups), and those that are mainly anti-government, rejecting federal authority in favor of state or local authority, or rejecting government authority entirely. It may include groups and individuals that are dedicated to a single issue, such as opposition to abortion or immigration.”<sup>163</sup> The report further defined veterans returning from Iraq and Afghanistan as potential threats, and warned that “rightwing extremists will attempt to recruit and radicalize returning veterans in order to exploit their skills and knowledge derived from military training and combat.”<sup>164</sup>

Mainstream political advocacy groups were rightly offended at being labeled potential terrorists or “rightwing extremists.” For example, the head of the American Legion, a prominent veterans and civic organization, sent a letter of protest to Secretary of Homeland Security Janet Napolitano, prompting a personal visit and apology.<sup>165</sup> House Homeland Security Committee chairman Rep. Bennie Thompson (D-MS) was critical as well, “Unfortunately, this report appears to have blurred the line between violent belief, which is constitutionally protected, and violent action, which is not.”<sup>166</sup>

### **Politicized Threat Reporting Does Not Identify Terrorists**

Demand for terrorism intelligence creates bureaucratic incentives in fusion centers and other police agencies to label certain political groups as threats to national security. When intelligence analysts come to perceive their own political opposites as potential terrorists, or substitute the judgment of nongovernmental political organizations for that of the intelligence agency they work for, terrorism investigations go awry.

The trend of politicized threat reporting is nowhere clearer than in the DHS *Rightwing Extremism* and North Texas Fusion System

reports, providing left- and right-wing spin respectively. As revealed by a FOIA request filed by Americans for Limited Government,<sup>167</sup> the DHS *Rightwing Extremism* report largely outsourced its “analysis” to a non-profit organization that cited only five specific instances of violence over a span of 15 years as the basis for its broad claims about potential terrorism threats.<sup>168</sup> DHS provided a list of the sources supporting the report.<sup>169</sup> Nearly a quarter of the cited sources came from the Southern Poverty Law Center (SPLC) website. While the SPLC may be held in high regard by its donors, the government agency ostensibly responsible for domestic counterterrorism should never cede its analysis of potential threats to a private non-profit organization that may have an agenda that would be inappropriate for the federal government.<sup>170</sup> The SPLC has separately labeled the Family Research Council, a socially conservative nonprofit organization, a “hate group” for its opposition to homosexuality, and placed it in the same category as skin-head gangs and Ku Klux Klan franchises.<sup>171</sup> Political commentary should not be the basis for allocating scarce police resources.

The North Texas Fusion System report provides a mirror image of threat reporting from a combination of pro-Israel and conservative viewpoints. The report cites the Anti-Defamation League website, as well as those of Christian Broadcasting Network, *Human Events*, and *Front Page Magazine*.<sup>172</sup> These sources may provide interesting reading for their members and adherents, but their agendas should not become the basis for domestic counterterrorism. Using the political left-right divide as an organizing principle for domestic surveillance and the identification of potential threats is both ineffective as an investigative technique and damaging to political discourse in the United States.

## **Conclusion**

The Department of Homeland Security has proven to be an unnecessary and costly

**When intelligence analysts substitute the judgment of nongovernmental political organizations for that of the intelligence agency they work for, terrorism investigations go awry.**

**The Department of Homeland Security should be abolished and its components reorganized into more practical groupings.**

reorganization of government. DHS's structure complicates management, frustrates oversight, and encourages wasteful spending. DHS grant programs also distort state and local spending priorities. If America could be made safer by wasteful spending on unused decontamination gear, Congress could declare victory now.

The Department of Homeland Security should be abolished and its components reorganized into more practical groupings. The agencies tasked with immigration, border security, and customs enforcement belong under the same oversight agency, which could appropriately be called the Border Security Administration. The Transportation Security Administration and Federal Air Marshal Service should be abolished.

DHS should also get out of the domestic intelligence business. The FBI and local police agencies already handle every other domestic criminal threat, and terrorism should be no exception. Federal and state legislators should end funding to fusion centers and move whatever legitimate tip-screening and information sharing functions they provide to FBI Joint Terrorism Task Forces. Political dissent should never become a key indicator of terrorist intent.

Abolishing DHS and reorganizing its components can save billions annually and alleviate the mounting pressure on civil liberties that we have experienced under ever-expanding homeland security bureaucracy. Terrorism remains a serious problem, but a sprawling Department of Homeland Security is not the proper way to address that threat.

### Notes

1. U.S. Commission on National Security/21st Century, "Road Map for National Security: Imperative for Change," January 31, 2001, p. 15, <http://www.cfr.org/pdf/Hart-Rudman3.pdf>.
2. See Raymond J. Decker, director, Defense Capabilities and Management, "Combating Terrorism: Observations on Options to Improve the Federal Response," Testimony before the Subcommittee on Economic Development, Public Buildings, and Emergency Management of the

House Committee on Transportation and Infrastructure, and the Subcommittee on National Security, Veterans Affairs, and International Relations, Committee on Government Reform, 107th Cong., 1st sess., April 24, 2001, <http://www.investigativeproject.org/documents/testimony/123.pdf>.

3. Executive Order 13228, "Establishing the Office of Homeland Security and the Homeland Security Council," October 8, 2001.

4. "The roles of the homeland security adviser and the Homeland Security Council appear to be redundant with those of the national security adviser and the NSC. For 55 years, the NSC existed to provide for the national security, but as soon as the nation was attacked at home, a new security bureaucracy was thought to be needed. By creating a new cabinet department, U.S. policymakers appear to subscribe to the strange notion that the NSC should provide for security only overseas." See "Homeland Security," *Cato Handbook for Congress: Policy Recommendations for the 108th Congress* (Washington: Cato Institute, 2003), p. 66.

5. See Helene Cooper, "In Security Shuffle, White House Merges Staffs," *New York Times*, May 27, 2009. This was originally recommended by the 9/11 Commission. See *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* [hereinafter "9/11 Commission Report"] (New York: Norton, 2004), p. 406.

6. I use the term "homeland security" only because of its commonality in policy circles. James Fallows accurately describes the term as "abhorrently un-American, odiously Teutono/Soviet." James Fallows, "Year End Pensees: More on Security," *Atlantic*, January 15, 2009, <http://www.theatlantic.com/science/archive/2009/01/year-end-pensees-more-on-security/9354/>. The concept of "homeland security" is at the root of many of the ills plaguing DHS, since its invocation justifies additional bureaucracy, clothes pork-barrel spending in a patina of patriotism, and sacrifices civil liberties in the name of over-hyped terrorist threats.

7. Jeffrey Rosen, "Man-Made Disaster," *New Republic*, December 24, 2008, <http://www.tnr.com/article/man-made-disaster>.

8. Some have argued that DHS's structure is the product of: (1) efforts by Congress to preserve committee jurisdiction in spite of changed governmental structure, cutting against the stated goals of centralization and coordination; (2) President Bush's desire to reduce resources devoted to DHS agencies' legacy regulatory mandates; and (3) a fearful American public that favored bold action in the wake of the September 11 ter-

rorist attacks. President Bush intended to swing the focus of the DHS agencies away from their regulatory duties and toward security duties, in essence moving the pendulum of government in the direction his party favored. See Dara Kay Cohen, Mariano-Florentino Cuéllar, and Barry R. Weingast, "Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates," *Stanford Law Review* 59 (2006): 714–32. Subsequent Congresses and budgets have moved DHS' focus back toward these regulatory duties and maintained elevated levels of security spending, producing a ratchet effect instead of a pendulum swing.

9. Susan B. Glasser and Michael Grunwald, "Department's Mission Was Undermined from Start," *Washington Post*, December 22, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/21/AR2005122102327.html>.

10. Quoted in *ibid.*

11. *Ibid.*

12. *Ibid.*

13. Quoted in Hearing before the House Committee on Government Reform, 107th Cong., 2nd sess., p. 2, June 20, 2002, [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_house\\_hearings&docid=f:81325.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_house_hearings&docid=f:81325.pdf). Mark Souder (R-IN) wanted to move the Drug Enforcement Administration (DEA) to DHS on the basis that "more than 4,000 Americans die each year from illegal drug use—at least the equivalent of a terrorist attack." The DEA managed to avoid that move after Director Ridge promised close coordination between the two agencies.

14. Quoted in *ibid.*, p. 79.

15. Quoted in *ibid.*, p. 103.

16. "My inclination, and it is just that, an inclination, would be to focus the department more directly on border security, information analysis and infrastructure protection. That would mean, for example, that FEMA would remain exactly where it is, that there would be no chemical, biological, radiological, and nuclear countermeasures directorate, meaning that [the Animal and Plant Health Inspection Service] would also stay where it is. Although Congress could always remove the Coast Guard, FEMA, APHIS, and the other units should the reorganization prove overly broad, my preference is to start with the most logical combinations, then add as needed. In a similar vein, no pun intended, Congress can always decide later to split the national pharmaceutical stockpile from the Public Health Service." Paul C. Light, nonresident senior fellow,

Brookings Institution, *Assessing the Proposed Department of Homeland Security*, Testimony before the Subcommittee on Civil Service, Census and Agency Organization of the House Committee on Government Reform, 107th Cong., 2nd sess., June 26, 2002, [http://www.brookings.edu/testimony/2002/0626homelandsecurity\\_light.aspx](http://www.brookings.edu/testimony/2002/0626homelandsecurity_light.aspx).

17. Quoted in Guy Gugliotta, "Unintended Tasks Face New Security Agency," *Washington Post*, June 10, 2002.

18. See House Vote on H.R. 5710 (Homeland Security Act of 2002), November 14, 2002: Library of Congress, Roll Call Vote # 477, <http://clerk.house.gov/evs/2002/roll477.xml>. See Senate Vote on H.R. 5005 (Homeland Security Act of 2002), November 14, 2002, United States Senate website, [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=107&session=2&vote=00249](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=2&vote=00249).

19. Department of Homeland Security, "Who Became a Part of the Department?" [http://www.dhs.gov/xabout/history/editorial\\_0133.shtm](http://www.dhs.gov/xabout/history/editorial_0133.shtm).

20. *9/11 Commission Report*, p. 181.

21. *Ibid.*, p. 272.

22. George P. Hatrup and Brian H. Kleiner, "How to Establish the Proper Span of Control for Managers," *Industrial Management*, November 1, 1993, p. 28.

23. Erik Auf der Heide, "The Incident Command System (ICS)," in *Disaster Response: Principles of Preparation and Coordination* (AMC, Hawaii: Center of Excellence in Disaster Humanitarian Assistance, 1989), <http://orgmail2.coe-dmha.org/dr/DisasterResponse.nsf/section/07?opendocument&home=html>.

24. FEMA Emergency Management Institute IS-200 Lesson Plan, <http://training.fema.gov/emiweb/downloads/IS200%20Lesson%20Summary.pdf>.

25. The 2006 Federal Human Capital Survey ranked 36 federal agencies with employee surveys. DHS ranked 36th in job satisfaction, 36th in results-oriented performance culture, 35th in leadership and 33rd in talent management, consistent with the 2004 survey results. DHS deputy secretary Michael Jackson issued a memorandum to all employees promising improvement. "These results deliver a clear and jolting message from managers and line employees alike. I am writing to assure you that, starting at the top, the leadership team across DHS is committed to address the underlying reasons for DHS employee dissatisfaction." Karen Rutzick, "Loud and Clear,"

- Government Executive*, April 1, 2007, <http://www.govexec.com/features/0407-01/0407-01na4.htm>.
26. Rosen, "Man-Made Disaster."
27. "Inside Washington: For Homeland Security Department, Too Much of a Good Thing?" Associated Press, May 17, 2011, [http://www.washingtonpost.com/politics/inside-washington-for-homeland-security-department-too-much-of-a-good-thing/2011/05/17/AFoPjV5G\\_story.html](http://www.washingtonpost.com/politics/inside-washington-for-homeland-security-department-too-much-of-a-good-thing/2011/05/17/AFoPjV5G_story.html); NPR, "Who Oversees Homeland Security? Um, Who Doesn't?" July 20, 2010, NPR, <http://www.npr.org/templates/story/story.php?storyId=128642876>.
28. Mike M. Ahlers, "Ground Broken on \$3.4 Billion Homeland Security Complex," CNN, September 9, 2009, <http://www.cnn.com/2009/POLITICS/09/09/homeland.security.headquarters/index.html>.
29. Tim Kauffman, "GSA, DHS Detail Plans for Consolidating Leased Office Space," *Federal Times*, March 25, 2010, <http://www.federaltimes.com/article/20100325/DEPARTMENTS03/3250306/>.
30. President George W. Bush, *Securing the Homeland, Strengthening the Nation*, Washington, February 2002, p. 8, [http://www.dhs.gov/xlibrary/assets/homeland\\_security\\_book.pdf](http://www.dhs.gov/xlibrary/assets/homeland_security_book.pdf). "The President signed the DHS Appropriations Act 2010, (P.L. 111-83) into law on October 28, 2009. The Act provides gross budget authority of \$51.9 billion for DHS for FY2010. The Act provides \$44.1 billion in net budget authority for DHS for FY2010." Jennifer E. Lake and Chad C. Haddal, "Homeland Security Department: FY2010 Appropriations," Congressional Research Service, December 14, 2009, p. 1, <http://www.fas.org/sgp/crs/homsec/R40642.pdf>. Though Congress passed the FY2011 budget, it did so halfway into the fiscal year. This paper will use FY2010 and FY2011 budgeting as appropriate.
31. John Mueller and Mark G. Stewart, "Terror, Security, and Money: Balancing the Risks, Benefits, and Costs of Homeland Security," presented at the panel, "Terror and the Economy: Which Institutions Help Mitigate the Damage?" at the Annual Convention of the Midwest Political Science Association, Chicago, April 1, 2011, p. 17, <http://polisci.osu.edu/faculty/jmueller/MID11TSM.PDF>.
32. "Since FY2002, Congress has appropriated over \$34 billion for homeland security assistance to states, specified urban areas and critical infrastructures (such as ports and rail systems), the District of Columbia, and U.S. insular areas." Shawn Reese, "Department of Homeland Security Assistance to States and Localities: A Summary and Issues for the 111th Congress," Congressional Research Service, April 30, 2010.
33. The five key pathologies of grant programs are: (1) a gold-rush response that produces extravagant overspending; (2) unfair redistributions of taxpayer money between states; (3) reduction of state government flexibility and innovation; (4) costly federal, state, and local bureaucracies to administer the grants; and (5) the time and information "overload" they create for citizens and federal politicians. Chris Edwards, *Downsizing Government* (Washington: Cato Institute, 2005), pp. 110-16.
34. Veronique de Rugy, "Are We Ready for the Next 9/11?" *Reason*, March 1, 2006, <http://reason.com/archives/2006/03/01/are-we-ready-for-the-next-9-11>.
35. A comprehensive discussion of all DHS grants is beyond the scope of this paper. Congress should review all DHS grant programs with an eye toward fiscal federalism, risk assessment, and deficit reduction.
36. "[A] review of terrorist attacks conducted by or attributed to al-Qaeda reveals that other than five attacks, every al-Qaeda attack outside of Iraq occurred in an urban area with a population of over 510,000 people. Of the five exceptions, two were in Saudi Arabia (Dhahran and Khobar), one was in Pakistan (Marden), one was on the Tunisian island of Djerba, and the last was the nightclub attack on the Indonesian island of Bali." Matt A. Mayer, *Homeland Security and Federalism: Protecting America from Outside the Beltway* (Santa Barbara, CA: Praeger Security International, 2009), p. 64.
37. See FY07 Homeland Security Grant Program, [http://www.dhs.gov/xlibrary/assets/grants\\_st-local\\_fy07.pdf](http://www.dhs.gov/xlibrary/assets/grants_st-local_fy07.pdf).
38. Quoted in Melissa Raines, "Hazmat Trailer, Truck to Be Sold," *Mount Vernon News* (Ohio), August 26, 2008, [http://www.mountvernonnews.com/local/08/06/24/hazmat\\_sale.php4](http://www.mountvernonnews.com/local/08/06/24/hazmat_sale.php4).
39. Department of Homeland Security, *The State of California's Management of Urban Areas Security Initiative Grants Awarded During Fiscal Years 2006 through 2008*, OIG-11-46, February 2011, p. 13.
40. Jordan Carleo-Evangelist, "No Town Left Behind in Terror Funding Flow," Boston University Washington Journalism Center, Fall 2003, [http://www.bu.edu/washjocenter/Fall-2003/Fall\\_2003Stories/Carleo-Evangelist\\_Jordan/Dhsfund.htm](http://www.bu.edu/washjocenter/Fall-2003/Fall_2003Stories/Carleo-Evangelist_Jordan/Dhsfund.htm).
41. David Villano, "The High Cost of Home-

- land Defense,” *Miami New Times*, October 9, 2003, <http://www.miaminewtimes.com/2003-10-09/news/the-high-cost-of-homeland-defense/>.
42. Kevin Diaz, “Pork-Barrel Security,” *Star Tribune* (Minneapolis, MN), September 11, 2004.
43. Travis Kavulla, “Checkpoint to Nowhere: A Stimulus Boondoggle in Big Sky Country,” *National Review*, September 2, 2009.
44. “Editorial: Checkpoint Follies,” *Las Vegas Review-Journal*, August 28, 2009, <http://www.lvrj.com/opinion/55668737.html>.
45. Several watchdog groups have provided detailed accounting of wasteful spending: Citizens against Government Waste; the *Texas Tribune* (which keeps a tally of homeland security funds broken down by Texas county); and the Center for Investigative Reporting, which has a complete database of homeland security spending since DHS’s creation. See Citizens against Government Waste, <http://www.cagw.org/>; “Per-Capita Homeland Security Spending in Texas,” *Texas Tribune*, <http://www.texastribune.org/library/data/texas-homeland-security-grants/>; and “Price of Peril,” Center for Investigative Reporting, <http://www.centerforinvestigativereporting.org/files/homelandsecurity/priceofperil.html>.
46. SHSP funding peaked at \$2,066,295,000 in FY03 and was \$842,000,000 in FY10. See “FY07 Homeland Security Grant Program,” [http://www.dhs.gov/xlibrary/assets/grants\\_st-local\\_fy07.pdf](http://www.dhs.gov/xlibrary/assets/grants_st-local_fy07.pdf), and “FY10 Homeland Security Grant Frequently Asked Questions,” [http://www.fema.gov/pdf/government/grant/2010/fy10\\_hsgp\\_faq.pdf](http://www.fema.gov/pdf/government/grant/2010/fy10_hsgp_faq.pdf). The FY11 budget, though passed halfway into the fiscal year, further cut SHSP spending to \$526 million. See Department of Homeland Security, “DHS Announces Grant Guidance for Fiscal Year (FY) 2011 Preparedness Grants,” news release, May 19, 2011, [http://www.dhs.gov/ynews/releases/pr\\_1305812474325.shtm](http://www.dhs.gov/ynews/releases/pr_1305812474325.shtm).
47. Formulas from the USA PATRIOT Act required 0.75 percent of grant money to go to each state, regardless of population. See P.L. 107-206, Sec. 1014(c)(3), 116 Stat. 820. This was amended by the 9/11 Act of 2007 with a declining scale of mandated spending for each state—0.375 percent in FY08 moving to 0.35 percent by FY12. See P.L. 110-53, Sec. 204(c)(3)(e), 121 Stat. 278.
48. Department of Homeland Security, “DHS Announces Grant Guidance for Fiscal Year (FY) 2011 Preparedness Grants,” news release, May 19, 2011, [http://www.dhs.gov/ynews/releases/pr\\_1305812474325.shtm](http://www.dhs.gov/ynews/releases/pr_1305812474325.shtm).
49. This is not to say that waste would be eliminated. DHS grants for “terrorism prevention” purposes support excessive spending at the local level. A Memphis Police official justified his city’s use of terrorism funds to fight local gang crime thusly: “We have our own terrorists, and they are taking lives every day. . . . No, we don’t have suicide bombers—not yet. But you need to remain vigilant and realize how vulnerable you can be if you let up.” Quoted in Dana Priest and William M. Arkin, “Monitoring America,” *Washington Post*, December 20, 2010, <http://projects.washingtonpost.com/top-secret-america/articles/monitoring-america/>.
50. Jeff Goodman, “Region Secures \$1 Million for Emergency Preparedness,” *Bakersfield.com*, July 21, 2010, <http://www.bakersfield.com/news/local/x1974424854/Region-secures-1-million-for-emergency-preparedness>.
51. See General Accountability Office, “Homeland Security: DHS Risk-Based Grant Methodology Is Reasonable, But Current Version’s Measure of Vulnerability Is Limited,” June 2008, GAO-08-852, <http://gao.gov/cgi-bin/getrpt?GAO-08-852>.
52. See General Accountability Office, “Urban Area Security Initiative: FEMA Lacks Measures to Assess How Regional Collaboration Efforts Build Preparedness Capabilities,” July 2009, GAO-09-651, <http://www.gao.gov/new.items/d09651.pdf>.
53. Department of Homeland Security, “DHS Announces Grant Guidance for Fiscal Year (FY) 2011 Preparedness Grants,” news release, May 19, 2011, [http://www.dhs.gov/ynews/releases/pr\\_1305812474325.shtm](http://www.dhs.gov/ynews/releases/pr_1305812474325.shtm).
54. Mickey McCarter, “House Democrats Fight Proposed Cuts to DHS Grant Programs,” *Homeland Security Today*, May 25, 2011, <http://www.hstoday.us/industry-news/general/single-article/house-democrats-fight-proposed-cuts-to-dhs-grant-programs/d52057cfe87d8bfa3f4304c5e67d6f16.html>.
55. P.L. 107-71.
56. Transportation Security Administration, “Our Workforce,” [http://www.tsa.gov/who\\_we\\_are/workforce/index.shtm](http://www.tsa.gov/who_we_are/workforce/index.shtm).
57. “TSA uses two types of imaging technology: millimeter wave and backscatter. Currently, there are 488 imaging technology units at 78 airports. In March 2010, TSA began deploying 450 advanced imaging technology units, which were purchased with American Recovery and Reinvestment Act (ARRA) funds.” Transportation Security Administration: Advanced Imaging Technology (AIT), <http://www.tsa.gov/approach/tech/ait/index.shtm>.

58. Gale Rossides, acting transportation security administrator, “Advanced Imaging Technology—Yes, It’s Worth It,” TSA Blog, March 31, 2010, <http://blog.tsa.gov/2010/03/advanced-imaging-technology-yes-its.html>; Michael Chertoff, “Former Homeland Security Chief Argues for Whole-body Imaging,” *Washington Post*, January 1, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/31/AR2009123101746.html>.
59. Mark G. Stewart and John Mueller, “Risk and Cost-Benefit Analysis of Advanced Imaging Technology Full Body Scanners for Airline Passenger Security Screening,” Centre for Infrastructure Performance and Reliability (CIPAR), University of Newcastle, UK, January 2011, p. 18, <http://hdl.handle.net/1959.13/805595>.
60. *Ibid.*, p. 13.
61. See Steve Lord, director, Homeland Security and Justice Issues, Government Accountability Office, “Aviation Security: TSA Is Increasing Procurement and Deployment of the Advanced Imaging Technology, but Challenges to This Effort and Other Areas of Aviation Security Remain,” Testimony before the Subcommittee on Transportation Security and Infrastructure Protection of the House Committee on Homeland Security, 111th Cong., 2nd sess., March 17, 2010, p. 9, [www.gao.gov/new.items/d10484t.pdf](http://www.gao.gov/new.items/d10484t.pdf).
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63. Grant Stinchfield, “TSA Source: Armed Agent Slips Past DFW Body Scanner,” NBC Dallas Forth-Worth, February 18, 2011, <http://www.nbcdfw.com/news/local/TSA-Agent-Slips-Through-DFW-Body-Scanner-With-a-Gun-116497568.html>.
64. Edward N. Luttwak, “The Body Scanner Scam,” *Wall Street Journal*, January 18, 2010, <http://online.wsj.com/article/SB10001424052748704541004575010962154452900.html>.
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69. William Saletan, “Sew-In Bombers,” *Slate*, July 7, 2011, <http://www.slate.com/id/2298657/>.
70. See John Mueller, “The Atomic Terrorist?” in *Terrorizing Ourselves: Why U.S. Counterterrorism Policy Is Failing and How to Fix It*, ed. Benjamin Friedman, Jim Harper, and Christopher Preble (Washington: Cato Institute, 2009), p. 139.
71. *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990).
72. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).
73. *City of Indianapolis v. Edmond*, 531 U.S. 32, 43 (2000).
74. “Our holding also does not affect the validity of border searches or searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute.” *Ibid.*, pp. 47–48.
75. *United States v. Davis*, 482 F.2d 893, 908 (1973) (Holding that airline searches are constitutionally permissible because they are “conducted as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings.”); *United States v. Hartwell*, 436 F.3d 174, 178 (2006), *cert. denied*, 127 S. Ct. 111 (2006); *United States v. Aukai*, 497 F.3d 955, 960 (2007).
76. See *Hartwell*, 436 F. 3d 174, 179–80 (2006); *Aukai*, 497 F.3d 955, 962 (2007).
77. Jeffrey Rosen, “Why the TSA Pat-Downs and Body Scans Are Unconstitutional,” *Washington Post*, November 28, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/24/AR2010112404510.html>.
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79. Hartwell, p. 180.
80. Brief of Petitioner, *Electronic Privacy Information Center v. Napolitano*, no. 10-1157 (D.C. Cir. Nov. 1, 2010), p. 32, [http://epic.org/EPIC\\_Body\\_Scanner\\_OB.pdf](http://epic.org/EPIC_Body_Scanner_OB.pdf).
81. *Electronic Privacy Information Center v. United States Department of Homeland Security*, no. 10-1157, 2011 U.S. App. LEXIS 14503 (D.C. Cir. July 15, 2011).
82. Bennett.
83. The Supreme Court has held that check-point searches may not become limitless searches motivated by a desire to uncover “evidence of ordinary criminal wrongdoing.” See *City of Indianapolis v. Edmond*, pp. 37–42. Lower federal courts have addressed this in greater depth and specificity in the aviation security context. See *United States v. Marquez*, 410 F.3d 612, 617 (2005) (approving airport screening where “nothing in the record indicat[ed] that [the searching agent] was looking for drugs or criminal evidence.”); *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1243 (1989) (“While narrowly defined searches for guns and explosives are constitutional as justified by the need for air traffic safety, a generalized law enforcement search of all passengers as a condition for boarding a commercial aircraft would plainly be unconstitutional.”) (citing *United States v. Davis*, p. 910).
84. See *United States v. Fofana*, 620 F. Supp. 2d 857 (2009) (suppressing evidence discovered when a TSA screener manipulated an envelope full of paper in an attempt to find razor blades, and, having felt nothing as rigid as a blade, opened the envelope and discovered fake passports); *United States v. McCarty*, 672 F. Supp. 2d 1085 (2009) (suppressing evidence discovered in checked baggage where a TSA screener investigated the nature of pictures that fell out of a computer bag based on a child protection motive, not an aviation security one); But see *Higerd v. Florida*, *Florida Law Weekly* 35 (2011): 2874 (admitting evidence through the good faith exception where TSA policy required a screener to “thumb through” a stack of papers, discovering child pornography).
85. Scott McCartney, “Is Tougher Airport Screening Going Too Far?” *Wall Street Journal*, July 16, 2009, <http://online.wsj.com/article/SB10001424052970204556804574261940842372518.html>.
86. Brief of Petitioner, *Bierfeldt v. Napolitano*, no. 09-01117 (D.C. Dist. June 18, 2009), p. 9, [http://www.aclu.org/files/pdfs/safefree/bierfeldtvnaapolitano\\_complaint.pdf](http://www.aclu.org/files/pdfs/safefree/bierfeldtvnaapolitano_complaint.pdf)
87. Stephen Dinan, “Airport Rules Changed after Ron Paul Aide Detained,” *Washington Times*, November 11, 2009, <http://www.washingtontimes.com/news/2009/nov/11/rules-changed-after-paul-aide-detained-at-airport/?page=1>.
88. Transportation Security Administration, TSA Management Directive no. 100.4: Transportation Security Searches, September 1, 2009, p. 6.
89. Daniel Rubin, “An Infuriating Search at Philadelphia International Airport,” *Philadelphia Inquirer*, August 18, 2010.
90. See “How the Israelis Do Airport Security,” CNN, January 10, 2010, <http://edition.cnn.com/2010/OPINION/01/11/yeffet.air.security.israel/> (interview with the former head of security for El Al Airlines).
91. While no exact calculation of a transition to Israeli-style procedures is available, there is no question that security spending would dramatically increase. *Washington Post* columnist Dana Milbank writes that security spending by the relatively small Israeli aviation industry could not be replicated in the U.S. market. “El Al, Israel’s national carrier, reported spending \$107,828,000 on security in 2009 for the 1.9 million passengers it carried. That works out to about \$56.75 per passenger. The United States, by contrast, spent \$5.33 billion on aviation security in fiscal 2010, and the air travel system handled 769.6 million passengers in 2009 (a low year), according to the Bureau of Transportation Statistics. That amounts to \$6.93 per passenger. The analogy isn’t perfect, because security is largely handled by the airline in Israel and by the government here. (In both countries, the government pays just under two-thirds of the security costs.) But this rough comparison indicates that Israel spends more than eight times as much on security per passenger. To duplicate that, the United States would need to spend an extra \$38 billion a year.” Dana Milbank, “Why the Israeli Security Model Can’t Work for the U.S.,” *Washington Post*, November 25, 2010. *Bloomberg* writer Peter Robison found that Israeli spending per passenger dwarfs that in the U.S.: “[El Al Chairman Israel] Borovich estimated El Al’s security bill at \$100 million a year, which amounts to \$76.92 per trip by its 1.3 million passengers. Half is paid by the Israeli government. By contrast, the TSA spent \$4.58 billion on aviation security, or just \$6.21 per trip by 737 million passengers, in fiscal 2005.” Peter Robison, “Israeli-Style Air Security, Costly and Intrusive, May Head West,” *Bloomberg*, August 24, 2006, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aFyfhM1e3G4&refer=politics>. *Foreign Policy* writer Annie Lowrey calculates that a transition

to Israeli-style security would require a workforce of 3 million TSA screeners and cost \$150 billion a year. Annie Lowrey, "What Would It Cost for the U.S. to Get Israel-Level Airport Security?" *Foreign Policy*, January 7, 2010, [http://blog.foreignpolicy.com/posts/2010/01/07/would\\_you\\_pay\\_25\\_for\\_71\\_seconds\\_of\\_scrutiny\\_in\\_an\\_airport](http://blog.foreignpolicy.com/posts/2010/01/07/would_you_pay_25_for_71_seconds_of_scrutiny_in_an_airport).

92. Andrew Seidman, "TSA Launching Behavior-Detection Program at Boston Airport," *Los Angeles Times*, August 17, 2011, <http://www.latimes.com/news/nationworld/nation/la-na-tsa-logan-20110818,0,59862.story>.

93. Ibid.

94. Jordy Yager, "Next Step for Tight Security Could Be Trains, Boats, Metro," *The Hill*, November 23, 2010, <http://thehill.com/homenews/administration/130549-next-step-for-body-scanners-could-be-trains-boats-and-the-metro->

95. Chertoff told editors of the Associated Press: "The truth of the matter is that a fully loaded airplane with jet fuel, a commercial airliner, has the capacity to kill 3,000 people. A bomb in a subway car may kill 30 people. When you start to think about your priorities, you're going to think about not having a catastrophic event first." Nicole Gaouette and Mary Curtius, "\$31.8-Billion Homeland Security Bill Passes," *Los Angeles Times*, July 15, 2005.

96. "Homeland Security Targets Bus Traffic in Tampa," *ABC Action News*, February 16, 2010, [http://www2.abcactionnews.com/dpp/news/region\\_west\\_hillsborough/Homeland-Security-targets-bus-traffic-in-Tampa](http://www2.abcactionnews.com/dpp/news/region_west_hillsborough/Homeland-Security-targets-bus-traffic-in-Tampa).

97. The FY2010 budget allocated \$2,759,000,000 for passenger and baggage screening, \$150 million for the Screening Partnership Program, and \$129 million for checkpoint support. See Lake and Haddal, Table 11, p. 43.

98. Transportation Security Administration, "Screening Partnership Program," [http://www.tsa.gov/what\\_we\\_do/optout/spp\\_news.shtm](http://www.tsa.gov/what_we_do/optout/spp_news.shtm).

99. See Transportation Security Administration, "Private Screening Operations Performance Evaluation Report," April 16, 2004, [www.tsa.gov/assets/pdf/Summary\\_Report.pdf](http://www.tsa.gov/assets/pdf/Summary_Report.pdf).

100. The TSA has estimated in the past that SPP airports cost approximately 17.4 percent more to operate than non-SPP airports, and separately hired a contractor that found SPP airports cost 9 to 17 percent more than non-SPP airports. Government Accountability Office, "Aviation Security: TSA's Cost and Performance Study of Private-Sector Airport Screening," GAO-09-27R, Janu-

ary 9, 2009. The TSA made GAO-recommended changes to its methodology to control for the additional cost of overlapping contract and government administrative personnel and the long-term costs of public employee retirement. In January 2011 the TSA revised its numbers and found that SPP airport screeners would cost 3 percent more than federal screeners, but the GAO responded that its recommendations had only been partially implemented. Government Accountability Office, "Aviation Security: TSA's Revised Cost Comparison Provides a More Reasonable Basis for Comparing the Costs of Private-Sector and TSA Screeners," GAO-11-375R, March 4, 2011. A House Transportation and Infrastructure Committee report likewise found significant savings from using SPP screeners instead of TSA screeners. United States House of Representatives, Committee on Transportation and Infrastructure, Oversight and Investigations, "TSA Ignores More Cost-Effective Screening Model," June 3, 2011.

101. See Government Accountability Office, "Aviation Security: Private Screening Contractors Have Little Flexibility to Implement Innovative Approaches," Statement of Norman J. Rabkin, managing director, Homeland Security and Justice, Testimony before the Subcommittee on Aviation, Committee on Transportation and Infrastructure, House of Representatives, April 22, 2004, [www.gao.gov/new.items/d04505t.pdf](http://www.gao.gov/new.items/d04505t.pdf).

102. Stephen Losey, "TSA Halts Expansion of Privatized Airport Screening," *Federal Times*, January 31, 2011, <http://www.federaltimes.com/article/20110131/DEPARTMENTS03/101310303/>.

103. Joe Davidson, "TSA Employees Can Vote on Union Representation, Labor Board Rules," *Washington Post*, November 12, 2010, [http://voices.washingtonpost.com/federal-eye/2010/11/tsa\\_employees\\_can\\_vote\\_on\\_unio.html?wprss=federal-eye](http://voices.washingtonpost.com/federal-eye/2010/11/tsa_employees_can_vote_on_unio.html?wprss=federal-eye).

104. Denise Kirsten Wills, "You're Fired," *Government Executive*, March 1, 2006, <http://www.govexec.com/features/0306-01/0306-01s3.htm>.

105. Dennis Cauchon, "Some Federal Workers More Likely to Die than Lose Jobs," *USA Today*, July 19, 2011.

106. United States Department of Homeland Security, Customs, and Border Protection, 63 FLRA 495 (2009).

107. United States Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, Washington, 63 FLRA 600 (2009).

108. United States Department of Homeland Security, Customs, and Border Protection, Wash-

ington, 63 FLRA 434 (2009).

109. For a more detailed analysis of this subject, see Robert Poole, *Airport Security: Time for a New Model*, Reason Foundation Policy Study no. 340 (2006), pp. 4–5.

110. United States House of Representatives, Committee on Transportation and Infrastructure, Oversight and Investigations, pp.17; 21–22.

111. The controversial pat-down of an eight-month-old child at Kansas City International was performed not by TSA screeners, but by contract screeners acting under TSA screening guidelines. See Robert A. Cronkleton, “Photo of Pat-Down of Baby at KCI Goes Worldwide,” *Kansas City Star*, May 20, 2011, <http://www.kansascity.com/2011/05/10/2865800/photo-of-pat-down-of-baby-at-airport.html>.

112. See 49 U.S.C. § 44920 (2005).

113. Marsh Inc., “The Marsh Report: Terrorism Risk Insurance 2010,” p. 10, <http://insurance.marketreport.com/Default.aspx?alias=insurance.marketreport.com/terrorism2010>.

114. *Ibid.*, p. 16.

115. Potential hijackers also face resistance from armed agents who are not employed by the Air Marshal Service. Federal, state, and local law enforcement officers can fly armed on commercial flights (federal law enforcement officers are generally authorized to carry a firearm on a commercial flight on or off duty, but state and local officers can carry arms only when they are on duty). These personnel would not be affected by any adjustment in FAMS and FFDO policy changes.

116. Statement of Congressman John J. Duncan, Jr., June 19, 2009, <http://duncan.house.gov/2009/06/22062009.shtml>. The FY 2011 budget increased funding for FAMS to \$929,802,000. See P.L. 112-10, Sec. 1620. The substance of the arrests matters as well; air marshals have not countered any 9/11-style hijacking attempts and their arrests stem from the same sorts of incidents that prompt airline passengers to subdue unruly or intoxicated fellow travelers. See Anahad O’Connor, “Air Marshals Intervene in Incident on Plane,” *New York Times*, April 7, 2010; Transportation Security Administration, “Federal Air Marshals Make Arrest on International Flight,” news release, June 26, 2008, [http://www.tsa.gov/press/happenings/federal\\_arrest\\_international\\_flight.shtml](http://www.tsa.gov/press/happenings/federal_arrest_international_flight.shtml); see also fn. 131 (listing passenger interventions). The rapid increase in the number of air marshals also resulted in loose hiring standards and significant criminality within air marshal ranks. See Michael Grabell, “Air Marshals: Undercover and Under Ar-

rest,” ProPublica.org, November 13, 2008, <http://www.propublica.org/article/federal-air-marshals-and-the-law>.

117. A CNN Investigation found that fewer than 1 percent of all domestic flights have air marshals on board. See Drew Griffin, Kathleen Johnston and Todd Schwarzschild, “Sources: Air Marshals Missing from Almost All Flights,” CNN, March 25, 2008, <http://www.cnn.com/2008/TRAVEL/03/25/siu.air.marshals/>. The TSA website countered that a higher number of flights had air marshal coverage, but the number remains classified and no figure higher than 5 percent is publicly cited. See Transportation Security Administration, “Federal Air Marshal Shortage?” [http://www.tsa.gov/approach/mythbusters/fams\\_shortage.shtm](http://www.tsa.gov/approach/mythbusters/fams_shortage.shtm).

118. See Ethan Rider, “Handguns and Air Marshals,” *Airliners.net*, November 15, 2003, <http://www.airliners.net/aviation-articles/read.main?id=64>.

119. See Mark G. Stewart and John Mueller, “Assessing the Risks, Costs and Benefits of United States Aviation Security Measures,” Centre for Infrastructure Performance and Reliability, University of Newcastle, Research Report no. 267.04.08, (2008), <http://polisci.osu.edu/faculty/jmueller/stewarr2.pdf>.

120. “TSA officials told the 50 people who provide the training that the program would be moved from the Federal Law Enforcement Training Center in Glynco, G.A. [sic], to a facility in Artesia, N.M., in a remote southeast section of the state. . . . Rep. Peter DeFazio, D-Ore. [sic], the ranking Democrat on the aviation committee, complained that the changes came as a surprise to Congress. . . . ‘It’s just another attempt by the administration to disrupt the program at the behest of the airlines who have always opposed arming pilots.’” Fred Bayles, “Pilots Say TSA Disrupting Gun Training,” *USA Today*, June 6, 2003.

121. John R. Lott, Jr., “Pilots Still Unarmed,” *New York Post*, January 6, 2004.

122. *Ibid.*

123. Mike M. Ahlers, “Report: Pilots’ Holsters Make Guns Vulnerable to Accidental Discharge,” CNN, December 2, 2008, <http://www.cnn.com/2008/TRAVEL/12/02/tsa.holster/index.html>.

124. Lake and Haddal, Table 11, p. 43.

125. Bruce Schneier, *Beyond Fear: Thinking Sensibly About Security in an Uncertain World* (New York: Springer, 2006), pp. 247–48.

126. “A woman having an apparent panic attack

over turbulence on a JetBlue flight bound for Newark was tackled by several passengers as she rose from her seat and banged into an emergency exit door while complaining to the flight crew, an FBI spokesman said.” Jonathan Dienst, “Turbulence Leads to Turbulence on JetBlue Flight,” NBC New York, September 9, 2010, <http://www.nbcnewyork.com/news/local-beat/Turbulence-Leads-to-Turbulence-On-JetBlue-Flight-102566229.html>; “Phil Orlandella, a spokesman for the Massachusetts Port Authority, says the 22-year-old Israeli man ran toward the cockpit and pounded on the door. He says passengers and crew helped to subdue the man.” “Mid-Air Drama: Passenger Tackled after Banging on Cockpit Door,” NBC New York, April 25, 2009, <http://www.nbcnewyork.com/news/local-beat/Flight-Diverted-To-Boston.html>; “A man who claimed to have a bomb aboard a Los Angeles-bound airliner and lunged for a door as it landed was tackled by other passengers and held for questioning Wednesday, authorities said.” “Fellow Passengers Tackle Man as Plane Lands at LAX,” NBC Los Angeles, January 7, 2009, <http://www.nbclosangeles.com/news/local-beat/Fellow-Passengers-Tackle-Man-as-Plane-Lands-at-LAX.html>.

127. Quoted in Joshua Norman, “Senators and TSA Defend ‘Love Pats’ at Airports,” CBS News.com, November 17, 2010, <http://www.cbsnews.com/stories/2010/11/17/national/main7063414.shtml>.

128. Transportation Security Administration, “What We Do: Layers of Security,” [http://www.tsa.gov/what\\_we\\_do/layers/index.shtml](http://www.tsa.gov/what_we_do/layers/index.shtml).

129. Alan Levin, “Airlines Seek to Move Air Marshals from First Class,” *USA Today*, October 18, 2010.

130. 28 C.F.R. 0.85(l).

131. See Fourth Amendment, U.S. Constitution. “[N]o Warrants shall issue, but upon *probable cause*.” (Emphasis added.)

132. Mike German, *Thinking Like a Terrorist* (Washington: Potomac Books, 2007), p. 194.

133. The Justice Department’s Executive Office for United States Attorneys reported “bringing 3,094 anti-terrorism cases against 3,925 defendants during fiscal years 2002 through 2006, and concluding 2,609 cases against 3,098 defendants during the same time frame,” while the Administrative Office of the United States Courts reports a total of 99 terrorism cases filed against 153 defendants during the same period, but the Department of Justice’s Counterterrorism Section “counted 527 defendants charged in international terrorism and terrorism-related cases between

September 11, 2001, and November 15, 2007.” Numbers vary greatly depending on whether the focus is on “terrorism” or “terrorism-related” prosecutions. See Richard B. Zabel and James J. Benjamin, Jr., “In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts,” *Human Rights First*, May 2008, p. 21, <http://www.humanrightsfirst.org/pdf/080521-USLS-pursuit-justice.pdf>. Zabel and Benjamin chose to focus on 107 cases with 257 defendants for analysis of the criminal justice system’s effectiveness in prosecuting terror suspects. *Ibid.*, p. 23.

134. Dana Priest and William M. Arkin, “A Hidden World, Growing Beyond Control,” *Washington Post*, July 19, 2010.

135. Quoted in *ibid.*

136. *Ibid.*

137. See Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, “Fusion Center Guidelines: Developing and Sharing Information and Intelligence in a New Era,” August 2006, p. 2, [www.it.ojp.gov/documents/fusion\\_center\\_guidelines\\_law\\_enforcement.pdf](http://www.it.ojp.gov/documents/fusion_center_guidelines_law_enforcement.pdf).

138. Mary Beth Sheridan and Spencer Hsu, “Localities Operate Intelligence Centers to Pool Terror Data,” *Washington Post*, December 31, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/30/AR2006123000238.html>.

139. See Shane Harris, “L.A.’s Anti-Terrorism Hub Serves as a Model,” *National Journal*, May 2, 2007; John Rollins and Timothy Connors, “State Fusion Center Processes and Procedures: Best Practices and Recommendations,” Manhattan Institute Policing Terrorism Report no. 2, September 2007, [http://www.manhattan-institute.org/html/ptr\\_02.htm](http://www.manhattan-institute.org/html/ptr_02.htm).

140. See National Commission on Terrorist Attacks upon the United States: Tenth Public Hearing (April 14, 2004), Statement of Robert S. Mueller, III, director, FBI, before the National Commission on Terrorist Attacks upon the United States, <http://www.fbi.gov/congress/congress04/mueller041404.htm>.

141. Department of Homeland Security, “Fusion Center Success Stories,” [http://www.dhs.gov/files/programs/gc\\_1296488620700.shtml](http://www.dhs.gov/files/programs/gc_1296488620700.shtml). The Congressional Research Service gave a variation of this proposal in a report outlining Congress’ options for defining federal participation in fusion centers, placing fusion centers under the supervision of the FBI’s Field Intelligence Groups. John Rollins, “Fusion Centers: Issues and Options for Congress,” Congressional Research Service, January 18, 2008, pp. 74–75.

142. Michael German and Jay Stanley, "What's Wrong with Fusion Centers?" American Civil Liberties Union, December 2007, [http://www.aclu.org/files/pdfs/privacy/fusioncenter\\_20071212.pdf](http://www.aclu.org/files/pdfs/privacy/fusioncenter_20071212.pdf). Mike German and Jay Stanley, "Fusion Center Update," American Civil Liberties Union, July 2008, [www.aclu.org/pdfs/privacy/fusion\\_update\\_20080729.pdf](http://www.aclu.org/pdfs/privacy/fusion_update_20080729.pdf).
143. As retired police officer and fusion center advocate Stephen Serrao notes, this focus on security clearances ironically hampers the work of fusion centers today: "Many fusion centers that will never have to deal with top secret information have been built to this standard, and now employees and processes must meet the top secret standard. Unfortunately, many of the staff assigned to work there don't have top secret clearance, so they are literally sitting in the hall outside the facility without access to many informational systems. Meanwhile, most centers are dealing with top secret data less than five percent of the time. We are overbuilding and over-securing these centers at significant cost, and it is causing great inefficiency. For example, entering a door at some fusion centers can take up to five minutes because of the complex, locking mechanisms on the door to meet the top secret standard; yet, when you get inside, there is no top secret information being handled at that facility. The data is usually unclassified and, in some cases, is open source. Over-securing the facility hampers access, thereby hindering investigations." Stephen Serrao, "Fusion Centers: Defining Success," HSToday.us, October 13, 2009, <http://www.hstoday.us/blogs/best-practices/blog/fusion-centers-defining-success/d2adf8a8025faecbe0268d81fe1d3c54.html>.
144. Quoted in *ibid.*
145. German and Stanley, "What's Wrong with Fusion Centers?" pp. 6-7.
146. Commonwealth of Virginia Department of State Police Virginia Fusion Center, "2009 Virginia Terrorism Threat Assessment," March 2009 (on file with author).
147. See Va. Code Ann. §§ 52-48, 52-49 (2010). A lawsuit filed by the Electronic Privacy Information Center (EPIC) uncovered a Memorandum of Understanding between the VFC and the FBI where the VFC agreed to submit any requests for information under state freedom of information laws to the FBI before information would be released, giving credibility to fears that the law was reportedly passed at the behest of the federal government. See Memorandum of Understanding between the Federal Bureau of Investigation and the Virginia Fusion Center, [http://epic.org/privacy/virginia\\_fusion/MOU.pdf](http://epic.org/privacy/virginia_fusion/MOU.pdf); Electronic Privacy Information Center, "Letter to Virginia Senate RE: HB 1007: Open Government and the Virginia Fusion Center," February 26, 2008, [http://epic.org/privacy/fusion/Letter\\_to\\_Senate\\_02\\_25\\_08.pdf](http://epic.org/privacy/fusion/Letter_to_Senate_02_25_08.pdf).
148. North Texas Fusion System, *Prevention Awareness Bulletin*, February 19, 2009 (on file with author).
149. *Ibid.*, p. 4.
150. *Ibid.*, p. 5.
151. Missouri Information Analysis Center, MIAC Strategic Report: The Modern Militia Movement, February 20, 2009, <http://epic.org/miac-militia-2009.pdf>.
152. <http://www.aclu.org/spy-files>.
153. Mark Scolforo, "Pa. State Police Says Bulletins Caused Headaches," Associated Press, September 27, 2010, [http://news.yahoo.com/s/ap/us\\_homeland\\_security\\_bulletin](http://news.yahoo.com/s/ap/us_homeland_security_bulletin); Angela Couloumbis, "Pa. Acting as Security Agent for Energy Interests?" *Philadelphia Inquirer*, September 14, 2010, [http://www.philly.com/philly/news/breaking/20100914\\_Pa\\_acting\\_as\\_security\\_agent\\_for\\_energy\\_interests.html](http://www.philly.com/philly/news/breaking/20100914_Pa_acting_as_security_agent_for_energy_interests.html); Angela Couloumbis, "Pa. Senate Hearing Learns Officials Raised Red Flags Over Intelligence Contractor," *Philadelphia Inquirer*, September 28, 2010. [http://www.philly.com/inquirer/front\\_page/20100928\\_Pa\\_Senate\\_hearing\\_learns\\_officials\\_raised\\_red\\_flags\\_over\\_intelligence\\_contractor.html](http://www.philly.com/inquirer/front_page/20100928_Pa_Senate_hearing_learns_officials_raised_red_flags_over_intelligence_contractor.html).
154. Pennsylvania Office of Homeland Security, *Pennsylvania Intelligence Bulletin* no. 131, August 30, 2010 (on file with author).
155. Matthew Harwood, "DHS to Create New Office to Support Intelligence Fusion Centers," *Security Management*, October 1, 2009, [www.securitymanagement.com/news/dhs-create-new-office-support-intelligence-fusion-centers-006287](http://www.securitymanagement.com/news/dhs-create-new-office-support-intelligence-fusion-centers-006287).
156. Kim Zetter, "Report: Political Appointees Vetted DHS Public Records Requests," *Wired*, July 22, 2010, <http://www.wired.com/threatlevel/2010/07/foia-filtered>; Jennifer Epstein and MJ Lee, "DHS Called FOIA Vetting 'Bananas,'" *Politico*, March 28, 2011, <http://www.politico.com/news/stories/0311/52033.html>.
157. See Robert Riegle, director, State and Local Program Office, Office of Intelligence and Analysis, Testimony before the Committee on Homeland Security, Subcommittee on Intelligence, Information Sharing, and Terrorism Risk Assessment, "The Future of Fusion Centers: Potential Promise and Dangers," April 1, 2009; see also Caryn Wagner, under secretary and chief intel-

ligence officer and principal deputy under secretary Bart R. Johnson, Testimony before the House Committee on Homeland Security, on the Office of Intelligence and Analysis' Vision and Goals, May 12, 2010; Janet Napolitano, secretary of the Department of Homeland Security, Testimony before the Senate Committee on Homeland Security and Governmental Affairs, "Eight Years after 9/11: Confronting the Terrorist Threat to the Homeland," September 30, 2009; Bart R. Johnson, acting under secretary for intelligence and analysis, Testimony before the Subcommittee on Intelligence, Information Sharing, and Terrorism Risk Assessment, "I&A Reconceived: Defining a Homeland Security Intelligence Role," September 24, 2009.

158. See Department of Homeland Security Privacy Office, "Privacy Impact Assessment for the Department of Homeland Security State, Local, and Regional Fusion Center Initiative," December 11, 2008, pp. 26, 30, [www.dhs.gov/xlibrary/assets/privacy/privacy\\_pia\\_ia\\_slrfci.pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_ia_slrfci.pdf).

159. Jack Douglas, Jr., "U.S. Security Memos Warn of Little Things," *Fort Worth Star-Telegram*, May 25, 2003.

160. "Feds Admit Wrongly Tracking Wisconsin Abortion Groups," *Chicago Daily Herald*, February 9, 2010.

161. Department of Homeland Security, "Rightwing Extremism: Current Economic and Political Climate Fueling Resurgence in Radicalization and Recruitment," April 7, 2009, <http://www.fas.org/irp/eprint/rightwing.pdf>.

162. *Ibid.*, pp. 3–4.

163. *Ibid.*, p. 2, fn.

164. *Ibid.*, p. 7.

165. See "DHS Apologizes for Language in Report," <http://ourvoice.legion.org/story/1543/dhs-apologizes-language-report>; "DHS Secretary to Legion: 'I'm Sorry,'" <http://ourvoice.legion.org/story/1629/dhs-secretary-legion-im-sorry>; "Homeland Security Chief Apologizes to Veteran Groups," <http://www.cnn.com/2009/POLITICS/04/16/napolitano.apology/>.

166. Bennie G. Thompson, Letter to Homeland Security Secretary Napolitano, April 14, 2009, [http://www.fas.org/irp/congress/2009\\_cr/hsc041409.pdf](http://www.fas.org/irp/congress/2009_cr/hsc041409.pdf).

167. Freedom of Information Request from Bill Wilson, President, Americans for Limited Government to Catherine M. Papoi, Deputy Chief FOIA Officer, Privacy Office, U.S. Department of

Homeland Security (April 17, 2009) (on file with author).

168. The five examples were the following: (1) Timothy McVeigh and the 1995 Oklahoma City bombing, pp. 2, 7, 8; (2) shooting deaths of three Pittsburgh police officers on April 4, 2009, p. 3; (3) arrest of six militia members in April 2007 for weapons and explosives violations, p. 5; (4) arrest of militia member in Wyoming in February 2007 for plans to kill illegal immigrants at the Mexican border, p. 5; (5) arrest of three militia members in Michigan for possession of pipe bombs, automatic weapons, and ordnance with intent to attack federal facilities, pp. 6–7.

169. Letter from Vama T. Locket, associate director, Disclosure & FOIA Operations, Privacy Office, U.S. Department of Homeland Security, to Nathan Mehrens, Americans for Limited Government (August 5, 2009) (on file with author).

170. The Southern Poverty Law Center (SPLC) has long been criticized for inflating threats from conservative groups for financial gain and notoriety. "Cofounded in 1971 by civil rights lawyer cum direct-marketing millionaire Morris Dees . . . the SPLC spent much of its early years defending prisoners who faced the death penalty and suing to desegregate all-white institutions like Alabama's highway patrol. That was then. Today, the SPLC spends most of its time—and money—on a relentless fund-raising campaign, peddling memberships in the church of tolerance with all the zeal of a circuit rider passing the collection plate . . . The center earned \$44 million last year alone—\$27 million from fund-raising and \$17 million from stocks and other investments—but spent only \$13 million on civil rights programs, making it one of the most profitable charities in the country." Ken Silverstein, "The Church of Morris Dees: How the Southern Poverty Law Center Profits from Intolerance," *Harper's Magazine*, November 2000, pp. 54–57. See also David Kopel, "The Militias Are Coming," *Reason*, August/September 1996, <http://reason.com/archives/1996/08/01/the-militias-are-coming>.

171. Southern Poverty Law Center, "Groups," <http://www.splcenter.org/get-informed/intelligence-files/groups>; See also Sean Lengell, "Family Research Council Labeled a 'Hate Group,'" *Washington Times*, November 24, 2010, <http://www.washingtontimes.com/news/2010/nov/24/frc-labeled-a-hate-group/>.

172. The North Texas Fusion System's sources are, in their entirety: a posting on the Anti-Defamation League website; an article by terror pundit Robert Spencer at *Human Events*, a posting on the Family Security Matters website citing Robert Spencer; a book review of Robert Spen-

cer's *Stealth Jihad: How Radical Islam Is Subverting America without Guns or Bombs* at the *Front Page Magazine* website; an article entitled *Stealth Jihad* citing Robert Spencer and his book at the Christian Broadcasting Network website; an op-ed by

Frank Gaffney on Muslim finance; a post at the *Counterterrorism Blog* on a Muslim financial conference; and a report by the Jamestown Foundation on a radical Islamic group. See North Texas Fusion System, p. 5.

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