

UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON TERRORISM, TECHNOLOGY, AND HOMELAND SECURITY

SENATOR JON KYL  
CHAIRMAN

SENATOR DIANNE FEINSTEIN  
RANKING MEMBER



**Five Years after September 11:  
Keeping America Safe**

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109TH CONGRESS

Report Submitted by Majority and Minority Staff



We calculated in advance the number of casualties from the enemy who would be killed based on the position of the [World Trade Center] tower. We calculated that the floors that would be hit would be three or four floors. I was the most optimistic of them all . . . due to my experience in this field, I was thinking that the fire from the gas in the plane would melt the iron structure of the building and collapse the area where the plane hit and all the floors above it only. This is all that we had hoped for.

— *Osama bin Laden*  
November 2001<sup>1</sup>

Four years after the attacks of Sept. 11, and one year after the Sept. 11 Commission issued its final report, the desperate aftermath of Hurricane Katrina reminds us how much remains to be done to improve homeland security and emergency preparedness across our country.

— *Thomas Kean and Lee Hamilton*  
The 9/11 Public Discourse Project  
September 2005<sup>2</sup>

Since that terrible day, we have been spared another major attack on American soil. This is a significant achievement, made possible by the diligence of many courageous Americans defending us at home and overseas. But the threat that struck so terribly on 9/11 remains extremely dangerous. [al Qaeda] and its affiliates have continued to strike at American and allied interests around the globe . . . These attacks are a reminder that the al Qaeda network is an adaptable enemy, willing to exploit any complacency or oversights in our defenses. It is also a patient enemy: The attacks of 9/11, for example, were conceived by Khalid Sheik Mohammed in 1996. We can only assume that [al Qaeda] and its affiliates continue to desire, and plan, further attacks against our homeland.

— *Thomas Kean and Lee Hamilton*  
The 9/11 Public Discourse Project  
September 2005<sup>3</sup>

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<sup>1</sup> John Barry and Evan Thomas, *Evil in the Cross Hairs*, Newsweek, Dec. 24, 2001, at 14 (Transcript of the Osama bin Laden Videotape).

<sup>2</sup> Thomas Kean and Lee Hamilton, *Sept. 11's Unfinished Business*, THE SAN JOSE MERCURY NEWS, Sept. 11, 2005, available at [http://www.9-11pdp.org/press/2005-09-11\\_op-ed.pdf](http://www.9-11pdp.org/press/2005-09-11_op-ed.pdf).

<sup>3</sup> Thomas Kean and Lee Hamilton, *Reviewing Our Defenses, Four Years After 9/11*, FORWARD, Sept. 9, 2005, available at [http://www.9-11pdp.org/press/2005-09-09\\_op-ed.pdf](http://www.9-11pdp.org/press/2005-09-09_op-ed.pdf).



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## TABLE OF CONTENTS

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<b>OVERVIEW</b> .....	<b>1</b>
<b>EXECUTIVE SUMMARY</b> .....	<b>2</b>
<b>HOMELAND SECURITY</b> .....	<b>11</b>
<b>Electromagnetic Pulse</b> .....	<b>11</b>
Introduction.....	11
The Threat of an Electromagnetic Pulse Attack.....	11
U.S. Dependency on Electricity.....	12
Probability of Attack.....	14
Why Would Terrorists Launch an EMP Attack?.....	14
How Can We Protect Ourselves?.....	15
Procurement of Infrastructure and Raising Public Awareness .....	16
<b>Nuclear Smuggling</b> .....	<b>16</b>
The Threat of Nuclear Smuggling.....	16
Nuclear Vulnerabilities after 9/11.....	17
Organization and Initiatives .....	17
Current Capabilities and Recommendations .....	18
Budget Decisions and Cuts .....	20
Future Capabilities and Funding .....	20
Addressing Today’s Threats and Developing Transformational Technologies .....	21
<b>Material Support to Terrorism Prohibition Improvements Act</b> .....	<b>22</b>
A Review of the Material Support to Terrorism Prohibition Improvements Act .....	22
Material Support Statutes.....	22
Legal Battles and Criticism.....	24
Prosecutions Based on the Material Support Statutes.....	24
Intelligence Reform and Terrorism Prevention Act.....	25
Providing Tools Necessary in the War Against Terrorists .....	27
<b>DOMESTIC SECURITY</b> .....	<b>28</b>
<b>Terrorism: Emergency Preparedness</b> .....	<b>28</b>
Lessons Learned from Responses to Previous Disasters and Attacks .....	28

Possible Future Attacks .....	28
Writing Effective Response Plans .....	29
Command and Control .....	30
Federal, State, and Local Coordination .....	31
Risk Assessment and Risk-Based Funding .....	32
Findings Regarding the Nation’s State of Emergency Preparedness .....	33
Emergency Preparedness Attachments .....	34
<b>BORDER SECURITY .....</b>	<b>40</b>
<b>Terrorist Travel, Enforcement, and Border Security .....</b>	<b>40</b>
Introduction.....	40
Visa-Issuance Policies .....	41
VWP Travel Document Standards.....	41
US-VISIT Exit Component and Non-Immigrant Visas.....	42
Responding to 9/11: Better Training and Resources for Front-Line Officers .....	42
<b>Strengthening Interior Enforcement .....</b>	<b>44</b>
Enforcement and Litigation of Immigration Law .....	44
Potential for Criminal and Terrorist Infiltration of the United States .....	44
Judicial Review .....	45
Detention and Removal Operations at the Bureau of Immigration and Customs Enforcement.....	46
Limitations on Detention and Removal Operations: <u>Zadvydas v. Davis</u> and <u>Clark v. Suarez-Martinez</u> .....	47
Alien Absconders.....	48
Providing for the Detention and Removal of Criminal Aliens .....	49
<b>Border Security Between the Ports of Entry .....</b>	<b>49</b>
Challenges Facing the Border Patrol .....	49
Budgetary and Technological Constraints .....	50
Cooperation with Mexican Authorities .....	50
Regulatory and Funding Constraints in Arizona.....	51
Trip to the Arizona Border .....	52
Raising Awareness of the Burden on States .....	53
Addressing Challenges Facing Border Enforcement Efforts .....	53
<b>The Need for Comprehensive Immigration Reform .....</b>	<b>54</b>
Introduction.....	54
Failures of Current Immigration Policy .....	54
Gaining Control of the Border.....	55

Workplace Enforcement.....	56
Reducing the Incentive to Immigrate Illegally.....	56
Identifying Illegal Immigrants within the United States .....	57
Subcommittee Support for Comprehensive Reform .....	57
<b>The Southern Border in Crisis.....</b>	<b>58</b>
Increased Immigration and the Problem of OTM Aliens .....	58
OTM Figures: The Magnitude of the Problem.....	58
OTM Infiltration and the Terrorist Threat.....	59
Expedited Removal as Part of the Solution.....	60
Identifying Illegal Aliens with Criminal Intent.....	61
Tying It All Together: Policy Solutions.....	62
<b>The Visa Waiver Program .....</b>	<b>62</b>
Introduction.....	62
General Features of the VWP.....	63
Tools Currently Used to Screen VWP Entrants .....	63
VWP Security Issues and GAO Recommendations.....	65
GAO Recommendations to Improve VWP Security.....	67
Related Concerns: Cargo on Passenger Airlines .....	68
Moving Forward .....	68
<b>Federal Strategies to End Border Violence .....</b>	<b>69</b>
Introduction.....	69
Behavioral Developments Amongst Illegal Aliens .....	69
Increasing Violence along the Southern Border .....	70
Mexican Military Incursions Across the Southern Border .....	71
Increased Sophistication of Gangs, Criminal Organizations, Smugglers, and Tunneling Operations .....	71
U.S. Responses.....	72
Subcommittee Recommendations.....	73
<b>Worksite Enforcement in the Immigration Debate.....</b>	<b>74</b>
Introduction.....	74
Problems with the USCIS Basic Pilot Program .....	76
Recommendations .....	77
<b>OPENNESS IN GOVERNMENT .....</b>	<b>79</b>
<b>Openness in Government.....</b>	<b>79</b>
Updating the Freedom of Information Act.....	79

State Model.....	79
Media Concerns .....	80
Business Concerns.....	81
Public Interest Concerns .....	82
Legislative and Executive Action .....	82

**APPENDIX: HEARINGS DURING THE 109TH CONGRESS .....84**

Terrorism and the EMP Threat to Homeland Security.....	84
Strengthening Enforcement and Border Security: The 9/11 Commission Staff Report on Terrorist Travel.....	85
Openness in Government and Freedom of Information: Examining the OPEN Government Act of 2005.....	86
Strengthening Interior Enforcement: Deportation and Related Issues.....	87
A Review of the Material Support to Terrorism Prohibition Improvements Act.....	88
Strengthening Border Security Between Ports of Entry: The Use of Technology to Protect the Borders .....	89
The Need for Comprehensive Immigration Reform: Strengthening Our National Security .....	90
The Southern Border in Crisis: Resources and Strategies to Improve National Security....	91
Terrorism: Emergency Preparedness.....	92
Federal Strategies to End Border Violence.....	93
Detecting Smuggled Nuclear Weapons.....	94
Keeping Terrorists Off the Plane: Strategies for Pre-Screening International Passengers Before Takeoff.....	95

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## INTRODUCTION

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On the morning of September 11, 2001, the nation and the world changed forever when 19 terrorists hijacked four commercial planes: American Airlines Flight 11 crashed into the North Tower of the World Trade Center; United Airlines Flight 175 crashed into the South Tower of the World Trade Center; American Airlines Flight 77 crashed into the Pentagon; and United Airlines Flight 93 crashed in Somerset County, Pennsylvania.<sup>4</sup> Masterminded by Osama bin Laden and his al Qaeda terrorist network, the attacks killed 3,016 people and wounded thousands more.<sup>5</sup>

On that day, we were, in President Bush's words, "a country awakened to danger and called to defend freedom."<sup>6</sup> The magnitude of the challenge is illustrated by the 1984 assassination attempt on Prime Minister Margaret Thatcher by Irish Republican Army terrorists. Their warning — and one that remains relevant today — was: "Remember, we only have to get lucky once; you have to be lucky always."<sup>7</sup>

In response to these attacks the government took substantive steps to turn the odds in our favor. One sign of the success of our actions since 2001 is that we have not had another terrorist attack on our soil. Nonetheless, terrorists remain a grave threat to national security and public safety.

Believing that we could not effectively fight terrorists and defend the homeland unless we understood possible threats and vulnerabilities, the Subcommittee on Terrorism, Technology, and Homeland Security focused its efforts during the 109th Congress on examining efforts to secure U.S. borders, possible future terrorist attacks, and the means by which terrorists derive financial and ideological support.

To this end, the Subcommittee held hearings on the threat of an electromagnetic pulse attack, nuclear smuggling, the nation's emergency preparedness system, border security and openness in government information. The attached report is a summary of

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<sup>4</sup> *A Nation Challenged: Indictment Chronicles "Overt Acts" That It Says Led to Sept. 11 Attacks*, N.Y. TIMES, Dec. 12, 2001, at B6.

<sup>5</sup> James Barron, *Two Years Later: Ceremonies; Another 9/11, and a Nation Mourns Again*, N.Y. TIMES, Sept. 12, 2003, at A1; David Chen, *Man Behind Sept. 11 Fund Describes Effort as a Success, With Reservations*, N.Y. TIMES, Jan. 1, 2004, at B1.

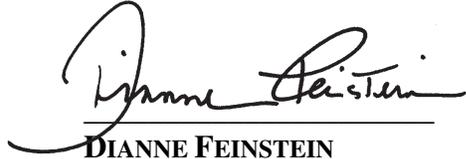
<sup>6</sup> 147 CONG. REC. S9553 (daily ed. Sept. 20, 2001) (address by Pres. George W. Bush to Joint Session of Congress).

<sup>7</sup> See, e.g., Paul Brown, *Cabinet Survives IRA Hotel Blast*, SUNDAY UK GUARDIAN, Oct. 13, 1984.

the Subcommittee's efforts to understand the terrorist threats to the United States and determine what remains to be done to secure the homeland.



**JON KYL**  
Chairman  
Subcommittee on Terrorism,  
Technology, and Homeland Security  
Committee on the Judiciary  
United States Senate



**DIANNE FEINSTEIN**  
Ranking Member  
Subcommittee on Terrorism,  
Technology, and Homeland Security  
Committee on the Judiciary  
United States Senate

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## Five Years After September 11: Keeping America Safe

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### OVERVIEW

In the 109th Congress, the Subcommittee on Terrorism, Technology, and Homeland Security was the Senate Judiciary Committee's most active Subcommittee, holding 12 hearings.<sup>8</sup> The Subcommittee investigated ways to secure the nation's borders and keep terrorists out of the country, how to protect against future terrorist attacks, respond to terrorist attacks, and streamline public access to government information.

The Subcommittee's hearings were successful, leading (among other things) to the introduction of a comprehensive bill on immigration reform;<sup>9</sup> a May 9, 2005 visit to the Mexican border by Chairman Kyl with Department of Homeland Security Secretary Michael Chertoff and a second visit on November 29, 2005, by Chairman Kyl with President Bush, Secretary Chertoff, and Attorney General Alberto Gonzales; the enactment of the Homeland Security Appropriations bill that allocates nearly \$9 billion for securing the nation's borders;<sup>10</sup> an Executive Order by the President to improve the implementation of the Freedom of Information Act;<sup>11</sup> the removal of the sunset provisions from the material support statutes;<sup>12</sup> the enactment of port security provisions introduced by Senators Feinstein and Kyl.<sup>13</sup>

The Subcommittee's efforts to promote legislative improvement require vigorous and effective oversight of the departments within its jurisdiction. Most important, of course, are the Departments of Justice and Homeland Security. The Subcommittee directs significant resources to this end, and welcomes the submission of briefings or reports that supplement its own independent research. These resources complement the hearing process and serve as mechanisms for further understanding the successes and failures of policies designed to secure the border and combat terrorism. Although issues within the Subcommittee's jurisdiction are among the most sensitive in America, the Subcommittee has crafted a bipartisan approach to oversight, as is illustrated by this joint report.

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<sup>8</sup> The Immigration, Border Security, and Citizenship Subcommittee held an equal number of hearings. The number of hearings each subcommittee held is listed in the parentheses after the subcommittee name: Terrorism, Technology, and Homeland Security (12, including 6 joint hearings with the Subcommittee on Immigration, Border Security, and Citizenship; the Subcommittee on Terrorism, Technology, and Homeland Security also held a briefing and helped run a number of full committee hearings); Immigration, Border Security, and Citizenship (12); Constitution, Civil Rights, and Property Rights (10); Intellectual Property (6); Administrative Oversight and the Courts (5); Antitrust, Competition Policy, and Consumer Rights (4); Corrections and Rehabilitation (2); and Crime and Drugs (1). U.S. Senate, Comm. on the Judiciary, All Hearings, *available at* [http://judiciary.senate.gov/schedule\\_all.cfm](http://judiciary.senate.gov/schedule_all.cfm).

<sup>9</sup> Comprehensive Enforcement and Immigration Reform Act, S. 1438, 109th Cong. (2005).

<sup>10</sup> Department of Homeland Security Appropriations Act, 2006, Pub. L. No. 109-90, 119 Stat. 2064 (2005).

<sup>11</sup> Improving Agency Disclosure of Information, Exec. Order No. 13,392, 70 Fed. Reg. 75,373 (Dec. 14, 2005).

<sup>12</sup> USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006).

<sup>13</sup> USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006); *see Covering the Waterfront: A Review of Seaport Security Since September 11, 2001: Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security of the Senate Comm. on the Judiciary*, 108th Cong., 2d Sess. (Jan. 27, 2004) (S. Hrg. 108-\_\_\_\_, Serial No. J-108-\_\_\_\_).

## EXECUTIVE SUMMARY

Key findings and accomplishments:

### Homeland Security

**An electromagnetic pulse (EMP) attack could cause catastrophic damage to the United States.** A single nuclear weapon detonated at high altitude could produce an electromagnetic pulse that, depending on its location and size, would disable power grids and other electrical systems across much of the United States for months, if not years.<sup>14</sup> In 2000, Congress established the Commission to Assess the Threat to the United States from Electromagnetic Pulse (EMP) Attack. The Commission found that preparing for and mitigating an EMP threat is “feasible and well within the Nation’s means and resources to accomplish.”<sup>15</sup> The Subcommittee held a hearing to investigate the likelihood of an EMP attack and the state of the nation’s preparedness for such an attack. According to expert testimony, America’s dependence on technological infrastructures makes the United States particularly vulnerable to an EMP attack.<sup>16</sup> Terrorists, even those who lack a high level of military or nuclear sophistication, could launch an EMP attack.<sup>17</sup> The effects would be devastating, and “the loss of life would run into the tens of millions, perhaps a great deal more.”<sup>18</sup> As a follow-up to the hearing, Chairman Kyl wrote a letter to 19 federal departments and agencies that detailed the EMP threat and the Subcommittee’s findings, and authored an op-ed published in the *Washington Post* to raise public awareness.<sup>19</sup>

**The United States lacks the necessary technology to detect and prevent nuclear weapons from being smuggled into the United States.**<sup>20</sup> Between 1993 and 2004, there were 662 cases of illicit trafficking in nuclear and radiological materials worldwide.<sup>21</sup> More than 400 of those cases involved materials that could

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<sup>14</sup> Commission to Assess the Threat to the United States from Electromagnetic Pulse (EMP) Attack, Report of the Commission to Assess the Threat to the United States from Electromagnetic Pulse (EMP) Attack, Volume 1: Exec. Report (2004), at 1-3, available at [www.globalsecurity.org/wmd/library/congress/2004\\_r/04-07-22emp.pdf](http://www.globalsecurity.org/wmd/library/congress/2004_r/04-07-22emp.pdf) [hereinafter “EMP Attack Report, 2004”].

<sup>15</sup> EMP Attack Report, 2004, at 1-3.

<sup>16</sup> Hearing of Mar. 8, 2005, at 14 (statement of Lowell Wood).

<sup>17</sup> *Terrorism and the EMP Threat to Homeland Security: Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security of the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (Mar. 8, 2005) (S. Hrg. 109-30, Serial No. J-109-5), at 11 (transcript) (statement of Lowell Wood) [hereinafter “Hearing of Mar. 8, 2005”].

<sup>18</sup> Hearing of Mar. 8, 2005, at 18 (statement of Lowell Wood).

<sup>19</sup> Jon Kyl, *Unready For This Attack*, WASH. POST, Apr. 16, 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A57774-2005Apr15.html>.

<sup>20</sup> *Detecting Smuggled Nuclear Weapons: Hearing Before the Subcomm. On Terrorism, Technology, and Homeland Security of the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. (July 27, 2006) (S. Hrg. 109-761, Serial No. J-109-102), at 36-37 (transcript) (statement of Fred Ikle) [hereinafter “Hearing of July 27, 2006”].

<sup>21</sup> Quoted in testimony before the Homeland Security and Government Affairs Committee by Eugene Aloise, Director of Natural Resources and Environmental Team at the Government Accountability Office, March 28, 2006; see also Hearing of July 27, 2006, at 3 (transcript) (statement of Jon Kyl).

be used to produce a dirty bomb,<sup>22</sup> and 21 of those cases involved material that could be used to make a nuclear weapon.<sup>23</sup> Evidence suggests that the government currently lacks the capacity to detect the covert introduction of nuclear materials across U.S. borders.<sup>24</sup> This vulnerability should be addressed through increased funding of nuclear detection programs. Such funding would facilitate advances in detection and prevention capabilities and would encourage the establishment of an industrial base capable of developing and mass producing nuclear detection technologies.<sup>25</sup> In 2006, the Senate Appropriations Committee proposed to cut the research and development budget of a Department of Homeland Security nuclear detection program by 30 percent.<sup>26</sup> After the Subcommittee’s hearing, Chairman Kyl wrote the Senate Appropriations Committee requesting that it reconsider its proposed cuts to the nuclear detection budget.<sup>27</sup> The conference report that emerged included \$480.97 million in nuclear detection funding — a \$38.6 million increase over the original Senate-passed level.<sup>28</sup> The report was signed into law by the President on October 4, 2006.<sup>29</sup>

**The material support statutes, 18 U.S.C. § 2339A and 18 U.S.C. § 2339B, are important counterterrorism tools.** The material support statutes criminalize knowingly providing material support or resources for a particular act of terrorism<sup>30</sup> and providing support to an entity designated a “foreign terrorist organization” (FTO) by the Secretary of State, regardless of whether the provider intends to aid particular acts of terrorism or engages in terrorism.<sup>31</sup> The Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, designates FTOs under section 219 of the Immigration and Nationality Act.<sup>32</sup> There are 42 designated FTOs.<sup>33</sup> The material support statutes recognize that terrorists are unable to carry out attacks without nonviolent experts and

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<sup>22</sup> A “dirty bomb” is an improvised nuclear device that uses conventional explosives to disperse radioactive materials into the atmosphere.

<sup>23</sup> Quoted in testimony before the Homeland Security and Government Affairs Committee by Eugene Aloise, Director of Natural Resources and Environmental Team at the Government Accountability Office, March 28, 2006; *see also* Hearing of July 27, 2006, at 3 (transcript) (statement of Jon Kyl).

<sup>24</sup> Govt. Accountability Off. Report, *Border Security: Investigators Successfully Transported Radioactive Sources Across Our Nation’s Borders at Selected Locations* (GAO 06-545R, March 28, 2006), *available at* <http://www.gao.gov/new.items/d06545r.pdf> (last visited Aug. 30, 2006); Hearing of July 27, 2006, at 9 (transcript) (statement of Dianne Feinstein).

<sup>25</sup> Hearing of July 27, 2006, at 60-61 (transcript) (statement of Vayl Oxford).

<sup>26</sup> Hearing of July 27, 2006, at 4 (transcript) (statement of Jon Kyl).

<sup>27</sup> Letter dated August 21, 2006 from Senator Kyl to Senators Gregg and Byrd, Chairman and Ranking Member, respectively, of the Subcommittee on Homeland Security appropriations.

<sup>28</sup> H. R. Rep. No. 109-699 (2006) (Conf. Rep.); H.R. Rep. No. 109-699 was passed as the Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, 120 Stat. 1355 (2006).

<sup>29</sup> Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, 120 Stat. 1355 (2006).

<sup>30</sup> 18 U.S.C. § 2339A (2004).

<sup>31</sup> 18 U.S.C. § 2339B (2004).

<sup>32</sup> 8 U.S.C. § 1101, et. seq.

<sup>33</sup> *A Review of the Material Support to Terrorism Prohibition Improvements Act: Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security of the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (Apr. 20, 2005) (S. Hrg. 109-49, Serial No. J-109-14), at 46 (written statement of Daniel Meron and Barry Sabin) [hereinafter “Hearing of Apr. 20, 2005”]; *see* State Department, Foreign Terrorist Organizations, *available at* <http://www.state.gov/s/ct/rls/fs/37191.htm> (42 designated FTOs as of October 11, 2005).

logistical support networks,<sup>34</sup> and have facilitated 96 prosecutions in 21 different federal judicial districts since their passage.<sup>35</sup> The 2004 Intelligence Reform and Terrorism Prevention Act amended the material support statutes to broaden their scope and to address concerns expressed by the U.S. Court of Appeals for the Ninth Circuit. These amendments were scheduled to expire at the end of 2006.<sup>36</sup> The Department of Justice strongly supported removing the sunset provisions that would have caused that expiration.<sup>37</sup> Consequently, Chairman Kyl authored language included in the USA PATRIOT Improvement and Reauthorization Act of 2005<sup>38</sup> to repeal those sunset provisions. Senators Kyl and Feinstein voted for the USA PATRIOT Improvement and Reauthorization Act, which the President signed into law on March 9, 2006.<sup>39</sup>

## Domestic Security

**Hurricane Katrina exposed weaknesses in the United States’s emergency preparedness that could lead to an ineffective response not only to future natural disasters, but also in the wake of a terrorist attack.** Hurricane Katrina struck the Gulf Coast in the early fall of 2005, after crossing the Gulf of Mexico. The hurricane was spotted several days before landfall. In contrast, a terrorist attack, such as a dirty bomb detonated on the west side of the U.S. Capitol,<sup>40</sup> could strike without warning as to its type, location, or severity. At a Subcommittee hearing, a panel of expert witnesses, including former Senator Slade Gorton of the 9/11 Commission, testified about effective emergency response preparation. Experts suggested studying possible types of terrorist attacks to better plan for a successful response,<sup>41</sup> writing effective response plans to ensure immediate responses during disasters,<sup>42</sup> defining clearly the command and control structure for various agencies involved in an emergency response plan,<sup>43</sup> integrating federal, state, and local response plans to provide damaged areas with necessary resources quickly,<sup>44</sup> and more effectively distributing limited resources through a system of

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<sup>34</sup> Hearing of Apr. 20, 2005, at 2 (statement of Barry Sabin).

<sup>35</sup> Hearing of Apr. 20, 2005, at 11 (statement of Barry Sabin).

<sup>36</sup> Hearing of Apr. 20, 2005, at 51 (written statement of Daniel Meron and Barry Sabin).

<sup>37</sup> Hearing of Apr. 20, 2005, at 51 (written statement of Daniel Meron and Barry Sabin).

<sup>38</sup> USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006).

<sup>39</sup> USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006).

<sup>40</sup> *Terrorism: Emergency Preparedness: Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security of the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (Oct. 26, 2005) (S. Hrg. 109-222, Serial No. J-109-46), at 7 (statement of Wayne Thomas) [hereinafter “Hearing of Oct. 26, 2005”].

<sup>41</sup> Hearing of Oct. 26, 2005, at 7-8 (statement of Wayne Thomas); *id.* at 10-11 (statement of Henry Renteria); *id.* at 15 (statement of Michael O’Hanlon).

<sup>42</sup> Hearing of Oct. 26, 2005, at 8-9 (statement of Wayne Thomas); *id.* at 25-26 (statement of Slade Gorton).

<sup>43</sup> Hearing of Oct. 26, 2005, at 5 (statement of Slade Gorton).

<sup>44</sup> Hearing of Oct. 26, 2005, at 1-2 (statement of Jon Kyl); *id.* at 6 (statement of Slade Gorton); *id.* at 8-9 (statement of Wayne Thomas); *id.* at 10-11 (statement of Henry Renteria); *id.* at 13 (statement of Matthew Bettenhausen); *id.* at 17-18 (statement of Michael O’Hanlon); *id.* at 19-20 (statement of John Cornyn).

risk-based assessments.<sup>45</sup> Since the hearing, Chairman Kyl has helped win \$80 million for the procurement of communication system that will assist federal, state, and local officials collaborate with one another during an emergency response.<sup>46</sup>

## **Border Security**

**U.S. officials have been more attentive to the travel patterns of potential terrorists since 9/11.** According to testimony before the Subcommittee, Department of Homeland Security (DHS) worked with the consular staff in Saudi Arabia to review over 20,000 visa applications by 2004.<sup>47</sup> DHS also selected permanent visa-security officers, half of whom have foreign language training, to be deployed to Saudi Arabia.<sup>48</sup> Further, DHS has improved the training of customs inspectors since 9/11 and created the Bureau of Customs and Border Protection (CBP).<sup>49</sup> CBP fingerprints and performs record checks on every illegal alien caught at the border.<sup>50</sup> DHS no longer returns stolen or fraudulent passports to those who use them, and DHS now prosecutes the use of fraudulent documents.<sup>51</sup> Despite these improvements, some front-line officers claim that they still are not receiving critical intelligence on terrorist travel indicators.<sup>52</sup>

**Terrorists and criminal aliens exploit U.S. immigration laws to enter the country illegally.**<sup>53</sup> According to witnesses at a Subcommittee hearing, terrorists and criminal aliens are capable of crossing the border, blending into our communities, and remaining unnoticed in the United States. For example, 30 percent of aliens released with a notice to appear before an immigration judge fail to do so.<sup>54</sup> Of those who appear for their hearing and are ordered deported, 80 to 85 percent do not comply with their removal orders.<sup>55</sup> The whereabouts of 465,000 absconders are unknown, and 80,000 of those individuals have criminal backgrounds.<sup>56</sup> To prevent terrorist attacks and secure the country, the federal

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<sup>45</sup> Hearing of Oct. 26, 2005, at 3-4 (statement of Diane Feinstein); *id.* at 5-6 (statement of Slade Gorton); *id.* at 15-19 (statement of Michael O'Hanlon); *id.* at 24-25 (statement of Jon Kyl).

<sup>46</sup> Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680 (2005).

<sup>47</sup> *Strengthening Enforcement & Border Security: 9/11 Commission Report on Terrorist Travel: Joint Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security and the Subcomm. on Immigration, Border Security, and Citizenship of the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (Mar. 14, 2005) (S. Hrg. 109-71, Serial No. J-109-6), at 13 (statement of Elaine Dezenski) [hereinafter "Hearing of Mar. 14, 2005"].

<sup>48</sup> Hearing of Mar. 14, 2005, at 11 (statement of Elaine Dezenski).

<sup>49</sup> Hearing of Mar. 14, 2005, at 12 (statement of Thomas Walters).

<sup>50</sup> Hearing of Mar. 14, 2005, at 16 (statement of Thomas Walters).

<sup>51</sup> Hearing of Mar. 14, 2005, at 24 (statement of Thomas Walters).

<sup>52</sup> Hearing of Mar. 14, 2005, at 28 (statement of Janice Kephart).

<sup>53</sup> *Strengthening Interior Enforcement: Deportation and Related Issues: Joint Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security and the Subcomm. on Immigration, Border Security, and Citizenship of the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (Apr. 14, 2005) (S. Hrg. 109-64, Serial No. J-109-13), at 2 (statement of John Cornyn) [hereinafter "Hearing of Apr. 14, 2005"].

<sup>54</sup> Hearing of Apr. 14, 2005, at 15 (statement of Victor Cerda).

<sup>55</sup> Hearing of Apr. 14, 2005, at 15 (statement of Victor Cerda).

<sup>56</sup> Hearing of Apr. 14, 2005, at 22 (statement of John Cornyn).

government must supply adequate tools and resources to Border Patrol agents, immigration investigators, detention officers, and other officials responsible for locating, detaining, and removing those who are in this country illegally. Officials need to be given the tools “to keep out of our country those who should be kept out, to identify those in our country who should be apprehended, and to remove from this country those the government orders deported.”<sup>57</sup> Following the hearing, Senators Kyl and Feinstein pushed for passage of legislation that provides a legal procedure substitute to ensure the timely prosecution of criminal aliens.<sup>58</sup> Also, Senator Kyl helped win an additional \$1.4 billion for new detention capacity<sup>59</sup> and authored provisions in Homeland Security Appropriations that provided for another 1,700 detention beds.<sup>60</sup> Most recently, Senators Kyl and Cornyn sent a letter to the President requesting \$45.5 million for the funding of 1,300 additional detention beds.<sup>61</sup>

**The federal government must address regulatory restrictions that hamper enforcement efforts, the Mexican government’s refusal to support U.S. border enforcement efforts, and provide funding assistance for states that bear the burden of illegal immigration.** Additional funding is needed to implement existing technologies — such as cameras and radar installations — that monitor the border.<sup>62</sup> Regulatory restrictions stall the implementation of effective border security measures. For instance, it currently takes two to three years to install remote video-surveillance equipment or to design and construct access roads.<sup>63</sup> Additionally, in many parts of the desert along the Arizona border, restrictions prohibit vehicular pursuit of illegal aliens and smugglers by the government, and agents can only be deployed on horses that have to be given “[special feed] so that the droppings left by the horses would not bring in non-indigenous plants.”<sup>64</sup> A combination of temporary checkpoints and multi-lane permanent checkpoints are needed to better secure the border.<sup>65</sup> The federal government must also encourage the Mexican government to act as a responsible partner in support of U.S. border enforcement efforts along the southern border.

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<sup>57</sup> Hearing of Apr. 14, 2005, at 2 (statement of John Cornyn).

<sup>58</sup> The REAL ID Act, H.R. 418, as passed the House, was appended as Division B to the end of H.R. 1268. H.R. 1268 was modified in conference, and the language of H.R. 418 was enacted as part of H.R. 1268, which became Pub. L. No. 109-13 on May 11, 2005. REAL ID Act of 2005, H.R. 418, 109th Cong. § 105 (2005); Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005).

<sup>59</sup> Department of Homeland Security Appropriations Act, 2006, Pub. L. No. 109-90, 119 Stat. 2064 (2005).

<sup>60</sup> Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, 120 Stat. 1355 (2006).

<sup>61</sup> Weekly Column, Senator Jon Kyl, Kyl, Cornyn Urge President’s Support for Emergency Border Security Funding (July 24, 2006) (<http://kyl.senate.gov/record.cfm?id=259345>).

<sup>62</sup> *Strengthening Border Security Between the Ports of Entry: The Use of Technology to Protect the Borders: Joint Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security and the Subcomm. on Immigration, Border Security, and Citizenship of the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (Apr. 28, 2005) (S. Hrg. 109-51, Serial No. J-109-18), at 4-5 (statement of David Aguilar) [hereinafter “Hearing of Apr. 28, 2005”].

<sup>63</sup> Hearing of Apr. 28, 2005, at 29 (statement of David Aguilar).

<sup>64</sup> Hearing of Apr. 28, 2005, at 30 (statement of David Aguilar).

<sup>65</sup> Hearing of Apr. 28, 2005, at 27-28 (statement of David Aguilar).

Senator Kyl contacted Secretary of State Condoleezza Rice<sup>66</sup> and then-Mexican President Vicente Fox<sup>67</sup> to express concerns about Mexico's attitude toward U.S. border security efforts. Until these issues are addressed, illegal immigration will continue to place an undue burden on states along the southern border. To raise public awareness about the costs associated with illegal immigration, Senators Kyl and Feinstein introduced legislation to authorize \$750 million for the costs to incarcerate criminal aliens,<sup>68</sup> and Senators Kyl, Hutchison, and Cornyn introduced legislation to provide \$500 million for the reimbursement of law enforcement and judiciary costs associated with illegal immigration.<sup>69</sup> Senator Kyl also helped get the Department of Justice assign 25 additional Assistant U.S. Attorneys to the five federal law enforcement districts along the border, and secured adoption of \$1 billion in reimbursement to hospitals that are required by federal law to treat illegal immigrants.<sup>70</sup>

**Comprehensive immigration reform is necessary for our national security.**

Witnesses at a Subcommittee hearing testified that immigration reform should include (1) the technology and agents to enforce the border effectively; (2) sufficient detention space, attorneys, judges, and international cooperation to detain and process immigrants caught illegally crossing into the United States; (3) effective workplace enforcement to make it less likely that an illegal immigrant will find employment; (4) a program that offers foreigners a viable alternative to seeking illegal employment; and (5) a means to identify illegal immigrants already within the United States.<sup>71</sup>

**The escalating problem of aliens from countries other than Mexico, or “Other than Mexican” (OTM) aliens, may be diminished by stepping up expedited removal, increasing bed space, and reducing the incentive to immigrate illegally.** Increasing numbers of OTM aliens has exacerbated traditional illegal immigration problems and created new challenges for border enforcement personnel. Even if OTMs are apprehended, lack of detention space and inadequate removal systems ensure that most OTMs who enter the United States will remain in the country.<sup>72</sup> Witnesses testified before the Subcommittee

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<sup>66</sup> Letter from Jon Kyl, Senator, U.S. Senate, to Condoleezza Rice, Secretary of State, U.S. State Department (Feb. 6, 2006) (on file with Author).

<sup>67</sup> Letter from Jon Kyl, Senator, U.S. Senate, to Vicente Fox, President, United Mexican States (Mar. 17, 2005) (on file with Author).

<sup>68</sup> State Criminal Alien Assistance Program Reauthorization Act of 2005, S. 188, 109th Cong. (2005).

<sup>69</sup> State Criminal Alien Assistance Program II, S. 1006, 109th Cong. (2006).

<sup>70</sup> Weekly Column, Senator Jon Kyl, Illegal Aliens and the Cost to Arizona's Hospitals (May 23, 2005) (<http://www.kyl.senate.gov/record.cfm?id=238054>); 42 U.S.C.A. § 1395dd.

<sup>71</sup> *The Need for Comprehensive Immigration Reform: Strengthening our National Security: Joint Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security and the Subcomm. on Immigration, Border Security, and Citizenship of the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (May 17, 2005) (S. Hrg. 109-65, Serial No. J-109-20).

<sup>72</sup> *The Southern Border in Crisis: Resources and Strategies to Improve National Security: Joint Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security and the Subcomm. on Immigration, Border Security, and Citizenship of the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (June 7, 2005) (S. Hrg. 109-\_\_\_\_, Serial No. J-109-\_\_\_\_), at 14-15 (transcript) (statement of Wesley Lee) [hereinafter “Hearing of June 7, 2005”].

that expedited removal is one viable solution to the escalating OTM alien problem. This procedure has greatly reduced the delay in processing OTMs in the Border Patrol sectors where it has been introduced.<sup>73</sup> An expansion of expedited removal, together with an increase in resources and bed space for detention and removal operations should be part of the long-term solution to the OTM alien problem. At the same time, reducing incentives to immigrate illegally will allow for more focused and successful border enforcement.

**The Visa Waiver Program (VWP) and airplane cargo security must be improved to provide a multilayered security system needed to protect airline passengers and the United States.** The VWP is a reciprocal agreement between the United States and 27 other countries that allows foreign nationals to enter the United States without a visa for up to 90 days.<sup>74</sup> Though the program has had enormous economic success, it creates a security risk because it admits 16 million people each year into the United States without the full visa application processes that screen out terrorists and criminals.<sup>75</sup> Along with US-VISIT<sup>76</sup> the United States currently uses three tools to screen VWP entrants before their arrival at U.S. ports of entry: (1) United States Visitor and Immigrant Indicator Technology (US-VISIT); (2) e-passports with biometric identifiers;<sup>77</sup> (3) the Computer Assisted Passenger Prescreening System-II (CAPPS-II);<sup>78</sup> (4) the Advanced Passenger Information System (APIS);<sup>79</sup> and (5) the Immigration Advisory Program (IAP).<sup>80</sup> Despite these measures, a Subcommittee hearing identified six major security issues that must be addressed: (1) pre-departure security procedures are inadequate to prevent terrorists from initiating travel to the U.S.;<sup>81</sup> (2) travel document fraud is prevalent within the VWP;<sup>82</sup> (3) DHS fails to provide adequate oversight in key areas (e.g., reporting guidelines, access to Interpol databases, and overstay information);<sup>83</sup> (4) four VWP countries withhold information, such as that related to lost or stolen travel documents, from Interpol;<sup>84</sup> and (5) border inspectors lack familiarity with foreign nationals and therefore cannot adequately interview entrants

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<sup>73</sup> Hearing of June 7, 2005, at 20 (transcript) (statement of Wesley Lee).

<sup>74</sup> *Keeping Terrorists off the Plane: Strategies for Pre-Screening International Passengers Before Takeoff: Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security of the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. (September 7, 2006) (S. Hrg. 109-760, Serial No. J-109-107), at 8 (written statement of Jon Kyl); *id.* at 11-12 (transcript) (statement of Paul Rosenzweig); *id.* at 40 (transcript) (statement of Jess Ford) [hereinafter "Hearing of Sept. 7, 2006"].

<sup>75</sup> Hearing of Sept. 7, 2006, at 40 (transcript) (statement of Jess Ford).

<sup>76</sup> Hearing of Sept. 7, 2006, at 12 (transcript) (statement of Paul Rosenzweig).

<sup>77</sup> Hearing of Sept. 7, 2006, at 5 (transcript) (statement of Jon Kyl); On October 26, 2006, the State Department released a notice that 24 of the 27 countries in the VWP had met the new October 26, 2006 deadline; Press Release, Department of Homeland Security, Majority of VWP Countries to Meet Digital Photo Deadline (Oct. 26, 2005) ([www.dhs.gov/xnews/releases/press\\_release\\_0789.shtm](http://www.dhs.gov/xnews/releases/press_release_0789.shtm)).

<sup>78</sup> Hearing of Sept. 7, 2006, at 13 (transcript) (statement of Paul Rosenzweig).

<sup>79</sup> Hearing of Sept. 7, 2006, at 4 (transcript) (statement of Jon Kyl).

<sup>80</sup> Hearing of Sept. 7, 2006, at 5 (transcript) (statement of Jon Kyl).

<sup>81</sup> Hearing of Sept. 7, 2006, at 12 (transcript) (statement of Paul Rosenzweig).

<sup>82</sup> Hearing of Sept. 7, 2006, at 8 (transcript) (statement of Dianne Feinstein).

<sup>83</sup> Hearing of Sept. 7, 2006, at 23 (transcript) (statement of Paul Rosenzweig).

<sup>84</sup> Hearing of Sept. 7, 2006, at 27 (transcript) (statement of Paul Rosenzweig).

at U.S. ports of entry.<sup>85</sup> Following the hearing, Senators Kyl and Feinstein wrote to the Secretary of DHS urging implementation of the Government Accountability Office's recommendations,<sup>86</sup> and Senators Kyl and Cornyn sent a letter to the President requesting an additional \$193 million to fund the US-VISIT Entry-Exit Program.<sup>87</sup> Also, Senator Kyl helped secure \$17.9 million for the Federal Law Enforcement Training Center to ensure that customs officials receive the training needed to effectively screen foreign nationals.<sup>88</sup>

**Securing the border of the United States from violence and illegal activity is essential to maintaining homeland security.**<sup>89</sup> There are not enough Border Patrol agents to control the United State's borders effectively. Although the number of Border Patrol agents has increased, "[i]n 2005, the Border Patrol had 11,268 agents patrolling over 9,000 miles of U.S. border. That does not even compare favorably with the City of New York, which employs 39,110 police officers to patrol just its five boroughs."<sup>90</sup> Sheriff A. D'Wayne Jernigan testified before the Subcommittee that courts' criminal dockets were becoming strained as the number of criminal aliens crossing the border increased.<sup>91</sup> According to Sheriff T. J. Bonner, President of the National Border Patrol Council, violence against Border Patrol agents, support personnel, and American citizens is occurring at record levels.<sup>92</sup> Criminal organizations, drug cartels, and smugglers are even more sophisticated and better trained to avoid U.S. law enforcement officials.<sup>93</sup> However, before effective measures can be taken to address these issues with internal enforcement, the federal government must make a concerted effort to control the flow of illegal aliens across the U.S.-Mexico border. Following the hearing, Senators Kyl and Feinstein introduced legislation to help curb the practice of border tunneling.<sup>94</sup> That legislation, the Border Tunneling Prevention Act, was included in the Homeland Security Appropriations Act for 2007, which the President signed into law on October 4, 2006.<sup>95</sup>

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<sup>85</sup> Hearing of Sept. 7, 2006, at 40 (transcript) (statement of Jess Ford).

<sup>86</sup> Letter from Jon Kyl and Dianne Feinstein, Senators, U.S. Senate, to Michael Chertoff, Secretary, Department of Homeland Security (Sept. 18, 2006) (on file with Authors).

<sup>87</sup> Letter from Jon Kyl and John Cornyn, Senators, U.S. Senate, to George Bush, President, United States of America (July. 24, 2006) (on file with Authors).

<sup>88</sup> Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680 (2005).

<sup>89</sup> *Federal Strategies to End Border Violence: Joint Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security and the Subcomm. on Immigration, Border Security, and Citizenship of the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. (Mar. 1, 2006) (S. Hrg. 109-556, Serial No. J-109-60), at 11 (statement of Paul Charlton) [hereinafter "Hearing of Mar. 1, 2006"].

<sup>90</sup> Hearing of Mar. 1, 2006, at 3 (statement of Jon Kyl).

<sup>91</sup> Hearing of Mar. 1, 2006, at 33 (statement of A. D'Wayne Jernigan).

<sup>92</sup> Hearing of Mar. 1, 2006, at 36 (statement of T. J. Bonner).

<sup>93</sup> Hearing of Mar. 1, 2006, at 8 (statement of David Aguilar).

<sup>94</sup> Hearing of Mar. 1, 2006, at 5 (statement of Dianne Feinstein); Border Tunneling Prevention Act, S. 2355, 109th Cong. (2006).

<sup>95</sup> Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, 120 Stat. 1355 (2006).

**An effective employment verification system is a critical component of securing the border.**<sup>96</sup> If worksite enforcement of immigration laws is not strong, the underground market for illegal labor will prevent any true reform.<sup>97</sup> Strong worksite enforcement of immigration laws will help reduce the demand for and supply of illegal labor. Unlike the 1986 program, which was too complicated to be easily enforced, any future worksite enforcement program should be easily administered and focused on reducing document fraud. Currently, over 29 combinations of documents can be used to prove identity and work eligibility.<sup>98</sup> Reducing the number of documents accepted by employers coupled with strict enforcement would help prevent document fraud and limit the employment opportunities available to illegal aliens.<sup>99</sup> Comprehensive reform of worksite enforcement should also address employers' needs by creating a fast and efficient system that verifies employee eligibility. Once a new system is in place, employers should face serious penalties for violations. Over 2,300 employers use the United States Citizenship and Immigration Services (USCIS) Basic Pilot program to verify electronically whether potential employees are authorized to work.<sup>100</sup> To service all U.S. employers, the USCIS Basic Pilot program must be expanded to handle up to 7.1 million employers. The USCIS Basic Pilot program also needs to be linked, online and real-time, with the US-VISIT and the USCIS immigration-benefits databases.

## **Openness in Government**

**An open government law must be balanced against national security concerns.** The Subcommittee held a hearing on two bills (S. 394 and S. 589) that would facilitate the public's access to government information.<sup>101</sup> Allowing public access to government information prevents corruption and helps businesses comply with government regulations.<sup>102</sup> Nevertheless, this access should be provided in a manner that ensures terrorists cannot obtain information that could harm the United States. As a result of the Subcommittee's hearing and Senate action on these bills, President Bush issued an Executive Order to improve the implementation of the Freedom of Information Act (FOIA).<sup>103</sup> The Executive Order directs agencies to "ensure citizen-centered and results-oriented agency FOIA operations."<sup>104</sup>

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<sup>96</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>97</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>98</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>99</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>100</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>101</sup> *Openness in Government and Freedom of Information: Examining the OPEN Government Act of 2005: Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security of the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (Mar. 15, 2005) (S. Hrg. 109-69, Serial No. J-109-7), at 1 (statement of John Cornyn) [hereinafter "Hearing of Mar. 15, 2005"].

<sup>102</sup> Hearing of Mar. 15, 2005, at 54-55 (statement of Thomas Susman); *id.* at 14-15 (statement of Mark Tapscott).

<sup>103</sup> Improving Agency Disclosure of Information, Exec. Order No. 13,392, 70 Fed. Reg. 75,373 (Dec. 14, 2005).

<sup>104</sup> Improving Agency Disclosure of Information, Exec. Order No. 13,392, 70 Fed. Reg. 75,373 (Dec. 14, 2005).

## HOMELAND SECURITY

### Electromagnetic Pulse

#### *Introduction*

In October 2000, Congress established the Commission to Assess the Threat to the United States from Electromagnetic Pulse (EMP) Attack (“EMP Commission”). In July 2004, the EMP Commission released an unclassified executive report on the threat of EMP attacks.<sup>105</sup> To assess the risks outlined in the EMP Commission Report, the Subcommittee held a hearing on March 8, 2005, entitled “Terrorism and the EMP Threat to Homeland Security.”<sup>106</sup>

Three experts testified at the hearing: (1) Dr. Lowell L. Wood, Jr., acting Chairman, EMP Commission, a member of the Technical Advisory Group of the U.S. Senate Select Committee on Intelligence, a member of the Undersea Warfare Experts Group of the U.S. House of Representatives Committee on Armed Services, and a member of the U.S. Nuclear Strategy Forum; (2) Dr. Peter Vincent Pry, former Chief Analyst on Foreign Views of EMP attacks, EMP Commission, Director of the United States Nuclear Strategy Forum, and one of the Central Intelligence Agency’s chief experts on the former Soviet Union’s plans for EMP attacks; and (3) Dr. Peter M. Fonash, acting Deputy Manager, National Communications System, Department of Homeland Security.

#### *The Threat of an Electromagnetic Pulse Attack*

In his opening statement, Chairman Kyl explained, “[t]he 9/11 Commission report stated that our biggest failure was one of ‘imagination.’ No one imagined that terrorists would do what they did on September 11, 2001.”<sup>107</sup> The Subcommittee sought to explore “new and imaginative possibilities of terrorist plots and methods . . . to examine a possibility that poses a grave threat and a crippling impact to our way of life.”<sup>108</sup>

The EMP Commission’s report provided the Subcommittee insight on four specific aspects of an EMP attack: “(1) the nature and magnitude of potential high-altitude EMP threats to the United States from all potentially hostile states or non-state actors that have or could acquire nuclear weapons and ballistic missiles enabling them to perform a high-altitude EMP attack against the United States within the next 15 years; (2) the

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<sup>105</sup> Commission to Assess the Threat to the United States from Electromagnetic Pulse (EMP) Attack, Report of the Commission to Assess the Threat to the United States from Electromagnetic Pulse (EMP) Attack, Volume 1: Exec. Report (2004), at 1-3, *available at* [www.globalsecurity.org/wmd/library/congress/2004\\_r/04-07-22emp.pdf](http://www.globalsecurity.org/wmd/library/congress/2004_r/04-07-22emp.pdf) [hereinafter “EMP Attack Report, 2004”].

<sup>106</sup> *Terrorism and the EMP Threat to Homeland Security: Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security of the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (Mar. 8, 2005) (S. Hrg. 109-30, Serial No. J-109-5), at 2 (statement of Jon Kyl) [hereinafter “Hearing of Mar. 8, 2005”].

<sup>107</sup> Hearing of Mar. 8, 2005, at 1 (statement of Jon Kyl).

<sup>108</sup> Hearing of Mar. 8, 2005, at 1-2 (statement of Jon Kyl). Chairman Kyl expounded his thoughts on the threat of an EMP attack in an editorial in the *Washington Post*. Jon Kyl, *Unready for this Attack*, WASH. POST, Apr. 16, 2005, at A19.

vulnerability of United States military and civilian systems to an EMP attack, giving special attention to vulnerability of the civilian infrastructure as a matter of emergency preparedness; (3) the capability of the United States to repair and recover from damage inflicted on United States military and civilian systems by an EMP attack; and (4) the feasibility and cost of hardening select military and civilian systems against EMP attack.”<sup>109</sup>

The report found that, although an EMP attack could cause catastrophic damage to the United States’s critical infrastructure, mitigating this threat is “feasible and well within the Nation’s means and resources to accomplish.”<sup>110</sup>

### *U.S. Dependency on Electricity*

Dr. Wood explained a key difference between the threat of an EMP attack and the nuclear threat during the Cold War:

Throughout the Cold War, the United States did not try to protect its civilian infrastructure against either the physical or an EMP effect of nuclear weapons and instead depended on deterrence for whatever safety might be attained . . . . [But] [t]he key difference, the Commission found, from the past is that the United States has developed more than most other nations as a modern society. It is heavily dependent on electronics, telecommunications, energy, information networks, and a rich set of financial and transportation systems that critically leverage modern technology.<sup>111</sup>

America’s dependence on technological infrastructures to produce economic, industrial, and societal advantages make American citizens vulnerable to an EMP attack.<sup>112</sup> Such an attack could destroy key infrastructure, including electrical power, telecommunications, food refrigeration, transportation, emergency services, water purification and delivery, and fire fighting equipment.<sup>113</sup> Chairman Kyl noted that in an EMP attack our “infrastructures would be rendered unusable, thus inflicting widespread disruption or failure on a national scale. The death toll from such an attack is almost unthinkable.”<sup>114</sup> Communication would break down. Powerless refrigerators would leave food rotting in warehouses, which would be marooned by a lack of transportation, and the lack of clean water would quickly threaten public health.

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<sup>109</sup> Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, 114 Stat. 1654 (2000).

<sup>110</sup> EMP Attack Report, 2004, at 1-3.

<sup>111</sup> Hearing of Mar. 8, 2005, at 13-14 (statement of Lowell Wood).

<sup>112</sup> Hearing of Mar. 8, 2005, at 14 (statement of Lowell Wood).

<sup>113</sup> Hearing of Mar. 8, 2005, at 2 (statement of Jon Kyl).

<sup>114</sup> Hearing of Mar. 8, 2005, at 2 (statement of Jon Kyl).

There would be no initial deaths from the nuclear detonation, “but in the immediate aftermath, America in a lot of senses would be hammered to its knees.”<sup>115</sup> If a nuclear weapon exploded anywhere above the United States during the middle of the day, people might not even see or hear anything, but as Dr. Wood testified,

The lights would go out. A great deal of things instantly dependent on electricity would go away. And depending on the nature of the damage, its severity, its geographical descent, the lights might come back on hours later, they might come back on decades later . . . . If the lights stay off for more than a year in this country, the Commission’s estimate was the loss of life would run into the tens of millions, perhaps a great deal more. You miss the harvest. You have no refrigeration, no transportation, no anything except what we had as a country in the 1880’s. Most Americans will die in that interval.<sup>116</sup>

Previous power failures, such as the 2004 blackout in New York or those resulting from hurricanes throughout the Gulf of Mexico, are not proper measures of the country’s preparedness for an EMP attack. In those cases, areas affected by the outages were surrounded by functioning electrical infrastructure, and outside help was immediately available to alleviate the power shortage. If the United States were to suffer a large-scale power outage in the aftermath of an EMP attack, that external assistance would not be available. The failure of one infrastructure could pull down others dependent on its functioning, and the failure of those, in turn, could seriously impede the recovery of the first infrastructure.<sup>117</sup>

With regard to our communications infrastructure, Dr. Fonash shared the results of the National Communications System test on the United States’s communications infrastructure and current core telecommunications switches. Dr. Fonash testified that an EMP attack would have only a minimal lasting effect on these switches because most of the nation’s core communications assets are in large, well-constructed facilities that provide a measure of shielding.<sup>118</sup> Dr. Pry, however, disagreed with Dr. Fonash’s determination that the telecommunications infrastructure could withstand an EMP attack.<sup>119</sup> He asserted that the communications infrastructure contains millions of Ethernet network cards that could not withstand even a moderate level of EMP.<sup>120</sup> Dr. Pry stated, “[t]o have massive failure of this kind of an item would be a very serious blow to our communications infrastructure.”<sup>121</sup>

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<sup>115</sup> Hearing of Mar. 8, 2005, at 26 (statement of Lowell Wood).

<sup>116</sup> Hearing of Mar. 8, 2005, at 18 (statement of Lowell Wood).

<sup>117</sup> Hearing of Mar. 8, 2005, at 12 (statement of Lowell Wood).

<sup>118</sup> Hearing of Mar. 8, 2005, at 5 (statement of Peter Fonash).

<sup>119</sup> Hearing of Mar. 8, 2005, at 27 (statement of Peter Pry).

<sup>120</sup> Hearing of Mar. 8, 2005, at 27 (statement of Peter Pry).

<sup>121</sup> Hearing of Mar. 8, 2005, at 27 (statement of Peter Pry).

### *Probability of Attack*

Many groups could launch an EMP attack against the United States. In March 2005, the Director of the Central Intelligence Agency testified that missing nuclear material from storage sites in Russia may have found its way into terrorists' hands.<sup>122</sup> Additionally, Director of the Federal Bureau of Investigations, Robert S. Mueller, confirmed new intelligence that suggests al Qaeda is trying to acquire weapons of mass destruction for use against the United States.<sup>123</sup> Egypt, Cuba, Pakistan, Iran, North Korea, China, and Russia, among others, possess the resources and understanding of nuclear technology to launch an EMP attack.<sup>124</sup> Moreover, numerous foreign governments have invested in strengthening programs to protect against a nuclear EMP attack; this further "indicates that this threat has broad international credibility."<sup>125</sup>

### *Why Would Terrorists Launch an EMP Attack?*

Terrorists are likely to choose an EMP attack because of its relative simplicity. While hitting a particular target on the ground, such as a city, with a SCUD missile is difficult, Dr. Wood testified that it would be relatively easy to launch a SCUD from a seagoing freighter and detonate it at the right altitude.<sup>126</sup> With a freighter off the Atlantic Coast, a terrorist group could mount an EMP attack against roughly half of the United States.<sup>127</sup> The SCUD missile necessary for such an attack could be purchased by anyone in the world's arms markets for as little as \$100,000.<sup>128</sup>

Chairman Kyl highlighted the key language from Dr. Wood's testimony:

The bottom line is that several classes of potential adversaries, including terrorist groupings, have or can acquire the capability to attack the United States with a high-altitude nuclear weapon — generated electromagnetic pulse. A determined adversary can achieve an EMP attack capability without having a high level of either military or nuclear sophistication. The effects on the systems and infrastructures dependent on electricity and electronics could be sufficiently ruinous as to qualify as catastrophic to the nation.<sup>129</sup>

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<sup>122</sup> Hearing of Mar. 8, 2005, at 1 (statement of Jon Kyl).

<sup>123</sup> Hearing of Mar. 8, 2005, at 1 (statement of Jon Kyl).

<sup>124</sup> Hearing of Mar. 8, 2005, at 5 (statement of Peter Pry).

<sup>125</sup> Hearing of Mar. 8, 2005, at 5 (statement of Peter Pry).

<sup>126</sup> Hearing of Mar. 8, 2005, at 11 (statement of Lowell Wood).

<sup>127</sup> Hearing of Mar. 8, 2005, at 11 (statement of Lowell Wood).

<sup>128</sup> Hearing of Mar. 8, 2005, at 11 (statement of Lowell Wood).

<sup>129</sup> Hearing of Mar. 8, 2005, at 15 (statement of Jon Kyl).

## *How Can We Protect Ourselves?*

At the Subcommittee hearing, Dr. Wood noted that the Secretary of Defense once said, “[v]ulnerability invites attack.”<sup>130</sup> Dr. Wood added, “extreme sustained vulnerability entices such attack.”<sup>131</sup> To protect itself, the United States, led by the Department of Homeland Security (DHS), must adopt the recommendations of the EMP Commission and take steps to improve prevention, protection, and recovery.

Dr. Pry stated that the EMP Commission has a constructive relationship with the Department of Defense, “where the Commission findings have been briefed all the way up to the [Deputy Secretary] Wolfowitz level.”<sup>132</sup> But, as of the hearing, the EMP Commission had not yet briefed DHS. Dr. Wood emphasized the importance of having DHS establish a partnership with the EMP Commission, as well as other governmental organizations and experts in the private sector. This collaboration is critical because DHS has the authority, responsibility, and obligation to request resources needed for protecting the United States from the most serious of threats, including an EMP attack.<sup>133</sup>

The EMP Commission’s plan would, in three to five years, reduce much of the EMP threat by creating measures to prevent and recover from an EMP attack.<sup>134</sup> The purpose of these measures should be to protect the transformers on an electrical power grid.<sup>135</sup> The transformers that an EMP attack would destroy are almost exclusively foreign-made.<sup>136</sup> Obtaining replacement transformers from overseas would be one of the greatest obstacles to restoring power quickly.<sup>137</sup> Therefore, the EMP Commission recommended that the United States purchase transformers in advance to have replacements available in the event of an EMP attack.<sup>138</sup>

The EMP Commission also recommended that the United States store back-up sources of power, such as diesel generators, at major communications centers to keep them functioning if electricity were suddenly unavailable.<sup>139</sup> The EMP Commission also suggested that U.S. authorities position diesel-electric locomotives near regional food warehouses and hospitals, so that the government could refrigerate food, control the temperature, and expeditiously move supplies in the aftermath of an EMP attack.<sup>140</sup>

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<sup>130</sup> Hearing of Mar. 8, 2005, at 14 (statement of Lowell Wood).

<sup>131</sup> Hearing of Mar. 8, 2005, at 14 (statement of Lowell Wood).

<sup>132</sup> Hearing of Mar. 8, 2005, at 29-30 (statement of Peter Pry).

<sup>133</sup> Hearing of Mar. 8, 2005, at 14-15 (statement of Lowell Wood).

<sup>134</sup> Hearing of Mar. 8, 2005, at 24-25 (statement of Peter Pry).

<sup>135</sup> Hearing of Mar. 8, 2005, at 19 (statement of Peter Pry).

<sup>136</sup> Hearing of Mar. 8, 2005, at 20 (statement of Lowell Wood).

<sup>137</sup> Hearing of Mar. 8, 2005, at 20 (statement of Lowell Wood).

<sup>138</sup> Hearing of Mar. 8, 2005, at 25 (statement of Peter Pry).

<sup>139</sup> Hearing of Mar. 8, 2005, at 27 (statement of Peter Fonash).

<sup>140</sup> Hearing of Mar. 8, 2005, at 25 (statement of Peter Pry).

## *Procurement of Infrastructure and Raising Public Awareness*

The EMP Commission's report suggests that U.S. dependence on technological infrastructure makes the American people particularly vulnerable to EMP attack.<sup>141</sup> The simplistic nature of an EMP attack makes it an attractive option to terrorist organizations like al Qaeda and rogue states engaged in nuclear proliferation. To mitigate the EMP threat, the United States should adopt the EMP Commission's recommendations and begin procurement of temporary replacement infrastructure.

Soon after the Subcommittee hearing, Dr. Fred C. Ikle, Under Secretary of Defense for Policy in the Reagan Administration, published an op-ed in the *Wall Street Journal* urging policymakers to protect against an EMP attack: "Without protective measures, such a vast and disabling blackout could last for months and cause near anarchy with huge casualties."<sup>142</sup> Chairman Kyl also highlighted the Subcommittee's finding in a letter to 19 federal departments and agencies alerting them to the EMP threat and authored an op-ed published in the *Washington Post* to raise public awareness.<sup>143</sup>

## **Nuclear Smuggling**

### *The Threat of Nuclear Smuggling*

In 2002, Congress established the bipartisan 10-member 9/11 Commission to compile a complete account of the circumstances leading up to the attacks of September 11, 2001.<sup>144</sup> The 9/11 Commission was also required to provide recommendations for the prevention of future attacks. Among other threats, the 9/11 Commission's report warned of the ease with which a terrorist organization might smuggle materials across U.S. borders to construct a nuclear device.<sup>145</sup>

In response to the Commission's finding, Chairman Kyl convened a Subcommittee hearing on July 27, 2006 to explore the government's efforts to prevent the covert introduction of nuclear materials into this country.<sup>146</sup> Five experts testified at that Subcommittee hearing: (1) Vayl Oxford, Director, Domestic Nuclear Detection Office, Department of Homeland Security, and former Director of Counterproliferation for the National Security Council; (2) Dr. Steve Aoki, Deputy Under Secretary of Energy for

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<sup>141</sup> Hearing of Mar. 8, 2005, at 14 (statement of Lowell Wood).

<sup>142</sup> Fred C. Ikle, *WMD Redux: Intelligence is Worthless Unless Policy Makers Act on It*, WALL ST. J., Apr. 1, 2005, available at <http://www.opinionjournal.com/editorial/feature.html?id=110006502>.

<sup>143</sup> Jon Kyl, *Unready For This Attack*, WASH. POST, Apr. 16, 2005, at A19.

<sup>144</sup> National Commission on Terrorist Attacks Upon the United States (9-11 Commission), available at <http://www.9-11commission.gov> (last visited Aug. 4, 2006).

<sup>145</sup> 9/11 Commission Report, at 380-381, available at [http://www.9-11commission.gov/report/911Report\\_Ch12.pdf](http://www.9-11commission.gov/report/911Report_Ch12.pdf) (last visited Aug. 4, 2006).

<sup>146</sup> *Detecting Smuggled Nuclear Weapons: Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security of the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. (July 27, 2006) (S. Hrg. 109-761, Serial No. 109-102) [hereinafter "Hearing of July 27, 2006"].

Counterterrorism, Department of Energy, and formerly with the Department of State and the National Security Council; (3) Dr. Peter Nanos, Associate Director of Research and Development, Defense Threat Reduction Agency, Department of Defense, former Director of the Los Alamos National Laboratory in New Mexico, and a retired Navy Vice-Admiral; (4) Dr. Michael Levi, fellow for science and technology, Council on Foreign Relations, and holder of a Ph.D. in war studies and an M.A. in physics; and (5) Dr. Fred Ikle, distinguished scholar, Center for Strategic and International Studies, Under Secretary of Defense for Policy during the first and second Reagan Administrations, Director of the U.S. Arms Control and Disarmament Agency during the Nixon and Ford Administrations, and a member of the Defense Policy Board.

### *Nuclear Vulnerabilities after 9/11*

In its 2004 report, the 9/11 Commission found:

A nuclear bomb can be built with a relatively small amount of nuclear material. A trained nuclear engineer with an amount of highly enriched uranium or plutonium about the size of a grapefruit or an orange, together with commercially available material, could fashion a nuclear device that would fit in a van like the one Ramzi Yousef parked in the garage of the World Trade Center in 1993. Such a bomb would level Lower Manhattan.<sup>147</sup>

Testimony at a hearing before the House Committee on Homeland Security and Governmental Affairs in March 2006, confirmed 662 cases where nuclear and radiological material were smuggled between 1993 and 2004. Twenty-one of those cases involved materials that could be used to make a nuclear weapon, and more than 400 involved materials that could be used to produce a dirty bomb.<sup>148</sup> In an undercover operation, the Government Accountability Office (GAO) successfully shipped to Washington enough nuclear materials to build two dirty bombs, crossing both the northern and southern borders of the United States.<sup>149</sup>

### *Organization and Initiatives*

The Department of Homeland Security (DHS), Department of Defense (DOD), and Department of Energy (DOE) are responsible for preventing nuclear smuggling.

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<sup>147</sup> 9/11 Commission Report, at 380-381, available at [http://www.9-11commission.gov/report/911Report\\_Ch12.pdf](http://www.9-11commission.gov/report/911Report_Ch12.pdf) (last visited Aug. 4, 2006).

<sup>148</sup> Quoted in testimony before the Homeland Security and Government Affairs Committee by Eugene Aloise, Director of Natural Resources and Environment Team at the GAO, March 28, 2006; see also Hearing of July 27, 2006, at 3 (transcript) (statement of Jon Kyl).

<sup>149</sup> Govt. Accountability Off. Report, *Border Security: Investigators Successfully Transported Radioactive Sources Across Our Nation's Borders at Selected Locations* (GAO 06-545R, March 28, 2006), available at <http://www.gao.gov/new.items/d06545r.pdf> (last visited Aug. 30, 2006); Hearing of July 27, 2006, at 9 (transcript) (statement of Dianne Feinstein).

The Domestic Nuclear Detection Office (DNDO) was established in April 2005 as the focal point for nuclear detection at DHS. DNDO officials completed the first comprehensive evaluation of domestic nuclear vulnerabilities and priorities in the federal, state, and local arenas.<sup>150</sup> DNDO also conducts extensive testing on detection technology and devices to understand their performance.<sup>151</sup> Additionally, DNDO ensures that foreign facilities that are helped by the United States to acquire protection and accounting systems alert the United States when they detect that a nuclear device or nuclear material is missing.<sup>152</sup>

The Defense Threat Reduction Agency (DTRA) is a combat-support agency within the DOD. It provides capabilities for the President's national strategy to combat the procurement and use of weapons of mass destruction.<sup>153</sup> Currently, DOD is working to advance integrated national research and development, avoid duplication, and offer better nuclear and radiological detection.<sup>154</sup>

DOE has multiple programs to prevent nuclear proliferation, including the national laboratories responsible for science and nuclear expertise, the Defense Nuclear Nonproliferation Program, which cooperates with other countries to improve security, and the Second Line of Defense and MegaPorts programs, which install detection equipment at foreign borders and major seaports.<sup>155</sup> DOE's experts also provide technical support to the Office of Emergency Operations for nuclear search operations, for disarming and disposing of nuclear devices, and for determining the source of a nuclear or radioactive attack, should one occur.<sup>156</sup> That office is supported by specialists from DOD and the FBI.

### *Current Capabilities and Recommendations*

One of Chairman Kyl's key inquiries explored the distribution of money among organizations like the DNDO, the DTRA, and the National Nuclear Security Administration. In particular, Chairman Kyl wanted to identify whether future funding should be allocated for near-term priorities or focused on developing and deploying new technologies.<sup>157</sup> His inquiry produced two hypotheticals from Dr. Levi and Dr. Ikle.

Dr. Levi focused on the benefits of implementing a nuclear detection strategy based on near-term, lesser capability systems. Dr. Levi, however, conceded that, while investing in near-term programs would instill confidence against lesser threats, those

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<sup>150</sup> Hearing of July 27, 2006, at 13 (transcript) (statement of Vayl Oxford).

<sup>151</sup> Hearing of July 27, 2006, at 14 (transcript) (statement of Vayl Oxford).

<sup>152</sup> Hearing of July 27, 2006, at 59 (transcript) (statement of Michael Levi).

<sup>153</sup> Hearing of July 27, 2006, at 24 (transcript) (statement of Peter Nanos).

<sup>154</sup> Hearing of July 27, 2006, at 25 (transcript) (statement of Peter Nanos).

<sup>155</sup> Hearing of July 27, 2006, at 21 (transcript) (statement of Steve Aoki).

<sup>156</sup> Hearing of July 27, 2006, at 21 (transcript) (statement of Steve Aoki).

<sup>157</sup> Hearing of July 27, 2006, at 3, 6-7 (transcript) (statement of Jon Kyl).

programs were ill-suited to prevent the occurrence of worst-case nuclear scenarios.<sup>158</sup> He illustrated the importance of near-term lesser capabilities by examining the possibility of a terrorist group that “is really good at stealing things, but not good at technical measures, [and] not good at recruiting scientists.”<sup>159</sup> For example, terrorists could break into a weapons facility, steal the material, but not do much to hide it. If those terrorists cross a border that uses only high-capability, shielded-uranium detection, the stolen nuclear weapon would in all likelihood enter the U.S. undetected.<sup>160</sup> Dr. Levi, believing that these less sophisticated adversaries pose the greatest risk, suggests that DOD’s approach to nuclear detection should focus on developing capabilities, “both of the potential opponents and of the defense, and try to cover as much of that space as possible, to have good capabilities against whatever we can defend against, and then in an evolutionary way try to improve that.”<sup>161</sup>

Dr. Ikle held a different view. He explored the Pentagon’s challenges:

Assume the President has just received a reliable intel warning that a nuclear bomb is being smuggled on one of several ships sailing from North Korea. He would turn to the Department of Defense to take lead action to find this bomb and render it harmless. But today neither the Defense Department, nor DOE, nor Homeland Security, nor the FBI have the tools to find and safely disarm this bomb. The Navy could sink every ship sailing from North Korea, without proof which ship had the weapon and without confirmation that any of the ships had a nuclear bomb.<sup>162</sup>

Dr. Ikle also testified that the United States lacks the necessary technology to find nuclear materials, and he urged immediate and substantial investments be made to this end.<sup>163</sup>

Chairman Kyl asked what could be done to prevent potential current threats.<sup>164</sup> Dr. Levi encouraged DOE scientists to publish “enough” information about our capabilities to deter would-be wrongdoers, but not so much that the enemy has the information to evade the system.<sup>165</sup>

The witnesses agreed that the United States needs (1) a missing-items tracking program; (2) smaller and more portable detectors; (3) fingerprinting and signature technology to determine ownership of nuclear devices or materials upon its seizure or

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<sup>158</sup> Hearing of July 27, 2006, at 54 (transcript) (statement of Michael Levi).

<sup>159</sup> Hearing of July 27, 2006, at 54-55 (transcript) (statement of Michael Levi).

<sup>160</sup> Hearing of July 27, 2006, at 54-55 (transcript) (statement of Michael Levi).

<sup>161</sup> Hearing of July 27, 2006, at 54-55 (transcript) (statement of Michael Levi).

<sup>162</sup> Hearing of July 27, 2006, at 36 (transcript) (statement of Fred Ikle).

<sup>163</sup> Hearing of July 27, 2006, at 36-37 (transcript) (statement of Fred Ikle).

<sup>164</sup> Hearing of July 27, 2006 at 47 (transcript) (statement of Jon Kyl).

<sup>165</sup> Hearing of July 27, 2006, at 47 (transcript) (statement of Michael Levi).

use;<sup>166</sup> (4) an improved ability to detect highly enriched uranium (the most difficult nuclear material to detect) and other target materials;<sup>167</sup> and (5) intelligent data analysis that synthesizes information derived from nuclear detection and radiography technologies.<sup>168</sup>

### *Budget Decisions and Cuts*

During the hearing, Chairman Kyl stated, “[i]n today’s budget-constrained environment, we simply cannot spend money on every technology that might keep us safe. But, if a nuclear 9/11 is, in fact, the greatest existential danger facing this Nation, then we must ensure that we are acting in a manner proportionate to the threat. That includes providing adequate funding, adequate authority, and adequate attention to the relevant agencies of our Government.”<sup>169</sup> Dr. Ikle contrasted these budgetary needs with other large budget allocations for long-term missions. Notably, the F-35 Lightning II Stealth Fighter budget (\$251 billion) is 1,000 times that of the DTRA budget.<sup>170</sup> Likewise, Dr. Levi pointed out that the budget for transformational technology at DNDO is smaller than all but one of the programs at the DOD’s long-term, high-risk detection program that operates under the Defense Advanced Research Projects Agency.<sup>171</sup>

Despite the small amount of the overall budget that is spent on detection technology, DNDO’s research and development budget was slated to be cut 30 percent by the Appropriations Subcommittee on Homeland Security.<sup>172</sup> Thirty-five percent of that cut would have come from DNDO’s transformational research program.<sup>173</sup> The slated research and development programs and the programs already engaged in transformation research would have been stifled by these cuts in at least three areas: (1) the DNDO / National Science Foundation Academic Research Initiative; (2) a program that would automatically identify shielded nuclear material (this portion of the budget was cut in half); and (3) development and production of next generation nuclear detection devices.<sup>174</sup>

### *Future Capabilities and Funding*

A budget of \$200 million in Fiscal Year 2008 for DNDO is necessary.<sup>175</sup> If, however, the budgets for the DTRA and DNDO were doubled, these agencies could make remarkable advances in detection and prevention. That level of funding could fund potential capabilities to

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<sup>166</sup> Hearing of July 27, 2006, at 52 (transcript) (statement of Vayl Oxford); *id.* at 44 (statement of Michael Levi); *id.* at 46 (statement of Fred Ikle); *id.* at 21 (statement of Steve Aoki).

<sup>167</sup> Hearing of July 27, 2006, at 30 (transcript) (statement of Michael Levi).

<sup>168</sup> Hearing of July 27, 2006, at 31 (transcript) (statement of Michael Levi).

<sup>169</sup> Hearing of July 27, 2006, at 6 (transcript) (statement of Jon Kyl).

<sup>170</sup> Hearing of July 27, 2006, at 53 (transcript) (statement of Fred Ikle).

<sup>171</sup> Hearing of July 27, 2006, at 31-32 (transcript) (statement of Michael Levi).

<sup>172</sup> Hearing of July 27, 2006, at 4 (transcript) (statement of Jon Kyl).

<sup>173</sup> Hearing of July 27, 2006, at 49 (transcript) (statement of Vayl Oxford).

<sup>174</sup> Hearing of July 27, 2006, at 49-50 (transcript) (statement of Vayl Oxford).

<sup>175</sup> Hearing of July 27, 2006, at 35 (transcript) (statement of Fred Ikle).

- create an industrial base that can develop and mass produce technologies necessary to detect nuclear devices and materials;<sup>176</sup>
- produce, in a cost-effective manner, exotic materials domestically rather than depending on foreign sources for components such as iodine crystal;<sup>177</sup>
- launch a “Manhattan Project” to focus experts and funding on the nuclear threat that could cause the most damage — a “worst-case scenario”,<sup>178</sup> and
- invest in resources proportionate to the potential threat.<sup>179</sup>

*Addressing Today's Threats and Developing Transformational Technologies*

Overwhelming evidence suggests that the government currently lacks the capacity to detect the covert introduction of nuclear materials into the United States.<sup>180</sup> The Subcommittee found that programs responsible for the prevention of nuclear smuggling within DHS, DOD, and DOE were grossly underfunded and in some cases slated for further cuts in Fiscal Year 2007. To mitigate the threat posed by smuggled nuclear materials, the government must allocate sufficient funding to reasonably protect against current threats while providing for the development of transformational nuclear technologies.

After the hearing, Chairman Kyl wrote a letter to the Senate Appropriations Committee regarding its proposed cuts to the nuclear detection budget (\$94 million less than President Bush requested).<sup>181</sup> Chairman Kyl shared the key points from the hearing and asked that those allocations be reconsidered in conference. The conference report to accompany the Fiscal Year 2007 Homeland Security appropriations bill included \$480.97 million in DNDO funding — a \$38.6 million increase over the original Senate-passed level.<sup>182</sup> The report was signed into law by the President on October 4, 2006.<sup>183</sup>

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<sup>176</sup> Hearing of July 27, 2006, at 60-61 (transcript) (statement of Vayl Oxford).

<sup>177</sup> Hearing of July 27, 2006, at 60 (transcript) (statement of Peter Nanos).

<sup>178</sup> Hearing of July 27, 2006, at 4 (transcript) (statement of Jon Kyl); *id.* at 56 (statement of Fred Ikle).

<sup>179</sup> Hearing of July 27, 2006, at 4 (transcript) (statement of Jon Kyl); *id.* at 56 (statement of Fred Ikle).

<sup>180</sup> Quoted in testimony before the Homeland Security and Government Affairs Committee by Eugene Aloise, Director of Natural Resources and Environment Team at the GAO, March 28, 2006; Govt. Accountability Off. Report, *Border Security: Investigators Successfully Transported Radioactive Sources Across Our Nation's Borders at Selected Locations*, GAO 06-545R (2006), available at <http://www.gao.gov/new.items/d06545r.pdf> (last visited Aug. 30, 2006); Hearing of July 27, 2006, at 3 (transcript) (statement of Jon Kyl); *id.* at 9 (transcript) (statement of Dianne Feinstein).

<sup>181</sup> Letter from Senator Kyl to Senators Gregg and Byrd, Chairman and Ranking Member, respectively, of the Subcommittee on Homeland Security appropriations (August 21, 2006). The letter requests \$442.594 million for the Domestic Nuclear Detection Office.

<sup>182</sup> H. R. Rep. No. 109-699 (2006) (Conf. Rep.); H.R. Rep. No. 109-699 was passed as the Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, 120 Stat. 1355 (2006).

<sup>183</sup> Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, 120 Stat. 1355 (2006).

## **Material Support to Terrorism Prohibition Improvements Act**

### *A Review of the Material Support to Terrorism Prohibition Improvements Act*

To investigate how the intelligence community and U.S. law enforcement agencies have utilized the criminal justice system to prevent terrorist attacks, the Subcommittee held a hearing on April 20, 2005, entitled “A Review of the Material Support to Terrorism Prohibition Improvements Act.”<sup>184</sup> The hearing focused on the material support statutes, 18 U.S.C. § 2339A and § 2339B, and on the Material Support to Terrorism Prohibition Improvements Act.<sup>185</sup>

The Subcommittee heard from three witnesses: (1) Barry Sabin, Chief, Counterterrorism Section, Criminal Division, Department of Justice; (2) Daniel Meron, Principal Deputy Assistant Attorney General, Civil Division, Department of Justice; and (3) Andrew McCarthy, Senior Fellow, Foundation for the Defense of Democracies.

### *Material Support Statutes*

The material support statutes are critical to prosecuting terrorists. The first statute, 18 U.S.C. § 2339A, criminalizes knowingly providing material support or resources for a particular act of terrorism.<sup>186</sup> The second statute, 18 U.S.C. § 2339B, criminalizes knowingly providing material support or resources to a “foreign terrorist organization” (FTO) as designated by the U.S. Secretary of State, irrespective of whether the providers have a violent intent.<sup>187</sup> As of February 2006, 42 FTOs have been designated by the State Department.<sup>188</sup>

These statutes criminalize behavior that facilitates terrorist attacks by providing support for terrorist infrastructure, even if that behavior does not involve the physical execution of an attack.<sup>189</sup> To carry out attacks, terrorists need people and entities willing to (1) raise funds and open and use bank accounts to transfer money; (2) communicate by phone and the Internet; (3) provide them with travel documents; (4) train and recruit new operatives; and (5) procure equipment for their attacks.<sup>190</sup> Testifying in support of the material support statutes, Mr. Meron explained to the Subcommittee that “[to] fight the war against terrorism, you have to attack terrorism at its source. These provisions do that

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<sup>184</sup> *A Review of the Material Support to Terrorism Prohibition Improvements Act: Hearing on S. 783 Before the Subcomm. on Terrorism, Technology, and Homeland Security of the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (Apr. 20, 2005) (S. Hrg. 109-49, Serial No. J-109-14) [hereinafter “Hearing of Apr. 20, 2005”].

<sup>185</sup> Material Support to Terrorism Prohibition Improvements Act of 2005, S. 783, 109th Cong. (2005).

<sup>186</sup> 18 U.S.C. § 2339A (2004).

<sup>187</sup> 18 U.S.C. § 2339B (2004).

<sup>188</sup> Hearing of Apr. 20, 2005, at 46 (written statement of Daniel Meron and Barry Sabin).

<sup>189</sup> Hearing of Apr. 20, 2005, at 2 (statement of Barry Sabin).

<sup>190</sup> Hearing of Apr. 20, 2005, at 2 (statement of Barry Sabin).

by preventing groups from raising money and obtaining the property, personnel, and expertise necessary to commit their terrorist acts.”<sup>191</sup>

Mr. McCarthy pointed out that, before the enactment of the material support statutes, proving attempt to attack required that the government demonstrate not only that the plotters agreed to commit the crime and that they took some preparatory measures, but also that those measures amounted to a “substantial step” toward accomplishment of the crime.<sup>192</sup> In other words, some purposeful actions aimed at carrying out a bombing could be viewed as “mere preparation” rather than a “substantial step,” and thus were not punishable under the law of attempt.<sup>193</sup> Therefore, when on the trail of a conspiracy, prosecutors were inclined to hold back and allow conspirators to proceed in order to build up evidence that would increase the government’s chances of obtaining a conviction.<sup>194</sup> This delay placed the public at risk, and, if investigators lost control of events, massive loss of life could easily have resulted.<sup>195</sup> The material support laws were passed to correct this flaw.

The material support statutes criminalize the inchoate acts of attempt and conspiracy as they relate to acts of terrorism and provide law enforcement officials the legal grounds to intervene at the initial stages of terrorist planning before terrorists have the opportunity to carry out an attack.<sup>196</sup> The statutes also increase the penalties associated with attempt and conspiracy to attack, making the severity of the punishment proportional to the seriousness of the offense.<sup>197</sup>

Mr. McCarthy explained that, before the material support statutes were enacted, a bombing attack could only be punished with a term of life imprisonment or execution if the attack resulted in death.<sup>198</sup> The criminal code contained no specific provision for bombing conspiracies, and the general federal conspiracy statute, 18 U.S.C. § 371, established a maximum five-year penalty for those who acted in concert to violate any criminal statute. Additionally, there was no requirement that the judge impose any minimum term of incarceration.<sup>199</sup> This penalty was too lenient for those who conspire to kill countless people.<sup>200</sup>

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<sup>191</sup> Hearing of Apr. 20, 2005, at 5 (statement of Daniel Meron).

<sup>192</sup> Hearing of Apr. 20, 2005, at 39 (written statement of Andrew McCarthy).

<sup>193</sup> Hearing of Apr. 20, 2005, at 40 (written statement of Andrew McCarthy).

<sup>194</sup> Hearing of Apr. 20, 2005, at 40 (written statement of Andrew McCarthy).

<sup>195</sup> Hearing of Apr. 20, 2005, at 40 (written statement of Andrew McCarthy).

<sup>196</sup> Hearing of Apr. 20, 2005, at 46 (written statement of Daniel Meron and Barry Sabin).

<sup>197</sup> Hearing of Apr. 20, 2005, at 39 (written statement of Andrew McCarthy).

<sup>198</sup> Hearing of Apr. 20, 2005, at 39 (written statement of Andrew McCarthy).

<sup>199</sup> Hearing of Apr. 20, 2005, at 39 (written statement of Andrew McCarthy).

<sup>200</sup> Hearing of Apr. 20, 2005, at 39 (written statement of Andrew McCarthy).

## *Legal Battles and Criticism*

Some people maintain that the process for designating a FTO is unconstitutional.<sup>201</sup> However, in *United States v. Afshari*<sup>202</sup> and *United States v. Hammond*,<sup>203</sup> panels of the U.S. Court of Appeals for the Fourth and Ninth Circuits sitting *en banc* each held that criminal defendants charged with providing material support to designated foreign terrorist organizations may not challenge the validity of the underlying designation in the course of the criminal prosecution.<sup>204</sup> Further, in *Humanitarian Law Project v. Ashcroft*, the Ninth Circuit sitting *en banc* held that there is no First Amendment right to provide material support to a FTO's supposedly humanitarian or political activities.<sup>205</sup>

Chairman Kyl questioned Mr. McCarthy about the criticisms levied against 18 U.S.C. § 2339B. Critics of the statute argue that, because many terrorist groups divide themselves into separate paramilitary, political, and social-service wings, individuals should not be prevented from contributing funds, advice, or expertise to support non-violent activities.<sup>206</sup> Mr. McCarthy responded that, by engaging in hostilities against the United States, those FTOs “forfeit any claim on our good will.”<sup>207</sup> Mr. Sabin of the Department of Justice (DOJ) explained that, if individuals are permitted to contribute resources to a FTO's humanitarian wings for school operations or social services, their donations of time and money free up other resources for use by the FTO's militant divisions.<sup>208</sup>

## *Prosecutions Based on the Material Support Statutes*

The material support statutes have proven to be powerful law enforcement tools. Mr. Sabin noted that the DOJ has carried out 96 material support prosecutions in 21 different districts.<sup>209</sup>

On March 10, 2005, a New York jury convicted two Yemeni citizens, Mohammed Ali Hasan Al-Moayad and Mohsen Yahya Zayed, of conspiring to provide material support to al Qaeda and Hamas, pursuant to 18 U.S.C. § 2339B.<sup>210</sup> Mr. Sabin explained that this case demonstrates two important principles.<sup>211</sup> First, U.S. prosecutors and investigators must collaborate with international partners to prosecute terrorist suspects successfully. In this case, these defendants could not have been convicted without the assistance of

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<sup>201</sup> Hearing of Apr. 20, 2005, at 15 (statement of Jon Kyl).

<sup>202</sup> *United States v. Afshari*, 392 F.3d 1031 (9th Cir. 2004).

<sup>203</sup> *United States v. Hammond*, 405 F.3d 1034 (4th Cir. 2005).

<sup>204</sup> Hearing of Apr. 20, 2005, at 49 (written statement of Daniel Meron and Barry Sabin).

<sup>205</sup> *Humanitarian Law Project v. Ashcroft*, 393 F.3d 902 (9th Cir. 2004); Hearing of Apr. 20, 2005, at 49 (written statement of Daniel Meron and Barry Sabin).

<sup>206</sup> Hearing of Apr. 20, 2005, at 41-42 (written statement of Andrew McCarthy).

<sup>207</sup> Hearing of Apr. 20, 2005, at 42 (written statement of Andrew McCarthy).

<sup>208</sup> Hearing of Apr. 20, 2005, at 11 (statement of Barry Sabin).

<sup>209</sup> Hearing of Apr. 20, 2005, at 11 (statement of Barry Sabin).

<sup>210</sup> Hearing of Apr. 20, 2005, at 46 (written statement of Daniel Meron and Barry Sabin).

<sup>211</sup> Hearing of Apr. 20, 2005, at 3 (statement of Barry Sabin).

German government officials, who worked alongside FBI agents during the operation. The German officials also made the arrests that culminated in the extradition of the defendants to the United States. Second, successful indictments and prosecutions often lead to further successes in combating terror. U.S. prosecutors and investigators can leverage the intelligence collected from suspects who cooperate in criminal cases to discover new leads and evidence. This particular investigation uncovered Al-Moayad's contacts in Brooklyn, including an associate who had transferred more than \$20 million abroad through a bank account of his small ice cream store. The Brooklyn associates were also charged with federal crimes.

In 2004, a Pakistani American pled guilty to violating 18 U.S.C. § 2339A and 18 U.S.C. § 2339B as a result of his involvement in procurement, training, and recruitment for al Qaeda. He had appeared on British television stating, "I do not feel any remorse for Americans [who die] . . . I am willing to kill Americans. I will kill every American that I see in Afghanistan. And every American soldier that I see in Pakistan."<sup>212</sup> The defendant organized a month-long jihadist training camp that trained individuals in basic military skills, including the use of explosives and weapons.<sup>213</sup> Among the attendees were individuals plotting to bomb targets abroad.<sup>214</sup>

Mr. Sabin also discussed the DOJ's use of 18 U.S.C. § 2339A to indict Babar Ahmed, a resident of the United Kingdom who allegedly operated and directed Azzam Publications and its family of Internet websites. These websites assisted the Chechen *mujabideen* and the Taliban by attracting recruits and raising funds for violent jihad in Chechnya and Afghanistan.<sup>215</sup> The websites offered instructions on how to transfer funds secretly to the Taliban, described how to travel to Pakistan and Afghanistan to fight with these groups, and solicited military items, including gas masks and night vision goggles.<sup>216</sup>

#### *Intelligence Reform and Terrorism Prevention Act*

In December 2004, Congress passed, and the President signed into law, amendments to the material support statutes as part of the Intelligence Reform and Terrorism Prevention Act.<sup>217</sup> These amendments enhanced the ability of prosecutors to eradicate terrorist activity at every stage by expanding the definition of "material support or resources." The definition was previously limited to specific types of material support and "other physical assets." The new definition covers all property, tangible and intangible, and

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<sup>212</sup> Hearing of Apr. 20, 2005, at 47-48 (written statement of Daniel Meron and Barry Sabin).

<sup>213</sup> Hearing of Apr. 20, 2005, at 48 (written statement of Daniel Meron and Barry Sabin).

<sup>214</sup> Hearing of Apr. 20, 2005, at 48 (written statement of Daniel Meron and Barry Sabin).

<sup>215</sup> Hearing of Apr. 20, 2005, at 3 (statement of Barry Sabin).

<sup>216</sup> Hearing of Apr. 20, 2005, at 48 (written statement of Daniel Meron and Barry Sabin); Pub. L. No. 108-458 (2004).

<sup>217</sup> Hearing of Apr. 20, 2005, at 50 (written statement of Daniel Meron and Barry Sabin); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004).

all services, except the supply of medical or religious materials.<sup>218</sup> This broad definition ensures that no terrorist assistance or activity will escape the scope of the statute.

Mr. Sabin noted that the amendments also clarified the meaning of “personnel,” as used in the definition of “material support or resources.”<sup>219</sup> The law now states that no individual can be convicted of providing personnel to a terrorist organization unless that person knowingly provided support to one or more individuals, including himself or herself, to manage, supervise, or otherwise direct the terrorist organization, or alternatively, to work under its direction or control.<sup>220</sup>

The amendments also expand the jurisdictional basis for a material support charge. Previously, 18 U.S.C. § 2339B was limited to activity occurring within the United States and to overseas activity committed by persons “subject to the jurisdiction of the United States.” Now, jurisdiction includes the conduct by any lawful permanent U.S. resident alien anywhere in the world, as well as the conduct of stateless persons who usually reside in the United States.<sup>221</sup> The statutes also apply to an alien offender outside of the United States who is later brought into or found within the country, regardless of whether that alien offender is a permanent U.S. resident alien.<sup>222</sup>

The knowledge requirement of 18 U.S.C. § 2339B has also changed. Mr. Sabin explained that the amendments clarify that the defendant must either know that the organization is a designated FTO or that it has engaged or currently engages in certain terrorist conduct.<sup>223</sup> The government is no longer required to show that the defendant provided material support for the express purpose of furthering the organization’s terrorist activities.<sup>224</sup> In *Humanitarian Law Project v. Ashcroft*, the Ninth Circuit ruled that this absence of an intent requirement is constitutionally sound.<sup>225</sup>

Mr. McCarthy testified that experts estimate that as many as 70,000 people may have participated in paramilitary training at al Qaeda camps.<sup>226</sup> To combat the threat posed by such training, Congress also enacted 18 U.S.C. § 2339D as part of the 2004 Intelligence Reform bill. This new provision criminalizes the receipt of military-type training from a FTO. Under the statute, “military-type training” includes “training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt

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<sup>218</sup> Hearing of Apr. 20, 2005, at 4 (statement of Barry Sabin).

<sup>219</sup> Hearing of Apr. 20, 2005, at 4 (statement of Barry Sabin).

<sup>220</sup> Hearing of Apr. 20, 2005, at 6 (statement of Daniel Meron).

<sup>221</sup> Hearing of Apr. 20, 2005, at 50 (written statement of Daniel Meron and Barry Sabin).

<sup>222</sup> Hearing of Apr. 20, 2005, at 50 (written statement of Daniel Meron and Barry Sabin).

<sup>223</sup> Hearing of Apr. 20, 2005, at 4 (statement of Barry Sabin).

<sup>224</sup> Hearing of Apr. 20, 2005, at 50 (written statement of Daniel Meron and Barry Sabin).

<sup>225</sup> *Humanitarian Law Project v. Ashcroft*, 393 F.3d 902 (9th Cir. 2004).

<sup>226</sup> Hearing of Apr. 20, 2005, at 8 (statement of Andrew McCarthy).

services to critical infrastructure, or training on the use, storage, production, or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction.”<sup>227</sup>

*Providing Tools Necessary in the War Against Terrorists*

The amendments to the material support statutes contained in the Intelligence Reform and Terrorism Prevention Act of 2004 were scheduled to expire at the end of 2006.<sup>228</sup> Recognizing that these amendments provided prosecutors important tools in the war on terrorists, Chairman Kyl sponsored the Material Support to Terrorism Prohibition Improvements Act of 2005<sup>229</sup> to repeal the sunset provisions that mandated the expiration of those amendments. That legislation was the subject of this hearing.<sup>230</sup> Chairman Kyl subsequently authored language included in the USA PATRIOT Improvement and Reauthorization Act of 2005 that provided for the repeal of those sunset provisions.<sup>231</sup> Both Chairman Kyl and Senator Feinstein voted for the USA PATRIOT Act, which the President signed into law on March 9, 2006.<sup>232</sup>

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<sup>227</sup> 18 U.S.C. § 2339D(c)(1) (2004).

<sup>228</sup> Hearing of Apr. 20, 2005, at 51 (written statement of Daniel Meron and Barry Sabin); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004).

<sup>229</sup> Material Support to Terrorism Prohibition Improvements Act of 2005, S. 783, 109th Cong. (2005).

<sup>230</sup> See generally Hearing of Apr. 20, 2005.

<sup>231</sup> USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006).

<sup>232</sup> USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006). In 2005 the full Senate Judiciary Committee complemented the Subcommittee’s efforts on domestic material support by holding a hearing on Saudi Arabia’s role in financing international terrorist operations. That hearing examined four issues: (1) the Saudi government’s efforts to control terrorist funding within its borders; (2) the publication and dissemination of hate literature; (3) messages of hate and intolerance in the Saudi media; and (4) the Saudi government’s response to messages of hate or extremist ideology, both within its borders and throughout the world; *Saudi Arabia: Friend or Foe in the War on Terror: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (Nov. 8, 2005) (S. Hrg. 109-\_\_\_\_, Serial No. J-109-\_\_\_\_), at 25 (transcript) (statement of Jon Kyl) [hereinafter “Hearing of Nov. 8, 2005”].

## DOMESTIC SECURITY

### Terrorism: Emergency Preparedness

#### *Lessons Learned from Responses to Previous Disasters and Attacks*

On August 29, 2005, a Category 4 hurricane, Katrina, slammed into the Gulf Coast region. Despite several days' notice, response teams were inadequately prepared. On October 26, 2005, the Subcommittee held a hearing to investigate the shortcomings of the nation's response preparedness and how those flaws could affect future response efforts to terrorist attacks.<sup>233</sup>

The Subcommittee called several expert witnesses: (1) former Senator Slade Gorton, member, the National Commission on Terrorist Attacks Upon the United States, and a Commissioner of the 9/11 Public Discourse Project; (2) Wayne Thomas, Vice-President of Homeland Security, Innovative Emergency Management, Inc.; (3) Henry Renteria, Director, California Governor's Office of Emergency Services; (4) Matthew Bettenhausen, Director, California Office of Homeland Security; and (5) Michael O'Hanlon, Senior Fellow and Co-Holder, Sydney Stein Chair, Foreign Relations Policy Studies Program, the Brookings Institution.<sup>234</sup>

#### *Possible Future Attacks*

On October 20, 2005, an article in the *Washington Post* noted, "Homeland Security Secretary Michael Chertoff acknowledged . . . that Hurricane Katrina 'overwhelmed' the Federal Emergency Management Agency (FEMA) and exposed major flaws in the nation's preparations for terrorism and natural disasters."<sup>235</sup> Unlike a hurricane, a terrorist attack could strike at any time without warning as to the type of attack, or when or where it would occur, and that attack could easily replicate or surpass the damage wrought by Hurricane Katrina.<sup>236</sup>

To better understand how to prepare adequately for such an attack, Chairman Kyl asked the witnesses about the likelihood and consequences of various terrorist acts.<sup>237</sup> Mr. Thomas and Dr. O'Hanlon both showed graphics outlining several potential attacks. Mr. Thomas displayed a simulation involving four different scenarios: (1) a dirty bomb on the west side of the U.S. Capitol building;<sup>238</sup> (2) the detonation of improvised explosive devices during an event at the University of Utah stadium in Salt Lake City, resulting in 550

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<sup>233</sup> *Terrorism: Emergency Preparedness: Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security of the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (Oct. 26, 2005) (S. Hrg. 109-222, Serial No. J-109-46) [hereinafter "Hearing of Oct. 26, 2005"].

<sup>234</sup> Hearing of Oct. 26, 2005, at 2-3 (statement of Jon Kyl); *id.* at 3-4 (statement of Dianne Feinstein).

<sup>235</sup> Spencer S. Hsu, *Chertoff Vows to 'Re-Engineer' Preparedness*, WASH. POST, Oct. 20, 2005, at A2.

<sup>236</sup> Hearing of Oct. 26, 2005, at 1 (statement of Jon Kyl).

<sup>237</sup> Hearing of Oct. 26, 2005, at 1-2 (statement of Jon Kyl).

<sup>238</sup> See Attachment A, at 37.

casualties;<sup>239</sup> (3) a chemical attack at the Golden Gate Park in San Francisco, leaving 2,000 dead;<sup>240</sup> and (4) an anthrax attack in St. Louis, resulting in an estimated death toll of 1,193,115.<sup>241</sup> To highlight the importance of the nation's emergency preparedness systems, Dr. O'Hanlon displayed graphics depicting three attack scenarios. Two of the hypothetical attacks took place in Washington, D.C. The first was an anthrax attack causing roughly 420,000 to 1,400,000 deaths.<sup>242</sup> The second demonstrated how a hydrogen bomb could cause an estimated 570,000 to 1,900,000 deaths.<sup>243</sup> Dr. O'Hanlon noted that this scenario was less likely to occur because most terrorists lack the means to manufacture independently such a sophisticated weapon.<sup>244</sup> The third scenario depicted the detonation of a cobalt bomb, also known as a "dirty" bomb, in New York City. A cobalt bomb attack could cause long-term contamination comparable to that of the Chernobyl disaster in the former Soviet Union.<sup>245</sup>

Additionally, Dr. O'Hanlon displayed a chart illustrating the 15 most probable attacks and their projected consequences.<sup>246</sup> The presentation demonstrated that a terrorist attack could cause devastation similar to, if not more severe than, Hurricane Katrina.

Members of the panel suggested that emergency preparedness could be improved by (1) adopting and testing emergency preparedness plans;<sup>247</sup> (2) clearly defining command structures during an emergency response;<sup>248</sup> (3) ensuring interoperability among federal, state, and local governments;<sup>249</sup> and (4) using risk-based assessments to allocate limited resources efficiently.<sup>250</sup>

### *Writing Effective Response Plans*

Mr. Thomas testified that "[p]lanning is the cornerstone of really everything that we do."<sup>251</sup> He referred to his experience as the Vice-President of Innovative Emergency Management, Inc., a private firm that assists state and local authorities with disaster response preparedness. Mr. Thomas focused on several issues involved in effective

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<sup>239</sup> See Attachment B at 37.

<sup>240</sup> See Attachment C at 38.

<sup>241</sup> See Attachment D at 38.

<sup>242</sup> See Attachment E at 39.

<sup>243</sup> See Attachment F at 39.

<sup>244</sup> Hearing of Oct. 26, 2005, at 18 (statement of Michael O'Hanlon).

<sup>245</sup> See Attachment F at 39.

<sup>246</sup> See Keith Bea, Congressional Research Service, *The National Preparedness System: Issues in the 109th Congress*, prepared March 2005 (included in this Report as Attachment H at 41).

<sup>247</sup> Hearing of Oct. 26, 2005, at 8-9 (statement of Wayne Thomas); *id.* at 25-26 (statement of Slade Gorton).

<sup>248</sup> Hearing of Oct. 26, 2005, at 4-5 (statement of Slade Gorton); *id.* at 9-11 (statement of Henry Renteria); *id.* at 12-13 (statement of Matthew Bettenhausen); *id.* at 16 (statement of Michael O'Hanlon); *id.* at 19 (statement of John Cornyn).

<sup>249</sup> Hearing of Oct. 26, 2005, at 1-2 (statement of Jon Kyl); *id.* at 6 (statement of Slade Gorton); *id.* at 8-9 (statement of Wayne Thomas); *id.* at 10-11 (statement of Henry Renteria); *id.* at 13 (statement of Matthew Bettenhausen); *id.* at 17-18 (statement of Michael O'Hanlon); *id.* at 19-20 (statement of John Cornyn).

<sup>250</sup> Hearing of Oct. 26, 2005, at 3-4 (statement of Dianne Feinstein); *id.* at 5-6 (statement of Slade Gorton); *id.* at 15-18 (statement of Michael O'Hanlon); *id.* at 19 (statement of John Cornyn); *id.* at 24-25 (statement of Jon Kyl).

<sup>251</sup> Hearing of Oct. 26, 2005, at 8 (statement of Wayne Thomas).

planning during his testimony. First, defining specific, acceptable goals is important:<sup>252</sup> “Simply having a plan that works well may not achieve the results that you want if you don’t determine what you want to achieve in advance.”<sup>253</sup> He recommended asking, “[w]hat is it the public demands of us?”<sup>254</sup> Second, federal, state, and local authorities must understand the consequences that disasters such as Hurricane Katrina or terrorist attacks will have on American communities and citizens.<sup>255</sup> Mr. Thomas stated that “[u]nless we utilize detailed consequence assessments . . . we cannot plan effectively.”<sup>256</sup> Finally, authorities must exercise and test the plans they develop. He recommended rigorous and frequent exercises to ensure that responders can effectively execute the emergency response plans prescribed for them.<sup>257</sup>

Mr. Bettenhausen emphasized that effective emergency planning requires cooperation between the public and private sectors.<sup>258</sup> He highlighted the need for a national infrastructure plan that identifies high probability targets that should be hardened and protected.<sup>259</sup> He also suggested that developing a “strategic system-wide plan so that [state and local authorities can focus on] systems rather than individual targets” would facilitate quicker recovery following multiple attacks.<sup>260</sup>

### *Command and Control*

Successfully coordinating disaster relief efforts requires strong centralized command and control systems. As Senator Gorton testified, “[o]n 9/11 in New York and New Orleans, command structures for emergency response were not clearly defined. It was not clear beforehand who was in charge or what each agency’s responsibilities were. This confusion cost lives.”<sup>261</sup> Senator Gorton also presented the 9/11 Public Disclosure Project’s Report Card detailing progress on the 9/11 Commission’s recommendations for emergency preparedness.<sup>262</sup>

As Senator Gorton pointed out, the 9/11 Commission pushed for local governments to create “incident command systems.”<sup>263</sup> An incident command system is essential because it “defines who is in charge and what agencies’ responsibilities are in a

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<sup>252</sup> Hearing of Oct. 26, 2005, at 8 (statement of Wayne Thomas).

<sup>253</sup> Hearing of Oct. 26, 2005, at 8 (statement of Wayne Thomas).

<sup>254</sup> Hearing of Oct. 26, 2005, at 8 (statement of Wayne Thomas).

<sup>255</sup> Hearing of Oct. 26, 2005, at 8 (statement of Wayne Thomas).

<sup>256</sup> Hearing of Oct. 26, 2005, at 8 (statement of Wayne Thomas).

<sup>257</sup> Hearing of Oct. 26, 2005, at 9 (statement of Wayne Thomas).

<sup>258</sup> Hearing of Oct. 26, 2005, at 13-14 (statement of Matthew Bettenhausen).

<sup>259</sup> Hearing of Oct. 26, 2005, at 14 (statement of Matthew Bettenhausen).

<sup>260</sup> Hearing of Oct. 26, 2005, at 14 (statement of Matthew Bettenhausen).

<sup>261</sup> Hearing of Oct. 26, 2005, at 5 (statement of Slade Gorton).

<sup>262</sup> See Attachment I at 42.

<sup>263</sup> Hearing of Oct. 26, 2005, at 5-6 (statement of Slade Gorton).

crisis.”<sup>264</sup> Senator Gorton explained, “if local plans are not highly specific and are not regularly rehearsed, confusion is inevitable.”<sup>265</sup>

Mr. Renteria discussed California’s Standardized Emergency Management System (SEMS) as a potential model for the federal government. SEMS provides guidelines for the cooperation of federal, state, and local authorities during a crisis situation.<sup>266</sup> Witnesses also emphasized the need to upgrade communications technology to facilitate collaboration among the various agencies responding to an emergency.<sup>267</sup> However, Mr. Renteria pointed out that interoperable communications are not possible without guidance from the federal government regarding standards and techniques.<sup>268</sup>

### *Federal, State, and Local Coordination*

An October 22, 2005, article in the *Washington Post* reported, “White House Homeland Security Advisor Frances Fragos Townsend acknowledged the government failed to prepare adequately for the consequences of Hurricane Katrina, noting studies of New Orleans’s vulnerability to flooding and lessons learned from flawed U.S. responses to past natural disasters and terrorist attacks.”<sup>269</sup> Additionally, several witnesses addressed the need to encourage better coordination among federal, state, and local governments.

Mr. Renteria recommended that the federal government act as a partner to state and local authorities before, during, and after disasters:<sup>270</sup> Before a disaster, federal, state, and local authorities should convey a single message of preparedness to all possibly affected;<sup>271</sup> during a disaster, the federal government should provide supplemental resources to state and local authorities;<sup>272</sup> and after a disaster, the federal government should assist state governments with establishing mitigation programs.<sup>273</sup>

Mr. Bettenhausen emphasized that, although state and local governments are the first responders, it is important that they work with the federal government to solve problems as they occur.<sup>274</sup> For disasters that overwhelm state and local authorities, the Department of Defense (DOD) must be prepared to step in — but Dr. O’Hanlon said “DOD is not yet good enough at reacting urgently.”<sup>275</sup> Federal agencies such as the Department of Homeland Security (DHS) and FEMA should also maintain a constant

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<sup>264</sup> Hearing of Oct. 26, 2005, at 5 (statement of Slade Gorton).

<sup>265</sup> Hearing of Oct. 26, 2005, at 6 (statement of Slade Gorton).

<sup>266</sup> Hearing of Oct. 26, 2005, at 9-10 (statement of Henry Renteria).

<sup>267</sup> Hearing of Oct. 26, 2005, at 22-23 (statement of Dianne Feinstein).

<sup>268</sup> Hearing of Oct. 26, 2005, at 10 (statement of Henry Renteria).

<sup>269</sup> Spencer S. Hsu, *Bush Adviser Acknowledges Lack of Preparation for Katrina*, WASH. POST, Oct. 22, 2005, at A7.

<sup>270</sup> Hearing of Oct. 26, 2005, at 10 (statement of Henry Renteria).

<sup>271</sup> Hearing of Oct. 26, 2005, at 10 (statement of Henry Renteria).

<sup>272</sup> Hearing of Oct. 26, 2005, at 10 (statement of Henry Renteria).

<sup>273</sup> Hearing of Oct. 26, 2005, at 10 (statement of Henry Renteria).

<sup>274</sup> Hearing of Oct. 26, 2005, at 9 (statement of Wayne Thomas).

<sup>275</sup> Hearing of Oct. 26, 2005, at 18 (statement of Michael O’Hanlon).

state of preparedness, capable of responding to an emergency situation 24 hours a day, seven days a week.<sup>276</sup>

### *Risk Assessment and Risk-Based Funding*

Senators Kyl, Feinstein, and Cornyn stressed the importance of utilizing risk-assessments to allocate government resources efficiently.<sup>277</sup> Dr. O’Hanlon, however, explained that conducting an accurate risk-assessment can be difficult due to the lack of information sharing between the federal and state governments.<sup>278</sup> The Intelligence Reform Act required DHS to create a risk-assessment based plan by April 1, 2005.<sup>279</sup> Although DHS met this deadline, the report cannot be used to help states develop emergency plans because it is classified.<sup>280</sup> Without federal guidance on this issue, vital infrastructure may go unprotected because states have incomplete or poorly constructed emergency preparedness plans.<sup>281</sup>

Dr. O’Hanlon provided examples of how risk-based funding could facilitate the efficient allocation of federal funding.<sup>282</sup> For instance, he advised against creating excess hospital capacity for a quarantine event because risk assessments suggest that the money could be better spent on vaccines, prevention, and monitoring people with diseases.<sup>283</sup> He also counseled against investing to secure all public spaces, as some Middle Eastern countries have chosen to do.<sup>284</sup> Rather, he recommended that the federal government (1) encourage chemical plant owners to better secure their facilities;<sup>285</sup> (2) improve border security;<sup>286</sup> and (3) increase local police capacity.<sup>287</sup>

Because resources are limited, risk-based funding is an essential part of an effective emergency preparedness system. Since 2001, Congress has allocated more than \$8 billion to state and local governments to improve emergency preparedness.<sup>288</sup> Senator Feinstein explained that money is not spent where it is needed most: “This is an assessment of threat, vulnerability, and consequence . . . we haven’t achieved that yet because everyone wants their part of the homeland security pie regardless of whether the assessment of

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<sup>276</sup> Hearing of Oct. 26, 2005, at 13 (statement of Matthew Bettenhausen).

<sup>277</sup> Hearing of Oct. 26, 2005, at 3-4 (statement of Dianne Feinstein); *id.* at 19 (statement of John Cornyn); *id.* at 24-25 (statement of Jon Kyl).

<sup>278</sup> Hearing of Oct. 26, 2005, at 30 (statement of Michael O’Hanlon).

<sup>279</sup> Hearing of Oct. 26, 2005, at 6 (statement of Slade Gorton).

<sup>280</sup> Hearing of Oct. 26, 2005, at 6 (statement of Slade Gorton).

<sup>281</sup> Hearing of Oct. 26, 2005, at 13-14 (statement of Matthew Bettenhausen).

<sup>282</sup> Hearing of Oct. 26, 2005, at 15-18 (statement of Michael O’Hanlon).

<sup>283</sup> Hearing of Oct. 26, 2005, at 15-16 (statement of Michael O’Hanlon).

<sup>284</sup> Hearing of Oct. 26, 2005, at 16 (statement of Michael O’Hanlon).

<sup>285</sup> Hearing of Oct. 26, 2005, at 17 (statement of Michael O’Hanlon).

<sup>286</sup> Hearing of Oct. 26, 2005, at 17 (statement of Michael O’Hanlon).

<sup>287</sup> Hearing of Oct. 26, 2005, at 17 (statement of Michael O’Hanlon).

<sup>288</sup> Hearing of Oct. 26, 2005, at 5-6 (statement of Slade Gorton).

threat, vulnerability, and consequence indicates they should have [it].”<sup>289</sup> Chairman Kyl concluded that the government could achieve its goals of prevention, protection, and response by focusing on threats and vulnerabilities and noted, “Dr. O’Hanlon really did us a service . . . by forcing us to concentrate on things not to do, not because they are not good things, but because you [have] scarce resources, and inevitably, we don’t have time or resources to do everything we want to do.”<sup>290</sup>

*Findings Regarding the Nation’s State of Emergency Preparedness*

The governmental response to 9/11 and Hurricane Katrina were tragic testaments to the nation’s state of emergency preparedness. Subcommittee testimony suggests that this state of unreadiness would be exacerbated during a biological, chemical, or nuclear attack of similar magnitude, which could feasibly result in the deaths of one to two million Americans.<sup>291</sup> The Subcommittee found that steps must be taken on the federal, state, and local level to develop emergency preparedness plans that are easily executable, have clearly defined command structures, and emphasize the need for interoperability amongst all levels of the government. Furthermore, the federal government should begin utilizing risk-based assessments for the efficient allocation of homeland security funds.

Since the hearing, Chairman Kyl has helped win \$80 million for the procurement of communication system that will assist federal, state, and local officials collaborate with one another during an emergency response.<sup>292</sup>

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<sup>289</sup> Hearing of Oct. 26, 2005, at 3 (statement of Dianne Feinstein).

<sup>290</sup> Hearing of Oct. 26, 2005, at 24 (statement of Jon Kyl).

<sup>291</sup> See Attachment D at 38; See Attachment F at 39.

<sup>292</sup> Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680 (2005).

### Attachment A



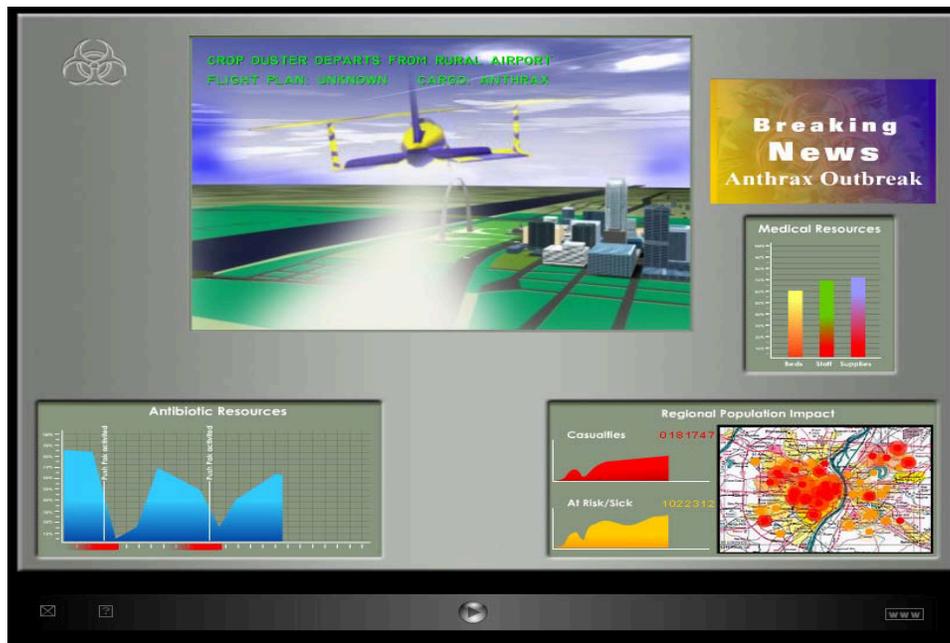
### Attachment B



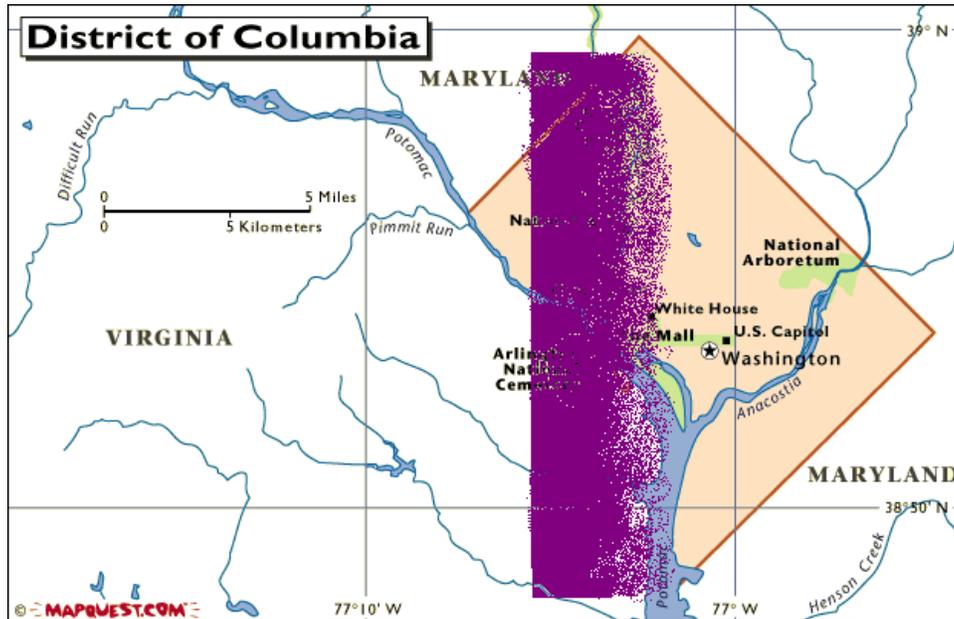
# Attachment C



# Attachment D

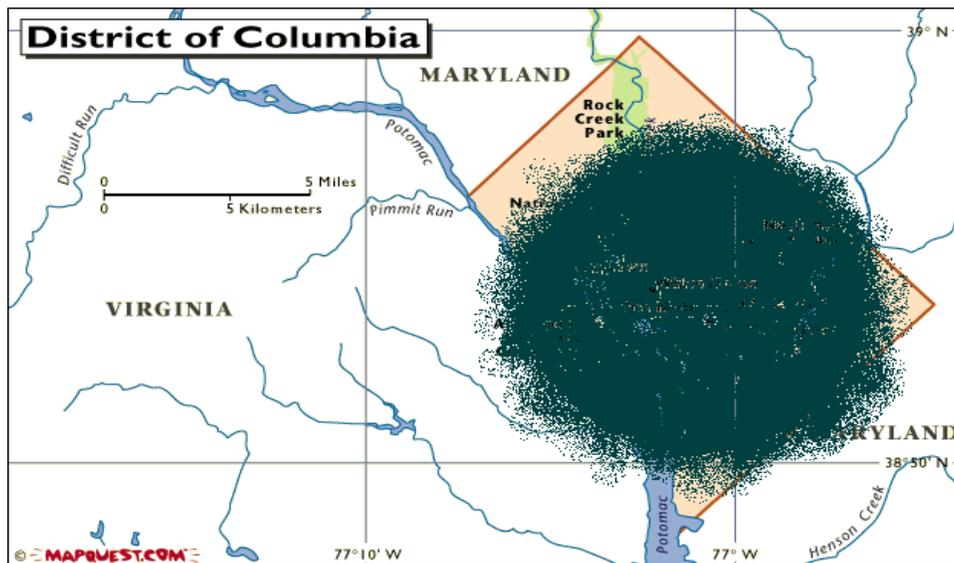


## Attachment E



Purple represents the area affected by 100 kg of Anthrax spores, delivered by airplane as aerosol line source. Area affected: 140 km squared. 420,000 to 1,400,000 deaths.

## Attachment F



Green represents the area affected by a hydrogen bomb, 1.0 Mt TNT- equivalent. Area affected: 190 km squared. 570,000 to 1,900,000 deaths.

## Attachment G



Cobalt Bomb In New York City (Long Term Contamination: Chernobyl Comparison)

- Inner Ring:* Same radiation level as permanently closed zone around Chernobyl
- Middle Ring:* Same radiation level as permanently controlled zone around Chernobyl
- Outer Ring:* Same radiation level as periodically controlled zone around Chernobyl

## Attachment H

Threat	Description Summary	Projected Consequences
Nuclear Denotation	Terrorists detonate a 10-kiloton nuclear device in a large city	450,000 or more evacuees; 3,000 square miles contaminated; hundreds of billions of dollars in economic impact
Biological Attack	Terrorists spray anthrax spores in a city using a concealed spray device	13,000 fatalities and injuries; extensive contamination; billions of dollars in economic impact
Biological Disease Outbreak – Pandemic Influenza	Natural outbreak of pandemic influenza that begins in China and spreads to other countries	87,000 fatalities; 300,000 hospitalizations; \$70 to \$160 billion impact
Biological Attack – Plague	Terrorists release pneumonic plague into three areas of a large city	2,500 fatalities; 7,000 injuries; millions of dollars in economic impact; possible evacuations
Chemical Attack – Blister Agent	Terrorists spray a combination of blister agents into a crowded football stadium	150 fatalities; 70,000 hospitalized; more than 100,000 persons evacuated; \$500 million in economic impact
Chemical Attack – Toxic Industrial Chemicals	Terrorists use grenades and explosive devices at petroleum facilities	350 fatalities; 1,000 hospitalizations; 50% of facility damaged; up to 700,000 persons evacuated
Chemical Attack – Nerve Agent	Terrorists spray Sarin into the ventilation system of three commercial buildings in a city	6,000 fatalities in buildings, 350 injuries downwind; evacuations of unknown number of people; \$300 million in economic impact
Chemical Attack – Chlorine Tank Explosion	Terrorists use explosives to release a large quantity of chlorine gas	17,500 fatalities; 100,000 hospitalizations; up to 70,000 persons evacuated; contamination at sight and waterways
Natural Disaster – Major Earthquake	7.2 magnitude earthquake occurs in a major metropolitan area	1,400 fatalities, 100,000 hospitalizations; 150,000 buildings destroyed; hundreds of billions of dollars in economic impact
Natural Disaster – Major Hurricane	Category 5 hurricane strikes a major city	1,000 fatalities, 5,000 hospitalizations; 1 million people evacuated; millions of dollars in economic impact
Radiological Attack – Radiological Dispersal Device	Terrorists detonate “dirty bombs” in three cities in close proximity	180 fatalities, 20,000 detectible contaminations in each city; billions of dollars in economic impact
Explosives Attack – Bombing Using Improvised Explosive Device	Terrorists detonate IEDs in a sports arena, use suicide bombers in a public transit concourse, and in a parking facility	100 fatalities, 450 hospitalizations; local economic impact; minimal evacuations
Biological Attack – Food Contamination	Terrorists contaminate food with anthrax in processing facilities	300 fatalities, 400 hospitalizations; million of dollars in economic impact
Biological Attack – Foreign Animal Disease (FAD, Foot & Mouth Disease)	Terrorists infect livestock at specific locations	No casualties; huge loss of livestock; hundreds of millions of dollars in economic impact
Cyber Attack	Terrorists conduct cyber attacks on US financial infrastructure	No casualties; millions of dollars in economic impact

## Attachment I



### Status of 9/11 Commission Recommendations: Emergency Preparedness and Response

Recommendation	Status	Next Steps
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<b>Emergency Preparedness and Response</b>		
<b>Provide adequate radio spectrum for first responders</b>	<b>Minimal Progress</b>	<b>Congress</b>
<b>Establish a unified Incident Command System</b>	<b>Minimal Progress</b>	<b>Local, State, Federal</b>
<b>Allocate homeland security funds based on risk and vulnerability</b>	<b>Minimal Progress</b>	<b>Congress</b>
<b>National critical infrastructure risks and vulnerabilities assessment</b>	<b>Unsatisfactory</b>	<b>Executive</b>
<b>Private sector preparedness</b>	<b>Minimal Progress</b>	<b>Private Sector</b>

## BORDER SECURITY

### Terrorist Travel, Enforcement, and Border Security

#### *Introduction*

The ease with which the 9/11 hijackers were able to cross U.S. borders undetected places new emphasis on the need to address weaknesses in our visa-issuance processes and border-enforcement systems. According to the 9/11 Commission, government officials were presented with opportunities to intercept no fewer than 15 of the 19 hijackers prior to 9/11. Proper analysis of travel documents, travel patterns, or information contained in government databases might have exposed many of these terrorists before they were able to perpetrate the attacks.

Even before the 9/11 Commission issued these findings, Senators Kyl and Feinstein worked to pass the Enhanced Border Security and Visa Entry Reform Act of 2002.<sup>293</sup> To improve visa-screening procedures, the Act mandated specialized training for consular officers, required that travel documents and passports contain machine-readable and tamper resistant biometric authentication features, and requested that the State Department and Department of Homeland Security (DHS) improve their capacity for information sharing with one another.<sup>294</sup> In December 2004, Senator Kyl also won passage of an amendment to intelligence-reform legislation that required most foreign nationals seeking a U.S. visa to undergo an in-person interview with a State Department consular officer and stipulated that the officer complete the requisite paperwork fully and accurately.<sup>295</sup>

To evaluate whether the State Department and DHS had implemented these reforms and corrected the process-based failures identified by the 9/11 Commission, the Subcommittee held a joint hearing with the Judiciary Committee's Subcommittee on Immigration, Border Security, and Citizenship, entitled "Strengthening Enforcement and Border Security: 9/11 Commission Report on Terrorist Travel," on March 14, 2005.<sup>296</sup> The hearing examined the need for a stricter visa-issuance process and for better enforcement at the border and ports of entry.<sup>297</sup>

Two panels provided testimony at the hearing. Panel one consisted of: (1) Elaine Dezenski, acting Assistant Secretary for Policy, Bureau of Transportation Security,

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<sup>293</sup> Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (2002).

<sup>294</sup> Weekly Column, Senator Jon Kyl, Homeland Security Job No. 1: Protect Our Borders (Mar. 21, 2005) (<http://kyl.senate.gov/record.cfm?id=233434>).

<sup>295</sup> Weekly Column, Senator Jon Kyl, Homeland Security Job No. 1: Protect Our Borders (Mar. 21, 2005) (<http://kyl.senate.gov/record.cfm?id=233434>).

<sup>296</sup> *Strengthening Enforcement and Border Security: The 9/11 Commission Staff Report on Terrorist Travel: Joint Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security and the Subcomm. on Immigration, Border Security, and Citizenship of the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (Mar. 14, 2005) (S. Hrg. 109-71, Serial No. J-109-6) [hereinafter "Hearing of Mar. 14, 2005"].

<sup>297</sup> Hearing of Mar. 14, 2005, at 4-5 (statement of Jon Kyl).

Department of Homeland Security; and (2) Tom Walters, acting Assistant Commissioner, Office of Training and Development, U.S. Customs and Border Protection, Department of Homeland Security. Panel two consisted of (1) Doris Meissner, former Commissioner, Immigration and Naturalization Service, Department of Justice, and a senior fellow at the Migration Policy Institute; and (2) Janice Kephart, former Counsel, 9/11 Commission, a co-author of *9/11 and Terrorist Travel* report, and a Senior Consultant at the Investigate Project.

### *Visa-Issuance Policies*

At the hearing, Senators Kyl and Feinstein asked about the progress of security in high-risk countries such as Saudi Arabia and the effectiveness of the Visa Waiver Program (VWP).<sup>298</sup> While some important changes have been made to the visa-issuance process and the VWP,<sup>299</sup> Senator Kyl questioned whether the immigration policies in practice have changed since 9/11, particularly with regard to interviewing and screening visa applicants. He also questioned whether VWP countries were on target to meet the October 26, 2005, deadline for issuing passports and travel documents with biometric identifiers.<sup>300</sup>

During her testimony, Secretary Dezenski outlined DHS' strategy to secure the visa-issuance process.<sup>301</sup> That strategy involves concentrating available resources in high-threat areas of the world, such as Saudi Arabia.<sup>302</sup> Secretary Dezenski noted that DHS had selected permanent visa-security officers, half of whom have foreign language training, to be deployed to Saudi Arabia "within the next 60 days."<sup>303</sup> DHS also worked with the consular staff in Saudi Arabia to review over 20,000 visa applications in 2004.<sup>304</sup>

Despite the Congressional mandate to strengthen visa-issuance procedures, Secretary Dezenski could not verify that all Saudi visa applicants were undergoing in-person interviews with consular officers.<sup>305</sup> She also could not provide an estimate of the number of applicants from countries of concern who were given an in-person interview.<sup>306</sup>

### *VWP Travel Document Standards*

As of the hearing, many VWP member countries had not yet implemented travel document standards found in the Enhanced Border Security and Visa Entry Reform Act of

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<sup>298</sup> Hearing of Mar. 14, 2005, at 13 (statement of Jon Kyl).

<sup>299</sup> Hearing of Mar. 14, 2005, at 13 (statement of Jon Kyl).

<sup>300</sup> Hearing of Mar. 14, 2005, at 13 (statement of Jon Kyl).

<sup>301</sup> Hearing of Mar. 14, 2005, at 10 (statement of Elaine Dezenski).

<sup>302</sup> Hearing of Mar. 14, 2005, at 10-11 (statement of Elaine Dezenski).

<sup>303</sup> Hearing of Mar. 14, 2005, at 13 (statement of Elaine Dezenski).

<sup>304</sup> Hearing of Mar. 14, 2005, at 13 (statement of Elaine Dezenski).

<sup>305</sup> Hearing of Mar. 14, 2005, at 14 (statement of Elaine Dezenski).

<sup>306</sup> Hearing of Mar. 14, 2005, at 13-14 (statement of Elaine Dezenski).

2002,<sup>307</sup> which requires that passports and other travel documents contain biometric information identifying foreign nationals seeking entrance into the United States. Secretary Dezenski explained that the cause of the delay had been technical and operational difficulties within the VWP.<sup>308</sup> Congress recognized that many VWP member countries would fail to meet the original deadline for compliance, October 26, 2004, and, at the request of the Administration, extended that deadline to October 26, 2005. Despite that extension, Secretary Dezenski could only confirm that two of the 27 VWP member countries would meet the new deadline for compliance.<sup>309</sup>

#### *US-VISIT Exit Component and Non-Immigrant Visas*

In addition to visa-issuance and visa-waiver processes, the Subcommittee hearing also covered the need to improve programs that track visitors with non-immigrant visas. Senator Feinstein pointed out that immigration inspectors automatically allow holders of non-immigrant visas six-month stays regardless of their travel intentions, rather than tailoring the length of a person's stay to their individual circumstances.<sup>310</sup> Secretary Dezenski agreed that this policy should be reviewed and updated to address current national security concerns.<sup>311</sup> Foreign visitors overstaying non-immigrant visas comprise 40 percent of illegal immigrants. Consequently, Ms. Meissner and Secretary Dezenski emphasized the need to utilize the exit component of the United States Visitor and Immigrant Status Indicator Technology Program (US-VISIT) so that these individuals can be identified and the problem can be addressed.<sup>312</sup> Secretary Dezenski testified that DHS had not yet implemented an exit system, but will focus on "getting an exit system up and running at all ports of entry" by March 2006.<sup>313</sup>

#### *Responding to 9/11: Better Training and Resources for Front-Line Officers*

Senator Kyl noted that, after diplomatic processing of visa applications abroad, the next line of defense is at the U.S. ports of entry.<sup>314</sup> He referred to a key passage in the *9/11 and Terrorist Travel* report that claimed that Immigration and Naturalization Services

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<sup>307</sup> Weekly Column, Senator Jon Kyl, Homeland Security Job No. 1: Protect Our Borders (Mar. 21, 2005) (<http://kyl.senate.gov/record.cfm?id=234388>); Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (2002).

<sup>308</sup> Hearing of Mar. 14, 2005, at 14-15 (statement of Elaine Dezenski).

<sup>309</sup> Hearing of Mar. 14, 2005, at 14 (statement of Elaine Dezenski); DHS's deadline to implement new travel document standards was again extended one year to October 26, 2006. On October 26, 2006, the State Department released a notice that 24 of the 27 countries in the VWP had met the new October 26, 2006 deadline.

<sup>310</sup> Hearing of Mar. 14, 2005, at 35 (statement of Dianne Feinstein).

<sup>311</sup> Hearing of Mar. 14, 2005, at 21 (statement of Elaine Dezenski).

<sup>312</sup> Hearing of Mar. 14, 2005, at 21-22 (statement of John Cornyn).

<sup>313</sup> Hearing of Mar. 14, 2005, at 22 (statement of Elaine Dezenski); As of January 31, 2007, DHS had not yet implemented an exit program at any port of entry and had no plans for implementation in the near future; Press Release, Department of Homeland Security, Majority of VWP Countries to Meet Digital Photo Deadline (Oct. 26, 2005) ([www.dhs.gov/xnews/releases/press\\_release\\_0789.shtm](http://www.dhs.gov/xnews/releases/press_release_0789.shtm)); US-VISIT: Challenges and Strategies for Security the U.S. Border: Hearing before the Subcomm. On Terrorism, Technology, and Homeland Security of the Senate Comm. on the Judiciary, 110th Cong., 1st Sess. (Jan. 31, 2007) (S. Hrg. 110-\_\_\_\_, Serial No. J-110-\_\_\_\_) (statement of John Cornyn); Press Release, Department of Homeland Security, Vast majority of VWP Countries Meet Security Upgrade to e-Passports (Oct. 26, 2005) ([http://www.dhs.gov/xnews/releases/pr\\_1161876358429.shtm](http://www.dhs.gov/xnews/releases/pr_1161876358429.shtm)).

<sup>314</sup> Hearing of Mar. 14, 2005, at 5-6 (statement of Jon Kyl).

(INS) inspectors were “inadequately trained in the essentials of identifying terrorists . . . received no counterterrorism training, and were remarkably undertrained in conducting primary inspections and in recognizing fraudulent documents.”<sup>315</sup> Senators Kyl and Feinstein were particularly interested in how DHS planned to improve the awareness and efficiency of the officers who oversee the border.<sup>316</sup>

Thomas Walters highlighted how DHS established the U.S. Customs and Border Protection Agency (CBP) following 9/11 to improve the training of customs inspectors.<sup>317</sup> New CBP officers are now required to begin their training with a 20-day orientation at their new duty post before completing 73 days of training at the CBP academy.<sup>318</sup> After graduation, officers return to their permanent duty post where they participate in 37 distinct modules of training and supervised application that further develop their skills.<sup>319</sup>

Ms. Kephart testified that front-line officers lack the resources needed to integrate travel document screening for terrorist indicators<sup>320</sup> into border screening procedures.<sup>321</sup> She pointed out that a specific terrorist indicator present on five of the passports used by the 9/11 hijackers “would without a doubt, keep al Qaeda terrorists out of our country if distributed to consular officers and immigration inspectors.”<sup>322</sup> Ms. Kephart also stressed the need for an integrated database, such as US-VISIT, that could provide front-line officers the biometric information needed to make informed decisions while screening travel documents.<sup>323</sup>

The Subcommittee convened this hearing to raise public awareness about the government’s progress in addressing process-based failures identified by the 9/11 Commission. Unfortunately, as of the time of the hearing, many of the security measures designed to correct these failures had not been fully implemented. The Subcommittee identified five areas of ongoing concern: (1) failure to personally interview non-immigrant visa applicants from nations of interest;<sup>324</sup> (2) failure of VWP member countries to implement new travel document standards by the extended Congressionally mandated deadline; (3) failure to amend visa issuance procedures to reflect an individual’s travel intentions;<sup>325</sup> (4) failure to implement the exit component of US-VISIT; and (5) failure to

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<sup>315</sup> Hearing of Mar. 14, 2005, at 5-6 (statement of Jon Kyl).

<sup>316</sup> Hearing of Mar. 14, 2005, at 6 (statement of Jon Kyl).

<sup>317</sup> Hearing of Mar. 14, 2005, at 12 (statement of Thomas Walters).

<sup>318</sup> Hearing of Mar. 14, 2005, at 12 (statement of Thomas Walters).

<sup>319</sup> Hearing of Mar. 14, 2005, at 12 (statement of Thomas Walters).

<sup>320</sup> Terrorist indicators are travel document characteristics that prompt further inspection when encountered. Hearing of Mar. 14, 2005, at 20 (statement of Janice Kephart).

<sup>321</sup> Hearing of Mar. 14, 2005, at 28 (statement of Janice Kephart).

<sup>322</sup> Hearing of Mar. 14, 2005, at 28 (statement of Janice Kephart).

<sup>323</sup> Hearing of Mar. 14, 2005, at 37 (statement of Janice Kephart).

<sup>324</sup> Hearing of Mar. 14, 2005, at 13-14 (statement of Elaine Dezenski).

<sup>325</sup> Hearing of Mar. 14, 2005, at 35 (statement of Dianne Feinstein).

provide front-line officers with the technology needed to implement travel document screening into border security procedures.<sup>326</sup>

This hearing was the first of seven that the Subcommittee on Terrorism, Technology, and Homeland Security held related to border security and visa issuance policies during the 109th Congress. Identifying outstanding security concerns provided the Subcommittee an important point of reference from which to conduct further investigations. A week after the hearing, a *New York Times* editorial echoed the concerns raised at the Subcommittee hearing by calling for more resources at the border, a better means of tracking people who overstay their visas, better information for front-line immigration officials, and shorter lengths of stays for visa holders.<sup>327</sup>

### **Strengthening Interior Enforcement**

#### *Enforcement and Litigation of Immigration Law*

The Subcommittee held a joint hearing with the Subcommittee on Immigration, Border Security, and Citizenship on April 14, 2005, entitled “Strengthening Interior Enforcement: Deportation and Related Issues.”<sup>328</sup> Its purpose was to examine challenges facing the enforcement of immigration law and the litigation of immigration cases in federal courts.

Two panels provided testimony at the hearing. Panel one consisted of: (1) Jonathan Cohn, Deputy Assistant Attorney General, Civil Division, Department of Justice (DOJ); and (2) Victor Cerda, acting Director of Detention and Removal Operations, U.S. Immigration and Customs Enforcement, Department of Homeland Security, and former chief of staff for Immigration and Naturalization Service Commissioner James Ziegler. Panel two consisted of: (1) David Venturella, former acting Director of Detention and Removal Operations, U.S. Immigration and Customs Enforcement, Department of Homeland Security; and (2) Lee Gelernt, Senior Staff Counsel, Immigrants’ Rights Project, American Civil Liberties Union.

#### *Potential for Criminal and Terrorist Infiltration of the United States*

Violent criminals are exploiting weaknesses in U.S. immigration laws to enter the United States undetected.<sup>329</sup> Two examples highlight the potential danger this situation presents. In January 2005, the Bureau of Immigration and Customs Enforcement (ICE)

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<sup>326</sup> Hearing of Mar. 14, 2005, at 37 (statement of Janice Kephart).

<sup>327</sup> Editorial, *Our Terrorist-Friendly Borders*, N.Y. TIMES, Mar. 21, 2005, at A16.

<sup>328</sup> *Strengthening Interior Enforcement: Deportation and Related Issues: Joint Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security and the Subcomm. on Immigration, Border Security, and Citizenship of the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (Apr. 14, 2005) (S. Hrg. 109-64, Serial No. J-109-13) [hereinafter “Hearing of Apr. 14, 2005”].

<sup>329</sup> Hearing of Apr. 14, 2005, at 1 (statement of John Cornyn).

agents arrested more than 100 members from the violent Central American Mala Salvatrucha-13 (MS-13) gang, all of whom were in the country illegally.<sup>330</sup> Also, in February 2005, the Department of Homeland Security (DHS) discovered an elaborate tunnel that connected a house in Mexico to one in California that could have been used to transport criminals, terrorists, or weapons into the United States undetected.<sup>331</sup>

These stories, which demonstrate the ease with which the criminal element can infiltrate the United States, illustrate how terrorists might cross the border, blend into society, and remain undetected.<sup>332</sup> Senator Kyl explained:

Secretary Rumsfeld made the point — and it has been picked up by others in conjunction with the review of the 9/11 tragedy — that sometimes we do not stop to think about the fact that we do not know what we do not know. And with respect to knowing who these 11 million illegal immigrants residing in our country today, maybe more, it is hard to know how many of them might be involved in terrorist cells.<sup>333</sup>

Senator Cornyn explained that merely assigning new personnel to enforce immigration law was insufficient to address this problem. He suggested that border agents must be supplied with “sufficient tools and resources to keep out of our country those who should be kept out, to identify those in our country who should be apprehended, and to remove from this country those the government orders deported.”<sup>334</sup>

### *Judicial Review*

Mr. Cohn testified that, from 1961 to 1996, the Immigration and Nationality Act (INA) stipulated that the courts of appeals were the only venues through which a deportation order could be challenged. He added that Congress’s intent was “to abbreviate the process of judicial review of deportation orders” by “eliminat[ing] the previous initial step in obtaining judicial review — a suit in a District Court.”<sup>335</sup> He further added, “district court review is unnecessary because the alien has already typically received multiple levels of administrative review before the case even reaches federal court.”<sup>336</sup>

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<sup>330</sup> Hearing of Apr. 14, 2005, at 2 (statement of John Cornyn).

<sup>331</sup> Hearing of Apr. 14, 2005, at 2 (statement of John Cornyn); As of May 2006, the Department of Homeland Security had discovered more than 20 cross-border tunnels in Arizona and California; News Release, U.S. Immigration and Customs Enforcement, Homeland Security Takes First Step to Seal Massive Cross Border Tunnel (May 2, 2006) (<http://www.ice.gov/pi/news/newsreleases/articles/060502sandiego.htm>).

<sup>332</sup> Hearing of Apr. 14, 2005, at 33-34 (statement of Jon Kyl).

<sup>333</sup> Hearing of Apr. 14, 2005, at 33 (statement of Jon Kyl).

<sup>334</sup> Hearing of Apr. 14, 2005, at 2 (statement of John Cornyn).

<sup>335</sup> Hearing of Apr. 14, 2005, at 3 (written statement of Jonathan Cohn).

<sup>336</sup> Hearing of Apr. 14, 2005, at 8 (statement of Jonathan Cohn).

Despite Congress's efforts to strip district courts of jurisdiction to hear collateral review petitions related to criminal deportation orders, the Supreme Court held in *INS v. St. Cyr* (2002) that the jurisdictional limit found in the INA was not sufficiently explicit.<sup>337</sup> As a result of that ruling, criminals facing deportation were given an additional avenue of appeal through the circuit court of appeals.<sup>338</sup> Consequently, criminal aliens can obtain review in two judicial forums, whereas non-criminal aliens may normally seek review only in the court of appeals.<sup>339</sup> Mr. Cohn criticized the *St. Cyr* decision for providing criminal aliens with the opportunity to seek judicial review that is largely unavailable to non-criminal aliens.<sup>340</sup> Criminal aliens might use this judicial review process as a means to delay their deportation, a possibility supported by the case of Oswaldo Calderon-Terrazas, who, after being convicted in the United States on two counts of sexual abuse for drugging and raping a 15-year-old girl, was able to delay his removal for two years by filing a collateral review petition in district court and appealing to the Fifth Circuit.<sup>341</sup>

Mr. Cohn urged Congress to pass section 105 of the Real ID Act, which would place limits on judicial review of removal orders to the courts of appeals.<sup>342</sup> He noted that the bill complies with *St. Cyr*, where the Supreme Court stated, "Congress could, without raising any constitutional questions, provide an adequate substitute [to collateral review] through the courts of appeals."<sup>343</sup> Thus, Congress can provide criminals facing deportation access to review while also protecting the American people from criminals and terrorists who would abuse the judicial process. Following the hearing, the Real ID Act was signed into law with the judicial review provisions Mr. Cohn supported.<sup>344</sup>

### *Detention and Removal Operations at the Bureau of Immigration and Customs Enforcement*

The core mission of the Detention and Removal Operations (DRO) program at the ICE is the apprehension, detention, and removal of deportable aliens, the management of non-detained aliens through immigration proceedings, and the enforcement of orders of removal.<sup>345</sup> DRO also handles absconders and criminal fugitives who remain at large in the United States.<sup>346</sup>

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<sup>337</sup> *INS v. St. Cyr*, 533 U.S. 289 (2001).

<sup>338</sup> Hearing of Apr. 14, 2005, at 6 (written statement of Jonathan Cohn).

<sup>339</sup> Hearing of Apr. 14, 2005, at 6 (written statement of Jonathan Cohn).

<sup>340</sup> Hearing of Apr. 14, 2005, at 2 (written statement of Jonathan Cohn).

<sup>341</sup> *Pequeno-Martínez v. Trominski*, 281 F. Supp. 2d 902 (S.D. Tex. 2003); *Calderon-Terrazas v. Ashcroft*, 117 Fed. Appx. 903 (5th Cir. 2004); Hearing of Apr. 14, 2005, at 8 (statement of Jonathan Cohn).

<sup>342</sup> Hearing of Apr. 14, 2005, at 8 (statement of Jonathan Cohn).

<sup>343</sup> *St. Cyr*, 533 U.S. at 314.

<sup>344</sup> The REAL ID Act, H.R. 418, as passed the House, was appended as Division B to the end of H.R. 1268. H.R. 1268 was modified in conference, and the language of H.R. 418 was enacted as part of H.R. 1268, which became Pub. L. No. 109-13 on May 11, 2005; REAL ID Act of 2005, H.R. 418, 109th Cong. § 105 (2005); Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005).

<sup>345</sup> Hearing of Apr. 14, 2005, at 9 (statement of Victor Cerda).

<sup>346</sup> Hearing of Apr. 14, 2005, at 9 (statement of Victor Cerda).

Victor Cerda, Director of Detention and Removal for DHS, detailed ICE's various accomplishments. In Fiscal Year 2004, ICE achieved a record number of alien removals (160,000), criminal alien removals (84,000), and a 62 percent increase in fugitive apprehensions (11,063).<sup>347</sup> Additionally, ICE implemented several alternatives to detention, including electronic bracelets and telephonic voice recognition. These systems allow ICE to provide supervised release to aliens who do not pose a threat to national security or public safety while still ensuring that they comply with court hearing dates and removal orders.<sup>348</sup>

Senator Kyl expressed concern that ICE is often forced to release criminal aliens because of its lack of detention space.<sup>349</sup> ICE's yearly budget provides for 19,400 daily bed spaces.<sup>350</sup> In 2004, however, ICE had over 200,000 initial admissions.<sup>351</sup> This situation forces ICE to operate continually at 100 percent capacity.<sup>352</sup> As a result, ICE must release individuals whom it would otherwise detain if there were sufficient bed space.<sup>353</sup>

*Limitations on Detention and Removal Operations: Zadvydas v. Davis and Clark v. Suarez-Martinez*

When the government is unable to remove a terrorist or criminal alien who presents a danger to the general public, it must either free or detain that individual.<sup>354</sup> Before 1996, detainment of aliens facing an order of removal was limited to six months, irrespective of the danger they posed.<sup>355</sup> Congress addressed this problem in 1996 by removing the six-month limit for aliens who present a danger to the public or national security.<sup>356</sup> Five years later, however, in *Zadvydas v. Davis*, the Supreme Court held, as a matter of statutory construction, that the six-month limit remained in effect.<sup>357</sup> In 2005, the Court held in *Clark v. Suarez-Martinez* that the six-month limitation must be applied to all illegal aliens detained by the U.S. government.<sup>358</sup>

Mr. Cohn criticized these decisions for having resulted in the release of hundreds of dangerous criminal aliens, including those who never had any legal right to enter the United States in the first place.<sup>359</sup> The ruling in *Clark v. Suarez-Martinez* allowed for the immediate release of approximately 920 excluded criminal aliens and many more have been

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<sup>347</sup> Hearing of Apr. 14, 2005, at 10 (statement of Victor Cerda).

<sup>348</sup> Hearing of Apr. 14, 2005, at 10 (statement of Victor Cerda).

<sup>349</sup> Hearing of Apr. 14, 2005, at 14 (statement of Jon Kyl).

<sup>350</sup> Hearing of Apr. 14, 2005, at 14 (statement of Victor Cerda).

<sup>351</sup> Hearing of Apr. 14, 2005, at 14 (statement of Victor Cerda).

<sup>352</sup> Hearing of Apr. 14, 2005, at 14 (statement of Victor Cerda).

<sup>353</sup> Hearing of Apr. 14, 2005, at 14 (statement of Victor Cerda).

<sup>354</sup> Hearing of Apr. 14, 2005, at 8 (statement of Jonathan Cohn).

<sup>355</sup> Hearing of Apr. 14, 2005, at 8 (statement of Jonathan Cohn).

<sup>356</sup> Hearing of Apr. 14, 2005, at 8 (statement of Jonathan Cohn).

<sup>357</sup> *Zadvydas v. Davis*, 533 U.S. 678 (2001).

<sup>358</sup> *Clark v. Martinez*, 543 U.S. 371 (2005).

<sup>359</sup> Hearing of Apr. 14, 2005, at 18 (written statement of Jonathan Cohn).

released since.<sup>360</sup> Mr. Cohn suggested that these rulings allow murderers, rapists, and child molesters to remain in the United States illegally, where they more often than not commit further acts of violence against the American people.<sup>361</sup>

### *Alien Absconders*

During the Subcommittee hearing, Senator Kyl inquired about compliance rates for non-detained aliens in immigration proceedings. Mr. Cerda explained that 30 percent of aliens released with a notice to appear fail to do so. Of those who do appear and are ordered deported, 80 to 85 percent fail to comply with removal orders.<sup>362</sup> Currently, there are 465,000 absconders whose whereabouts are unknown, 80,000 of whom are criminals.<sup>363</sup>

Mr. Cerda explained that, when aliens fail to appear for removal proceedings after being ordered deported, they face no enhanced penalty for having absconded.<sup>364</sup> Senator Sessions referred to this period of time, after issuance of a departure order but before removal processing, as the “weak link.”<sup>365</sup> He emphasized the need for additional resources to discourage absconding: “Once you have had a finding that they are here illegally . . . after some sort of hearing, that is when we need to have some space to hold them temporarily until they can be deported.”<sup>366</sup> Until DHS has enough space to detain these individuals, illegal aliens will be able to disregard deportation and take up residency within the United States as fugitive absconders.

To address the issue of absconders already residing in the United States, state and local law enforcement must be provided with the technology necessary to identify these individuals when caught committing other offenses. Senator Kyl expressed concern that absconders are not currently included in the National Crime Information Center (NCIC) system.<sup>367</sup> Absconder information should be provided through the NCIC, which would allow law enforcement to quickly identify these individuals while in the field.<sup>368</sup> Mr. Cerda also highlighted the importance of the Law Enforcement Support Center (LESC), which can serve as an important supplement to the NCIC. The LESL provides local, state, and federal law enforcement agencies with immigration status and identity information on aliens suspected, arrested, or convicted of criminal activity.<sup>369</sup> In Fiscal Year 2004, the LESL responded to more than 667,000 requests for immigration related information.<sup>370</sup>

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<sup>360</sup> Hearing of Apr. 14, 2005, at 18-19 (written statement of Jonathan Cohn).

<sup>361</sup> Hearing of Apr. 14, 2005, at 19 (written statement of Jonathan Cohn).

<sup>362</sup> Hearing of Apr. 14, 2005, at 15 (statement of Victor Cerda).

<sup>363</sup> Hearing of Apr. 14, 2005, at 22 (statement of John Cornyn).

<sup>364</sup> Hearing of Apr. 14, 2005, at 23 (statement of Victor Cerda).

<sup>365</sup> Hearing of Apr. 14, 2005, at 36 (statement of Jeff Sessions).

<sup>366</sup> Hearing of Apr. 14, 2005, at 36-37 (statement of Jeff Sessions).

<sup>367</sup> Hearing of Apr. 14, 2005, at 33 (statement of Jon Kyl).

<sup>368</sup> Hearing of Apr. 14, 2005, at 18 (statement of Tom Coburn).

<sup>369</sup> Hearing of Apr. 14, 2005, at 10 (statement of Victor Cerda).

<sup>370</sup> Hearing of Apr. 14, 2005, at 10 (statement of Victor Cerda).

## *Providing for the Detention and Removal of Criminal Aliens*

The ease with which the criminal element can cross U.S. borders provides terrorists with ample opportunity to infiltrate the United States undetected.<sup>371</sup> While stronger border enforcement is part of the solution, this hearing suggests that apprehension of illegal aliens is just the first step. Mr. Cohn explained that recent court decisions coupled with a lack of detention space have forced the release of hundreds of dangerous criminal aliens.<sup>372</sup> To remedy this situation, Congress should encourage a review of time limitations on the detainment of illegal aliens facing removal orders, particularly those who pose a danger to the general public, to see if further action is warranted. Furthermore, Congress should provide additional funding for the construction of new detention facilities to hold these dangerous criminals.

Following the hearing, Congress passed legislation that included section 105 of the Real ID Act, which provides a collateral review substitute through the court of appeals for criminal aliens.<sup>373</sup> Senators Kyl and Feinstein supported that legislation. Also, in the months following the hearing, Senator Kyl helped win an additional \$1.4 billion for new detention capacity as part of the Homeland Security Appropriations Act for 2006.<sup>374</sup> In 2007, Senator Kyl authored provisions in Homeland Security Appropriations that provided for another 1,700 detention beds.<sup>375</sup> Most recently, Senators Kyl and Cornyn sent a letter to the President requesting \$45.5 million for the funding of 1,300 additional detention beds.<sup>376</sup>

## **Border Security Between the Ports of Entry**

### *Challenges Facing the Border Patrol*

On April 28, 2005, the Subcommittee held a joint hearing with the Subcommittee on Immigration, Border Security, and Citizenship. The hearing, entitled “Strengthening Border Security Between Ports of Entry: The Use of Technology to Protect the Borders,”

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<sup>371</sup> Hearing of Apr. 14, 2005, at 33-34 (statement of Jon Kyl).

<sup>372</sup> Hearing of Apr. 14, 2005, at 2, 18 (written statement of Jonathan Cohn).

<sup>373</sup> The REAL ID Act, H.R. 418, as passed the House, was appended as Division B to the end of H.R. 1268. H.R. 1268 was modified in conference, and the language of H.R. 418 was enacted as part of H.R. 1268, which became Pub. L. No. 109-13 on May 11, 2005; REAL ID Act of 2005, H.R. 418, 109th Cong. § 105 (2005); Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005). The full Senate Judiciary Committee also held two hearings during the 109<sup>th</sup> Congress on the collateral review process. As a result, Congress enacted several collateral review provisions, many of which Chairman Kyl authored, as part of the National Defense Authorization Act for Fiscal Year 2006 and the Patriot Improvement and Reauthorization Act of 2006. *Habeas Corpus Proceedings and Issues of Actual Innocence: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (July 13, 2005) (S. Hrg. 109-\_\_\_\_, J-109-\_\_\_\_), at 9 (transcript) (statement of Jon Kyl) [hereinafter “Hearing of July 13, 2005”]; *Habeas Reform: The Streamlined Procedures Act, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (Nov. 16, 2005) (S. Hrg. 109-366, Serial No. J-109-52) [hereinafter “Hearing of Nov. 16, 2005”].

<sup>374</sup> Department of Homeland Security Appropriations Act, 2006, Pub. L. No. 109-90, 119 Stat. 2064 (2005).

<sup>375</sup> Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, 120 Stat. 1355 (2006).

<sup>376</sup> Weekly Column, Senator Jon Kyl, Kyl, Cornyn Urge President’s Support for Emergency Border Security Funding (July 24, 2006) (<http://kyl.senate.gov/record.cfm?id=259345>).

focused on the challenges facing Border Patrol agents patrolling U.S. ports of entry and on new technologies that might facilitate their enforcement efforts.<sup>377</sup>

Two witnesses testified at the hearing: (1) David Aguilar, Chief, Office of the Border Patrol, U.S. Customs and Border Protection, Department of Homeland Security; and (2) Kirk Evans, Director, Mission Support Office, Homeland Security Advanced Research Projects Agency, Science and Technology Directorate, Department of Homeland Security.

### *Budgetary and Technological Constraints*

Senators Kyl and Cornyn emphasized that the use of technology has the potential to improve significantly the Border Patrol's ability to secure the border.<sup>378</sup> Senator Kyl also stressed that Congress must “fully commit . . . to funding the agencies that make up our immigration system so that these agencies can effectively perform [their] work.”<sup>379</sup> He asked if the Border Patrol had enough money to “aggressively pursue the operational goals in the area of technology.”<sup>380</sup> Director Evans responded that the current level of “funding limits the number of different kinds of things we can look at.”<sup>381</sup>

Chief Aguilar outlined a new program, America's Shield Initiative (ASI), that would be “an all-encompassing means by which to bring electronic monitoring to the border.”<sup>382</sup> Senators Kyl and Coburn inquired as to whether the development and deployment of technologies through ASI had been properly funded,<sup>383</sup> and Director Evans agreed to provide Congress with an estimate for funding needs.<sup>384</sup> (Since the hearing, the concept of ASI has been incorporated into a larger program, SBI-net. SBI-net couples the sophisticated technology ASI envisioned with tactical infrastructure and personnel. SBI-net's first project is a 28-mile stretch of Arizona border slated for completion by April 2007.)<sup>385</sup>

### *Cooperation with Mexican Authorities*

The hearing also emphasized foreign policy challenges that hinder effective enforcement along the U.S.-Mexico border. To date, cooperation with Mexican authorities

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<sup>377</sup> *Strengthening Border Security Between the Ports of Entry: The Use of Technology to Protect the Borders: Joint Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security and the Subcomm. on Immigration, Border Security, and Citizenship of the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (Apr. 28, 2005) (S. Hrg. 109-51, Serial No. J-109-18), at 2-3 (statement of John Cornyn) [hereinafter “Hearing of Apr. 28, 2005”].

<sup>378</sup> Hearing of Apr. 28, 2005, at 2-3 (statement of John Cornyn); *id.* at 4-5 (statement of Jon Kyl).

<sup>379</sup> Hearing of Apr. 28, 2005, at 4 (statement of Jon Kyl).

<sup>380</sup> Hearing of Apr. 28, 2005, at 13 (statement of Jon Kyl).

<sup>381</sup> Hearing of Apr. 28, 2005, at 14 (statement of Kirk Evans).

<sup>382</sup> Hearing of Apr. 28, 2005, at 24 (statement of David Aguilar).

<sup>383</sup> Hearing of Apr. 28, 2005, at 5 (statement of Tom Coburn); *id.* at 26 (statement of Jon Kyl).

<sup>384</sup> Hearing of Apr. 28, 2005, at 19 (statement of Kirk Evans).

<sup>385</sup> *The Secure Border Initiative: Ensuring Effective Implementation and Financial Accountability of SBI-net: Hearing Before the Subcomm. on Management, Integration, and Oversight of the House Comm. on Homeland Security*, 109th Cong., 2d Sess. (Nov. 15, 2006) (Serial No. 109-\_\_\_), at 2-3, 6 (written statement of Deborah Spero).

to secure the southern border has proven difficult in some respects. This is evidenced by the existence of, among other issues, well-known “staging” areas — towns on the Mexican side of the border in which thousands of transitory residents are continuously preparing to cross illegally into the United States.<sup>386</sup> Senator Kyl encouraged the Mexican government to act as a responsible partner in support of U.S. border enforcement efforts and noted that Mexican authorities have proven themselves capable of reducing border crossings in the past.<sup>387</sup>

Chief Aguilar pointed out that through the border safety initiative and repatriation programs, Department of Homeland Security (DHS) has partnered with federal, state, and local law enforcement agencies and the Mexican government to “create a safer and more secure border.”<sup>388</sup> The Border Patrol’s Mexican Liaison Units, consisting of U.S. Border Patrol agents and Mexican law enforcement personnel, were established to share important resources and security information.<sup>389</sup> For example, the Mexican government has “shared information regarding arrests of transnational threats . . . [such as] MS-13 [gang members] and [other] special interest aliens traveling through Mexico with the intention of entering the United States illegally.”<sup>390</sup> Chief Aguilar testified, however, that, beyond investigating smuggling organizations and other “special interest groups,” the Mexican government has been reluctant to stem the general flow of immigration across the U.S.-Mexico border.<sup>391</sup>

#### *Regulatory and Funding Constraints in Arizona*

Senator Kyl asked why the control of illegal immigration across the border with Mexico has been more successful in Texas and California than in Arizona.<sup>392</sup>

First, Chief Aguilar pointed out that most of Texas is privately owned land that is easily accessible to federal agents.<sup>393</sup> The Arizona border, on the other hand, is largely under the ownership of the federal government and therefore subject to strict environmental regulations.<sup>394</sup> Any Border Patrol action, such as putting in bollards (posts driven into the ground) to prevent vehicles from crossing the border, adding fencing, or installing camera poles is subject to strict review under the National Environmental Policy Act.<sup>395</sup> Chief Aguilar estimated that under these constraints it takes two to three years to install remote video-surveillance equipment or to construct roads for border patrol

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<sup>386</sup> Hearing of Apr. 28, 2005, at 36 (statements of Jon Kyl and David Aguilar).

<sup>387</sup> Hearing of Apr. 28, 2005, at 4-5 (statement of Jon Kyl).

<sup>388</sup> Hearing of Apr. 28, 2005, at 3 (written statement of David Aguilar).

<sup>389</sup> Hearing of Apr. 28, 2005, at 4 (written statement of David Aguilar).

<sup>390</sup> Hearing of Apr. 28, 2005, at 4 (written statement of David Aguilar).

<sup>391</sup> Hearing of Apr. 28, 2005, at 35-36 (statement of David Aguilar).

<sup>392</sup> Hearing of Apr. 28, 2005, at 26 (statement of Jon Kyl).

<sup>393</sup> Hearing of Apr. 28, 2005, at 27 (statement of David Aguilar).

<sup>394</sup> Hearing of Apr. 28, 2005, at 27 (statement of David Aguilar).

<sup>395</sup> Hearing of Apr. 28, 2005, at 28 (statement of Jon Kyl).

access.<sup>396</sup> Furthermore, government vehicular pursuit of illegal aliens and smugglers is restricted along many parts of the Arizona border. In these areas, agents can only be deployed on horses, which must be given “special feed so that the droppings left by the horses would not bring in non-indigenous plants.”<sup>397</sup>

Another problem unique to the Tucson Border Patrol sector in Arizona is the lack of permanent checkpoints.<sup>398</sup> Until Fiscal Year 2007, Congressional appropriations blocked funding for permanent checkpoints in the Tucson Border Patrol sector, even though such checkpoints are “essential to bringing control to the immediate border.”<sup>399</sup> Chief Aguilar advocated the establishment of mobile, temporary checkpoints and permanent, multi-lane checkpoints supported by video surveillance systems, sensors, fencing, and tactical infrastructure.<sup>400</sup>

### *Trip to the Arizona Border*

Shortly after the hearing, Senator Kyl toured the Arizona border with DHS Secretary Michael Chertoff and Senator John McCain.<sup>401</sup> They visited Douglas and Yuma to review the progress of the Arizona Border Control initiative. There they met with local officials, federal law enforcement officers, resource managers, tribal leaders, and private citizens to discuss problems caused by smugglers and illegal immigrants.

Secretary Chertoff also met with tribal leaders to discuss the drug smuggling and human trafficking that occurs on Indian lands. As the Secretary flew over the vast expanse of the Tohono O’Odham Nation, he was able to review where, in 2004 alone, authorities apprehended 111,000 undocumented aliens and seized 70,000 pounds of narcotics.<sup>402</sup>

Senators Kyl and McCain raised the possibility of terrorists smuggling weapons across the southern border undetected through established border smuggling rings. Smuggling rings, like any other form of organized crime, adapt quickly to new law enforcement approaches. The only criterion that determines what they will smuggle is whether the price is right, and that price could be easily met by well-funded organizations like al Qaeda.<sup>403</sup>

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<sup>396</sup> Hearing of Apr. 28, 2005, at 29 (statement of David Aguilar).

<sup>397</sup> Hearing of Apr. 28, 2005, at 30 (statement of David Aguilar).

<sup>398</sup> Hearing of Apr. 28, 2005, at 30 (statement of David Aguilar).

<sup>399</sup> Hearing of Apr. 28, 2005, at 27 (statement of David Aguilar).

<sup>400</sup> Hearing of Apr. 28, 2005, at 28, 30-31 (statement of David Aguilar).

<sup>401</sup> Weekly Column, Senator Jon Kyl, Showing Washington the Border Firsthand, and Helping Communities Bear its Costs (May 16, 2005) (<http://www.kyl.senate.gov/record.cfm?id=237700>).

<sup>402</sup> Telephone interview by Senate staff with Tohono O’Odham Police Department, in Washington, DC (May 13, 2005).

<sup>403</sup> *Immigration Enforcement Resources Authorized in the Intelligence Reform and Terrorism Prevention Act of 2004: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the House Comm. on the Judiciary*, 109th Cong., 1st Sess. (March 3, 2005) (Serial No. 109-4), at 7 (statement of Solomon P. Ortiz).

### *Raising Awareness of the Burden on States*

The trip to Arizona also served as a reminder that states and localities need compensation from the federal government for bearing the brunt of costs associated with illegal immigration. Senators Kyl and Feinstein introduced legislation in 2005 to authorize \$750 million per year to reimburse states and localities for the costs they incur to incarcerate criminal aliens.<sup>404</sup> Senator Kyl also introduced a bill with Senators Hutchison and Cornyn to provide \$500 million per year for four years to reimburse states and counties for costs such as indigent defense, criminal prosecution, autopsies, translators and interpreters, court costs, and detention costs associated with illegal immigration.<sup>405</sup>

In the Medicare reform bill of 2003, Senator Kyl secured adoption of an amendment that provides \$1 billion in reimbursement over four years to hospitals that are required by federal law to provide care to indigents, including illegal immigrants.<sup>406</sup> This was necessary because under federal law, hospitals that receive Medicare funds must treat anyone who arrives at the emergency room.<sup>407</sup> This requirement costs health-care facilities in the United States an estimated \$1.45 billion per year.<sup>408</sup> The reimbursement program Senator Kyl supported raises national awareness about the costs associated with illegal immigration and the need for financial assistance from the federal government.

### *Addressing Challenges Facing Border Enforcement Efforts*

The hearing emphasized the need for Congressional support in securing the nation's borders. First, additional funding should be allocated to provide for the development and deployment of new enforcement technologies. Second, Congress should take action to encourage the Mexican government to act as a responsible partner in support of U.S. border enforcement efforts, and remove regulatory constraints that stymie enforcement efforts along the southern border. Lastly, Congress should provide additional funding to alleviate the financial burden border states endure as a result of illegal immigration.

Following the hearing, Senator Kyl contacted Secretary of State Condoleezza Rice<sup>409</sup> and then-Mexican President Vicente Fox<sup>410</sup> to express concerns about Mexico's attitude toward U.S. border security efforts. To address the burden placed on the state

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<sup>404</sup> State Criminal Alien Assistance Program Reauthorization Act of 2005, S. 188, 109th Cong. (2005).

<sup>405</sup> State Criminal Alien Assistance Program II, S. 1006, 109th Cong. (2006).

<sup>406</sup> Weekly Column, Senator Jon Kyl, *Illegal Aliens and the Cost to Arizona's Hospitals* (May 23, 2005) (<http://www.kyl.senate.gov/record.cfm?id=238054>); 42 U.S.C.A. § 1395dd.

<sup>407</sup> 42 U.S.C. § 1395dd (2007).

<sup>408</sup> Weekly Column, Senator Jon Kyl, *Illegal Aliens and the Cost to Arizona's Hospitals* (May 23, 2005) (<http://www.kyl.senate.gov/record.cfm?id=238054>).

<sup>409</sup> Letter from Jon Kyl, Senator, U.S. Senate, to Condoleezza Rice, Secretary of State, U.S. State Department (Feb. 6, 2006) (on file with Author).

<sup>410</sup> Letter from Jon Kyl, Senator, U.S. Senate, to Vicente Fox, President, United Mexican States (Mar. 17, 2005) (on file with Author).

judicial systems that must process and prosecute criminal aliens, Senator Kyl cosponsored legislation to create new federal judgeships in states that experience extremely high caseloads associated with illegal immigration.<sup>411</sup> Senator Kyl also requested that the Department of Justice (DOJ) assign additional prosecutors to handle immigration related offenses in border states. DOJ complied with that request, and assigned 25 Assistant U.S. Attorneys to the five federal law enforcement districts along the border.

## **The Need for Comprehensive Immigration Reform**

### *Introduction*

On May 17, 2005, the Subcommittee held a joint hearing with the Subcommittee on Immigration, Border Security, and Citizenship, entitled “The Need for Comprehensive Immigration Reform: Strengthening Our National Security.”<sup>412</sup> Three witnesses testified: (1) The Honorable Asa Hutchinson, former Under Secretary for Border and Transportation Safety, Department of Homeland Security, and Chair of Homeland Security Practice at Venable, LLP; (2) Margaret D. Stock, Assistant Professor of Law, United States Military Academy; and (3) Mark K. Reed, Chief Executive Officer and President, Border Management Strategies, LLC.

The May 17, 2005 hearing concentrated on four components of immigration reform: border security, reducing incentives to immigrate illegally, worksite enforcement, and how best to approach those illegal aliens who have already infiltrated U.S. borders. During the hearing, all witnesses present expressed support for a comprehensive approach toward immigration reform, and Mr. Reed cautioned that focusing on only one “piece of the solution, while ignoring other essential components of the problem, will not work, is inherently dishonest, and in today’s world, dangerous.”<sup>413</sup>

### *Failures of Current Immigration Policy*

Secretary Hutchinson suggested that “to be effective in the war against terrorism, our nation must be able to secure its borders.”<sup>414</sup> It is estimated that for every person caught entering the United States illegally, three others enter undetected.<sup>415</sup> From 2003 to 2004, the number of illegal aliens captured from countries other than Mexico increased 48

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<sup>411</sup> A bill to increase the number of Federal judgeships, in accordance with recommendations by the Judicial Conference, in districts that have an extraordinarily high immigration caseload, S. 3773, 109th Cong. (2006).

<sup>412</sup> *The Need for Comprehensive Immigration Reform: Strengthening our National Security: Joint Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security and the Subcomm. on Immigration, Border Security, and Citizenship of the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (May 17, 2005) (S. Hrg. 109-65, Serial No. J-109-20) [hereinafter “Hearing of May 17, 2005”].

<sup>413</sup> Hearing of May 17, 2005, at 11 (statement of Mark Reed); *id.* at 19 (statement of Margaret Stock); *id.* at 7 (statement of Asa Hutchinson).

<sup>414</sup> Hearing of May 17, 2005, at 1 (written statement of Asa Hutchinson).

<sup>415</sup> Hearing of May 17, 2005, at 16 (statement of Dianne Feinstein).

percent.<sup>416</sup> That includes an influx of illegal aliens from countries of interest — such as Syria, Iran, and Iraq.<sup>417</sup> Mr. Reed warned that inadequate funding and conflicting policy encourages smuggling and identity fraud and allows terrorists to enter the United States and “move openly among us without the threat of detection.”<sup>418</sup>

Illegal immigration is also affecting the nation’s military capabilities.<sup>419</sup> The Barry M. Goldwater Gunnery Range in Arizona is the military’s premier facility for training combat pilots.<sup>420</sup> Unfortunately, in 2004 alone, over 1,100 hours of training were lost and over 400 missions aborted because illegal immigrants were detected in the vicinity of operations.<sup>421</sup>

### *Gaining Control of the Border*

Senator Kyl stressed that the first step toward comprehensive reform of immigration law must be to gain control of the border.<sup>422</sup> To accomplish this, increases in personnel should be coupled with access to better technologies for law enforcement agents.<sup>423</sup> The value of technology to border enforcement efforts is evidenced by areas covered by the Arizona Border Control Initiative. After border agents were provided with better technologies, areas covered by the Arizona Border Control Initiative saw a 47 percent increase in the apprehension rate of illegal immigrants.<sup>424</sup> While the 2005 federal budget provided \$64 million for the American Shield Initiative and the war supplemental provided 500 new border agents, Secretary Hutchinson testified that the implementation of new technologies warrants even better funding and oversight.<sup>425</sup> Mr. Reed affirmed that flaws in border enforcement “can be . . . solved on the back of what we already have in place,” but pointed out that providing agents with better technology would be “a small investment for a great return.”<sup>426</sup>

Providing new technologies to apprehend illegal aliens will do little to secure the borders unless law enforcement agents are able to detain those individuals.<sup>427</sup> As of 2005, the nation had 19,000 beds for detaining illegal immigrants; however, 30,000 to 40,000 more beds were needed to satisfy demand.<sup>428</sup> Most illegal aliens detained for immigration

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<sup>416</sup> Hearing of May 17, 2005, at 16 (statement of Dianne Feinstein).

<sup>417</sup> Hearing of May 17, 2005, at 16 (statement of Dianne Feinstein).

<sup>418</sup> Hearing of May 17, 2005, at 11 (statement of Mark Reed).

<sup>419</sup> Hearing of May 17, 2005, at 4 (statement of Jon Kyl).

<sup>420</sup> Hearing of May 17, 2005, at 4 (statement of Jon Kyl).

<sup>421</sup> Hearing of May 17, 2005, at 4 (statement of Jon Kyl).

<sup>422</sup> Hearing of May 17, 2005, at 4 (statement of Jon Kyl).

<sup>423</sup> Hearing of May 17, 2005, at 7 (statement of Asa Hutchinson).

<sup>424</sup> Hearing of May 17, 2005, at 7 (statement of Asa Hutchinson).

<sup>425</sup> Hearing of May 17, 2005, at 7 (statement of Asa Hutchinson).

<sup>426</sup> Hearing of May 17, 2005, at 29 (statement of Mark Reed).

<sup>427</sup> Hearing of May 17, 2005, at 9 (statement of Jon Kyl).

<sup>428</sup> Hearing of May 17, 2005, at 17 (statement of Tom Coburn).

proceedings are prematurely released because of the lack of detention space.<sup>429</sup> Once released, most then fail to appear for proceedings and disappear to live illegally inside the United States.<sup>430</sup> Currently, there are 465,000 absconders whose whereabouts are unknown, 80,000 of whom are criminals.<sup>431</sup>

### *Workplace Enforcement*

Comprehensive immigration reform must focus on securing the border and reducing the economic incentives motivating illegal immigration.<sup>432</sup> Secretary Hutchinson explained that “the magnet for illegal entry almost becomes too powerful to resist” when ineffective enforcement is coupled with great economic incentive.<sup>433</sup> Mr. Reed agreed, explaining that if the incentive to immigrate illegally is reduced, the wave of border crossers will recede.<sup>434</sup>

To reduce the economic incentives driving illegal entrants, the federal government should establish a simple yet effective system of worksite identity verification. Mr. Reed cited a previous worksite verification operation, known as Vanguard, which was so successful that it had to be scaled back because more than 3,500 undocumented workers left the Nebraska meatpacking industry within 30 days of implementation.<sup>435</sup> The United States could foster better enforcement and closer tracking of foreign workers by implementing a system that enables employers to easily verify an individual’s legal status and report when temporary workers begin and end their employment.<sup>436</sup>

### *Reducing the Incentive to Immigrate Illegally*

As a complement to workplace identity verification, the federal government could establish a system that focuses on minimizing the incentives to immigrate illegally. If such a program were implemented, foreign workers could pursue temporary employment in the United States, with an understanding that they are expected to return to their home countries. Secretary Hutchinson and Professor Stock provided testimony that emphasized the importance of reducing the incentives driving immigrants to pursue illegal entry.<sup>437</sup> Senator Kyl pointed out, however, that any program that permitted the hiring of immigrant workers must operate “within the rule of law so we can benefit the American economy without harming U.S. workers.”<sup>438</sup> Senator Feinstein, citing the experience of California’s

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<sup>429</sup> Hearing of May 17, 2005, at 15 (statement of Dianne Feinstein, quoting Asa Hutchinson).

<sup>430</sup> Hearing of May 17, 2005, at 16 (statement of Dianne Feinstein, quoting Asa Hutchinson).

<sup>431</sup> Hearing of Apr. 14, 2005, at 22 (statement of John Cornyn).

<sup>432</sup> Hearing of May 17, 2005, at 12 (statement of Mark Reed).

<sup>433</sup> Hearing of May 17, 2005, at 8 (statement of Asa Hutchinson).

<sup>434</sup> Hearing of May 17, 2005, at 12 (statement of Mark Reed).

<sup>435</sup> Hearing of May 17, 2005, at 12 (written statement of Mark Reed).

<sup>436</sup> Hearing of May 17, 2005, at 8 (statement of Asa Hutchinson).

<sup>437</sup> Hearing of May 17, 2005, at 3 (written statement of Asa Hutchinson); *id.* at 4 (written statement of Margaret Stock).

<sup>438</sup> Hearing of May 17, 2005, at 5 (statement of Jon Kyl).

H-2A program, criticized temporary worker programs because participants often do not return to their countries after the temporary period has elapsed.<sup>439</sup>

Most importantly, the panelists suggested that any program involving foreign workers must include a system that clearly identifies the individual, demonstrates worker status, and prevents fraud.<sup>440</sup> Biometric identifiers, including fingerprints, digital facial scans, or iris scans, would be useful and workable for to identify potential security threats.<sup>441</sup> In addition to biometric identifiers, Secretary Hutchinson explained that Mexico needs to invest in better criminal databases to allow the United States to verify the criminal status of Mexican nationals.<sup>442</sup> Senator Kyl agreed that cooperation from participating nations is imperative for the development of a sound way to reducing the incentives that encourage foreigners to immigrate illegally.<sup>443</sup>

#### *Identifying Illegal Immigrants within the United States*

The final aspect of a comprehensive immigration reform plan must address the status of those who have already entered the United States undetected.<sup>444</sup> Secretary Hutchinson pointed out that it is “a significant vulnerability” and a “terrorist’s dream” to allow such a large population to live and work without legal identities or other connections to society.<sup>445</sup>

Professor Stock recommended that the United States encourage illegal immigrants within the country to identify themselves legally by providing them an opportunity to earn legal permanent resident status.<sup>446</sup> Both Secretary Hutchinson and Mr. Reed explained that offering illegal immigrants permanent resident status was unnecessary since implementation of a worksite enforcement program would force illegal immigrants in the United States to register for an adjusted status or face unemployment.<sup>447</sup>

#### *Subcommittee Support for Comprehensive Reform*

The Subcommittee found that all witnesses present testified in support of comprehensive immigration reform.<sup>448</sup> That comprehensive approach should include (1) increases in enforcement personnel coupled with better technologies to stem the flow of

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<sup>439</sup> Hearing of May 17, 2005, at 31 (statement of Dianne Feinstein).

<sup>440</sup> Hearing of May 17, 2005, at 37 (statements of Asa Hutchinson, Margaret Stock, and Mark Reed).

<sup>441</sup> Hearing of May 17, 2005, at 36 (statements of Asa Hutchinson, Margaret Stock, and Mark Reed).

<sup>442</sup> Hearing of May 17, 2005, at 21 (statement of Asa Hutchinson).

<sup>443</sup> Hearing of May 17, 2005, at 5 (statement of Jon Kyl); *id.* at 37 (statement of Margaret Stock).

<sup>444</sup> Hearing of May 17, 2005, at 9 (statement of Margaret Stock).

<sup>445</sup> Hearing of May 17, 2005, at 7 (statement of Asa Hutchinson).

<sup>446</sup> Hearing of May 17, 2005, at 9 (statement of Margaret Stock).

<sup>447</sup> Hearing of May 17, 2005, at 86 (statement of Mark Reed).

<sup>448</sup> Hearing of May 17, 2005, at 11 (statement of Mark Reed); *id.* at 19 (statement of Margaret Stock); *id.* at 7 (statement of Asa Hutchinson).

illegal aliens across the southern border;<sup>449</sup> (2) implementation of a nationwide workplace identity verification system;<sup>450</sup> and (3) a program focused on decreasing the economic incentive to immigrate illegally<sup>451</sup> and encourage illegal aliens already in the United States to disclose their presence.<sup>452</sup> Many of the issues discussed at the Subcommittee’s hearing gained national attention one year later during the Senate’s debate of the Comprehensive Immigration Reform Act of 2006.<sup>453</sup>

## **The Southern Border in Crisis**

### *Increased Immigration and the Problem of OTM Aliens*

To address the growing problem of illegal immigration by foreign nationals from countries other than Mexico (OTM), the Subcommittee on Terrorism, Technology, and Homeland Security convened a joint hearing with the Subcommittee on Immigration, Border Security, and Citizenship on June 7, 2005, entitled “The Southern Border in Crisis: Resources and Strategies to Improve National Security.”<sup>454</sup>

Two panels provided testimony at the hearing. Panel one consisted of: (1) David Aguilar, Chief, Chief, Office of the Border Patrol, U.S. Customs and Border Protection, Department of Homeland Security; and (2) Wesley Lee, acting Director, Detention and Removal Operations, U.S. Immigration and Customs Enforcement, Department of Homeland Security. Panel two consisted of: (1) C. Stewart Verdery, Principal, Mehlman Vogel Castagnetti, Inc., and an adjunct fellow at the Center for Strategic and International Studies.

### *OTM Figures: The Magnitude of the Problem*

The United States continues to experience an influx of OTM aliens illegally entering the country. According to Chief Aguilar, 98,000 of the estimated 812,000 illegal aliens apprehended by June of Fiscal Year 2005 were OTM aliens. Fiscal Year 2005 also saw a 175 percent increase in OTM apprehensions along the southern border and a 131 percent increase nationwide.<sup>455</sup> Director Lee also pointed out that, having originated from over 100 different foreign countries, this influx reflects a greater geographical diversity of OTM aliens than what has been seen in the past.<sup>456</sup>

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<sup>449</sup> Hearing of May 17, 2005, at 7 (statement of Asa Hutchinson).

<sup>450</sup> Hearing of May 17, 2005, at 8 (statement of Asa Hutchinson).

<sup>451</sup> Hearing of May 17, 2005, at 4 (written statement of Margaret Stock).

<sup>452</sup> Hearing of May 17, 2005, at 86 (statement of Mark Reed).

<sup>453</sup> Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

<sup>454</sup> *The Southern Border in Crisis: Resources and Strategies to Improve National Security: Joint Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security and the Subcomm. on Immigration, Border Security, and Citizenship of the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (June 7, 2005) (S. Hrg. 109-\_\_\_\_, Serial No. J-109-\_\_\_\_) [hereinafter “Hearing of June 7, 2005”].

<sup>455</sup> Hearing of June 7, 2005, at 4 (written statement of David Aguilar).

<sup>456</sup> Hearing of June 7, 2005, at 82 (transcript) (statement of Wesley Lee).

Only a small percentage of OTM aliens apprehended are detained until the completion of their removal proceedings. The Border Patrol processes most OTMs under section 240 of the Immigration and Nationality Act (INA, Section 240).<sup>457</sup> With the exception of those suspected of being aggravated felons or terrorists, OTM aliens are not subject to mandatory detention pending the completion of removal proceedings<sup>458</sup> and are often released on their own recognizance or on a bond.<sup>459</sup> The release of OTM aliens is particularly troubling considering that 30 percent of illegal aliens released with a notice to appear fail to do so. Of those who do appear and are ordered deported, 80 to 85 percent fail to comply with removal orders.<sup>460</sup> Failure to detain OTM aliens only increases the likelihood that they will add to the other 465,000 absconders whose whereabouts are unknown, 80,000 of whom are criminals.<sup>461</sup>

### *OTM Infiltration and the Terrorist Threat*

The recent influx of OTM aliens greatly increases the likelihood that terrorists have infiltrated, or will infiltrate, the United States undetected.<sup>462</sup> Senator Kyl quoted former Department of Homeland Security (DHS) Deputy Secretary James Loy's testimony before the Senate Intelligence Committee:

Recent information from ongoing investigations, detentions, and emerging threat streams strongly suggest that [al Qaeda] has considered using the Southwest Border to infiltrate the United States. Several [al Qaeda] leaders believe operatives can pay their way into the country through Mexico and also believe illegal entry is more advantageous than legal entry for operational security reasons.<sup>463</sup>

This threat is magnified because, even if authorities apprehend OTM aliens, very few of them are ever processed for deportation.<sup>464</sup> Mexican authorities refuse to accept OTM aliens who illegally enter the United States through Mexico. As a result, authorities must arrange for the deportation of OTM aliens to their nations of origin. This delay exacerbates the current shortage of detention facilities, and thus, most OTM aliens must be released with notice to attend deportation proceedings. Only 30 percent of OTM aliens

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<sup>457</sup> Hearing of June 7, 2005, at 4 (written statement of David Aguilar).

<sup>458</sup> Hearing of June 7, 2005, at 4 (written statement of David Aguilar).

<sup>459</sup> Hearing of June 7, 2005, at 4 (written statement of David Aguilar).

<sup>460</sup> *Strengthening Interior Enforcement: Deportation and Related Issues: Joint Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security and the Subcomm. on Immigration, Border Security, and Citizenship of the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (Apr. 14, 2005) (S. Hrg. 109-64, Serial No. J-109-13), at 15 (statement of Victor Cerda) [hereinafter "Hearing of Apr. 14, 2005"].

<sup>461</sup> Hearing of Apr. 14, 2005, at 22 (statement of John Cornyn).

<sup>462</sup> Hearing of June 7, 2005, at 4 (transcript) (statement of Jon Kyl).

<sup>463</sup> *Current and Projected National Security Threats to the United States, Senate Select Comm. on Intelligence*, 109th Cong., 1st Sess. (February 16, 2005) (S. Hrg. 109-61), at 41 (written statement of James Loy).

<sup>464</sup> Hearing of June 7, 2005, at 42 (transcript) (statement of Wesley Lee).

served with notice attend their hearings, and of those who do, 85 percent of those ordered removed abscond.<sup>465</sup> As a result, the vast majority of apprehended OTM aliens disappear.<sup>466</sup> The situation worsens when one considers that for every illegal alien apprehended, three others enter the United States successfully, and any number could be affiliated with criminal or terrorist organizations.<sup>467</sup>

To address the national security concerns raised by OTM aliens, the federal government should consider adopting an expedited removal procedure that ensures the execution of deportation orders and seek new ways to reduce the economic incentives that motivate the illegal entrance of OTM aliens seeking employment in the United States.

### *Expedited Removal as Part of the Solution*

On September 13, 2004, DHS began implementing expedited removal, on a limited basis, in the Tucson and Laredo Border Patrol Sectors.<sup>468</sup> Expedited removal is a procedure that allows experienced Border Patrol agents to issue removal orders for eligible illegal aliens. Expedited removal is approved only if three criteria are met: (1) the alien must have been present in the United States for fewer than 14 days; (2) the alien must have no valid travel documents (or fraudulent travel documents); and (3) the alien must be apprehended within 100 miles of the U.S. border.<sup>469</sup> This procedure is primarily used to deal with OTM aliens, Mexican and Canadian nationals with criminal histories, human traffickers, or individuals with a history of immigration violations.<sup>470</sup>

On average, the detention time for OTM aliens processed under INA, Section 240 is 89 days. In contrast, the average length of detention time under expedited removal is 32 days.<sup>471</sup> By accelerating the processing of aliens who are not entitled to a hearing before an immigration judge, expedited removal allows for more efficient use of the limited detention space available throughout the nation.<sup>472</sup> Furthermore, because aliens processed under expedited removal are subject to mandatory detention, OTM aliens are unable to abscond before or after their deportation proceedings.<sup>473</sup> Mandatory detention of aliens under expedited removal ensures a near 100 percent removal rate, thus discouraging growth of the absconder population.<sup>474</sup>

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<sup>465</sup> Hearing of June 7, 2005, at 43 (transcript) (statement of Wesley Lee).

<sup>466</sup> Hearing of June 7, 2005, at 9 (transcript) (statement of John Cornyn).

<sup>467</sup> *The Need for Comprehensive Immigration Reform: Strengthening our National Security: Joint Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security and the Subcomm. on Immigration, Border Security, and Citizenship of the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (May 17, 2005) (S. Hrg. 109-65, Serial No. J-109-20), at 16 (statement of Dianne Feinstein) [hereinafter "Hearing of May 17, 2005"].

<sup>468</sup> Hearing of June 7, 2005, at 4 (written statement of Wesley Lee).

<sup>469</sup> Hearing of June 7, 2005, at 13 (written statement of C. Stewart Verdery).

<sup>470</sup> Hearing of June 7, 2005, at 4 (written statement of Wesley Lee).

<sup>471</sup> Hearing of June 7, 2005, at 20 (transcript) (statement of Wesley Lee).

<sup>472</sup> Hearing of June 7, 2005, at 4-5 (written statement of Wesley Lee).

<sup>473</sup> Hearing of June 7, 2005, at 12 (written statement of C. Stewart Verdery).

<sup>474</sup> Hearing of June 7, 2005, at 5 (written statement of Wesley Lee).

According to the Border Patrol's David Aguilar, quantifiable evidence shows that expedited removal does in fact work as a deterrent. Namely, in those Border Patrol sectors (Tucson and Laredo) where expedited removal is in place, the number of OTM aliens has dramatically declined, and in those sectors where it is not yet available, the number of OTM aliens has increased.<sup>475</sup> Historically, OTM aliens have been encouraged to immigrate illegally because, even if apprehended, traditional deportation policies made absconding easy. Under expedited removal, OTM aliens realize that they will not be released after apprehension and therefore are less likely to bear the costs associated with illegal immigration.

Critics argue that allowing the removal of OTM aliens without review by an immigration judge may result in the deportation of persons who are eligible for asylum. Mr. Verdery suggested that such concerns are largely unsubstantiated, as internal and external reviews of the asylum process largely conclude that DHS handles this subset of cases appropriately.<sup>476</sup> If these criticisms are found to be unsubstantiated, it would be reasonable to implement expedited removal in other Border Patrol sectors as well, although care must be taken to ensure those procedures adequately consider individual rights.

As of May 2005, 8,452 aliens (mostly OTM aliens) have been placed in expedited removal proceedings, and 6,792 were removed.<sup>477</sup> Although the program has met with considerable success, expedited removal procedures are only available, on a limited basis, in the Tucson and Laredo Border Patrol Sectors.<sup>478</sup> The advantages of processing OTM aliens through the expedited removal process are obvious, and, according to Mr. Verdery, “[i]n short, a broad expansion of expedited removal is necessary and [will provide] the type of proven enforcement that will bring substantive enhancements in security and demonstrate to skeptics that the government is serious in deterring illegal entry into the United States.”<sup>479</sup>

### *Identifying Illegal Aliens with Criminal Intent*

The establishment of a program that addresses the economic incentives driving illegal immigration would do much to combat the national security concerns raised by OTM aliens.<sup>480</sup> Mr. Verdery suggested that most aliens who cross the border illegally in search of work present no risk of terrorism or organized criminal activity.<sup>481</sup> The Border Patrol, however, has no way to differentiate between these individuals and the small number of terrorists or criminals who might be among them.<sup>482</sup> If a program were

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<sup>475</sup> Hearing of June 7, 2005, at 5 (written statement of David Aguilar).

<sup>476</sup> Hearing of June 7, 2005, at 13 (written statement of C. Stewart Verdery).

<sup>477</sup> Hearing of June 7, 2005, at 20 (transcript) (statement of Wesley Lee).

<sup>478</sup> Hearing of June 7, 2005, at 4 (written statement of Wesley Lee).

<sup>479</sup> Hearing of June 7, 2005, at 13 (written statement of C. Stewart Verdery).

<sup>480</sup> Hearing of June 7, 2005, at 25-27 (transcript) (statement of C. Stewart Verdery).

<sup>481</sup> Hearing of June 7, 2005, at 26 (transcript) (statement of C. Stewart Verdery).

<sup>482</sup> Hearing of June 7, 2005, at 2 (written statement of C. Stewart Verdery).

established that separated persons entering the United States in search of work from those interested in committing crimes or acts of terror, then border enforcement will be more focused and consequently more successful.<sup>483</sup> In other words, by decreasing the number of OTM aliens crossing the border illegally, border enforcement agents will be better able to identify those individuals with terrorist or criminal intent.

### *Tying It All Together: Policy Solutions*

To address national security concerns associated with the influx of OTM alien infiltrations, the federal government should take action in three respects: (1) the expedited removal process, which is currently only operational on a limited basis in the Tucson and Laredo Border Patrol Sectors, should be fully implemented in all 20 of the United States's Border Patrol Sectors; (2) additional funding should be provided to expand detention facilities throughout the nation; and (3) a program should be adopted that decreases the economic incentives motivating illegal immigration and thereby allows for the easier identification of illegal aliens with criminal intent. Implementation of these three policies would provide for the timely deportation of OTM aliens, decrease the likelihood that apprehended OTM aliens will have an opportunity to abscond, and enable law enforcement to monitor the border for criminal or terrorist threats more readily. Following the hearing Senators Kyl, Feinstein, and Cornyn wrote to Homeland Security Secretary Michael Chertoff requesting that DHS advise Congress of the additional resources it needed to address the growing problem of OTM aliens along the border.<sup>484</sup>

## **The Visa Waiver Program**

### *Introduction*

The Visa Waiver Program (VWP) is a reciprocal agreement with 27 other countries that allows foreign nationals to enter the United States without a visa for up to 90 days. The program has proven an economic success,<sup>485</sup> and each year more than 16 million foreign nationals visit the United States through the VWP.<sup>486</sup> Despite the economic advantages of the VWP, a number of VWP entrants pose a national security risk.<sup>487</sup>

On September 7, 2006, the Subcommittee on Terrorism, Technology, and Homeland Security convened a hearing, entitled “Keeping Terrorists off the Plane: Strategies for Pre-Screening International Passengers Before Takeoff,” to investigate criticisms of the security measures used to screen foreign nationals in the Visa Waiver

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<sup>483</sup> Hearing of June 7, 2005, at 26 (transcript) (statement of C. Stewart Verdery).

<sup>484</sup> Letter from Jon Kyl, Dianne Feinstein, and John Cornyn, Senators, U.S. Senate, to Michael Chertoff, Secretary, Department of Homeland Security (June 22, 2005) (on file with Authors).

<sup>485</sup> Hearing of Sept. 7, 2006, at 40 (transcript) (statement of Jess Ford).

<sup>486</sup> Hearing of Sept. 7, 2006, at 5 (transcript) (statement of Jon Kyl).

<sup>487</sup> Hearing of Sept. 7, 2006, at 40 (transcript) (statement of Jess Ford).

Program (VWP).<sup>488</sup> Four experts on the VWP testified before the Subcommittee: (1) Paul S. Rosenzweig, Counselor to the Assistant Secretary for Policy, U.S. Customs and Border Protection, Department of Homeland Security; (2) Jayson P. Ahern, Assistant Commissioner, Office of Field Operations, U.S. Customs and Border Protection, Department of Homeland Security; (3) Jess Ford, Director of International Affairs and Trade, Government Accountability Office; and (4) Leon Laylagian, Executive Vice-President, Passenger-Cargo Security Group.

#### *General Features of the VWP*

The VWP is monitored by the VWP Oversight Unit within the Department of Homeland Security (DHS). The oversight unit is responsible for analyzing the security risks of the VWP and implementing procedures to counter those risks. The oversight unit is comprised of only two permanent members and three contract workers.<sup>489</sup> It primarily partners with Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) to analyze security systems in foreign countries and improve the quality of security information by locating security weaknesses.<sup>490</sup>

#### *Tools Currently Used to Screen VWP Entrants*

The VWP admits 16 million people into the United States each year without employing the full visa application processes that would normally detect terrorists and criminals.<sup>491</sup> Therefore, it is critical that the VWP filter out security risks in some other manner. The United States uses five tools to screen VWP entrants before their arrival at U.S. ports of entry: (1) United States Visitor and Immigrant Indicator Technology (US-VISIT); (2) e-passports with biometric identifiers; (3) the Computer Assisted Passenger Prescreening System-II (CAPPS-II); (4) the Advanced Passenger Information System (APIS); and (5) the Immigration Advisory Program (IAP).

The first layer of security included in the VWP involves US-VISIT. Foreign nationals must submit to fingerprint and photograph analysis, which, after being cross-checked against criminal and terrorist databases, identifies whether an individual represents a known threat to national security.

The second aspect of VWP security involves the adoption of e-passports. By October 26, 2006, all 24 VWP member nations were directed to issue e-passports that offer additional security features such as integrated data chips, machine-readable magnetic strips,

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<sup>488</sup> *Keeping Terrorists off the Plane: Strategies for Pre-Screening International Passengers Before Takeoff: Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security of the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. (September 7, 2006) (S. Hrg. 109-760, Serial No. J-109-107), at 5 (transcript) (written statement of Jon Kyl); *id.* at 11-12 (transcript) (statement of Paul Rosenzweig); *id.* at 40 (transcript) (statement of Jess Ford) [hereinafter “Hearing of Sept. 7, 2006”].

<sup>489</sup> Hearing of Sept. 7, 2006, at 36 (transcript) (statement of Paul Rosenzweig).

<sup>490</sup> Hearing of Sept. 7, 2006, at 36-37 (transcript) (statement of Paul Rosenzweig).

<sup>491</sup> Hearing of Sept. 7, 2006, at 40 (transcript) (statement of Jess Ford).

and digital photographs.<sup>492</sup> These passports are designed to reduce the ease and prevalence of document fraud, which has plagued the VWP since its inception.

The VWP also makes use of CAPPs-II, which compares Passenger Name Record (PNR) data, travel plans, itineraries, and contact numbers<sup>493</sup> against commercial and government databases to identify terrorists.<sup>494</sup> Most impressively, this program allows for the identification of unknown terrorists, also known as “cleanskins.”<sup>495</sup> During the hearings, Chairman Kyl inquired, “[i]sn’t the problem here that not everybody is known to be a terrorist who is a terrorist? Sometimes you have to put a few things together to ‘connect the dots’ . . . .”<sup>496</sup> Mr. Rosenzweig responded, “[t]he Passenger Name Record is principally of use for us in identifying the unknown terrorists.”<sup>497</sup> At the time of the hearing, privacy concerns prompted the European Parliament to oppose sharing PNR data with the United States despite an initial agreement between DHS and the European Union Commission.<sup>498</sup>

The APIS is a body of rules promulgated by DHS in response to the passage of the Intelligence Reform and Terrorism Prevention Act of 2004, which mandated the pre-departure vetting of passengers.<sup>499</sup> APIS requires that air carriers provide the CBP with biographical data for comparison against terrorist and law enforcement databases.<sup>500</sup> A major flaw with the APIS is that air carriers may transmit security data up to 15 minutes after takeoff,<sup>501</sup> too late to prevent a terrorist from boarding the plane.<sup>502</sup> The APIS must find a way to expedite the collection and transmission of passenger information since passengers are rarely subjected to a full check under APIS due to time constraints.<sup>503</sup>

To augment the APIS, DHS is developing the Advance Quick Query (AQQ) system.<sup>504</sup> AQQ is a real-time security check that allows for the evaluation of passengers who arrive too late for screening through the APIS.<sup>505</sup> Chairman Kyl noted the AQQ’s

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<sup>492</sup> Hearing of Sept. 7, 2006, at 5 (transcript) (statement of Jon Kyl); On October 26, 2006, the State Department released a notice that 24 of the 27 countries in the VWP had met the new October 26, 2006 deadline; Press Release, Department of Homeland Security, Majority of VWP Countries to Meet Digital Photo Deadline (Oct. 26, 2005) ([www.dhs.gov/xnews/releases/press\\_release\\_0789.shtm](http://www.dhs.gov/xnews/releases/press_release_0789.shtm)).

<sup>493</sup> PNR information is collected by the airline upon booking the ticket for a passenger and is stored in the airlines’ reservation and departure control databases.

<sup>494</sup> Hearing of Sept. 7, 2006, at 13 (transcript) (statement of Paul Rosenzweig).

<sup>495</sup> Hearing of Sept. 7, 2006, at 33 (transcript) (statement of Paul Rosenzweig).

<sup>496</sup> Hearing of Sept. 7, 2006, at 33 (transcript) (statement of Jon Kyl).

<sup>497</sup> Hearing of Sept. 7, 2006, at 33 (transcript) (statement of Paul Rosenzweig).

<sup>498</sup> Hearing of Sept. 7, 2006, at 33 (transcript) (statement of Paul Rosenzweig). Following the hearing, Secretary of Homeland Security Michael Chertoff announced that DHS and the EU reached an agreement allowing DHS to access PNR data and share the information with other U.S. counter-terrorism agencies. Press Release, Department of Homeland Security, Statement by Homeland Security Secretary Michael Chertoff on Passenger Name Record Agreement with European Union (Sept. 30, 2006) ([http://www.dhs.gov/xnews/releases/pr\\_1160772588688.shtm](http://www.dhs.gov/xnews/releases/pr_1160772588688.shtm)).

<sup>499</sup> Hearing of Sept. 7, 2006, at 4 (transcript) (statement of Jon Kyl).

<sup>500</sup> Hearing of Sept. 7, 2006, at 17 (transcript) (statement of Jayson Ahern).

<sup>501</sup> Hearing of Sept. 7, 2006, at 19 (transcript) (statement of Jayson Ahern).

<sup>502</sup> To prevent this threat, a pending rule change would alter the definition of “departure” to mean push-back rather than wheels up.

<sup>503</sup> Hearing of Sept. 7, 2006, at 18 (transcript) (statement of Jayson Ahern).

<sup>504</sup> Hearing of Sept. 7, 2006, at 20 (transcript) (statement of Jayson Ahern).

<sup>505</sup> Hearing of Sept. 7, 2006, at 18 (transcript) (statement of Jayson Ahern).

efficiency: “[it] seems logical that for 95 percent of the passengers, there is plenty of time to get the pre-screening done, and for the few that come in at the very last minute, you could do some real-time checking, and it wouldn’t be too burdensome.”<sup>506</sup> Together, APIS and AQQ will provide adequate screening to protect the VWP’s integrity while minimizing the financial impact of security regulations on air carriers.<sup>507</sup>

The final security measure utilized by the VWP is the Immigration Advisory Program, which assigns CBP officers to permanent posts in foreign airports. This allows them to monitor fraud and the execution of screening procedures firsthand. While successful at detecting travel-document fraud, the program fails to bolster security significantly because, as of the hearing, it had only been implemented in London, Amsterdam, and Warsaw. Chairman Kyl suggested that the pilot IAP should be aggressively expanded to permanent posting of CBP agents in other member countries as well.<sup>508</sup>

#### *VWP Security Issues and GAO Recommendations*

Despite precautionary measures like the US-VISIT program and e-passports, five major security issues endanger the security of the VWP. All of these issues were raised at the Subcommittee hearing, and, following a review of the VWP’s security procedures, the Government Accountability Office (GAO) recommended that several steps be taken to address these vulnerabilities.

First, pre-departure security procedures are inadequate to prevent terrorists from boarding a plane. VWP participants are not required to submit photographs or fingerprints until after they reach the United States.<sup>509</sup> This procedure fails to account for the possibility that a terrorist might hijack or destroy the plane during flight.

Second, although the VWP adopted e-passports to address travel document fraud, traditional passports remain valid for 10 years, offering an opportunity for that fraud to continue capitalizing on the use of outdated technology.<sup>510</sup> During the hearing, Senator Feinstein observed, “[w]hat complicates this [issue] is there is so much fraudulent passport use, and I want to read one sentence from the GAO report right at the beginning: ‘Stolen passports from visa waiver countries are prized travel documents among terrorists, criminals, and immigration law violators, creating an additional risk.’” Senator Feinstein further noted, “DHS officials acknowledge that an undetermined number of inadmissible aliens may have entered the United States using a stolen or lost passport from a visa waiver

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<sup>506</sup> Hearing of Sept. 7, 2006, at 20 (transcript) (statement of Jon Kyl).

<sup>507</sup> Hearing of Sept. 7, 2006, at 21 (transcript) (statement of Jayson Ahern).

<sup>508</sup> Hearing of Sept. 7, 2006, at 5 (transcript) (statement of Jon Kyl). Chairman Kyl reiterated the point to DHS Secretary Chertoff in a joint letter with Senator Feinstein on Sept. 18, 2006; Letter from Jon Kyl and Dianne Feinstein, Senators, U.S. Senate, to Michael Chertoff, Secretary, Department of Homeland Security (Sept. 18, 2006) (on file with Authors).

<sup>509</sup> Hearing of Sept. 7, 2006, at 12 (transcript) (statement of Paul Rosenzweig).

<sup>510</sup> Hearing of Sept. 7, 2006, at 51 (transcript) (statement of Jess Ford).

country.”<sup>511</sup> Clearly, criminals and terrorists recognize the usefulness of these passports, and action should be taken to ensure that all VWP participants present passports that meet biometric standards proposed in the Enhanced Border Security and Visa Entry Reform Act of 2002, the House version of a bill that both Chairman Kyl and Senator Feinstein co-sponsored in the Senate.<sup>512</sup>

Third, DHS must improve oversight of the VWP. DHS’s failure to issue clear reporting guidelines has prevented member countries from properly reporting lost or stolen travel document information.<sup>513</sup> Additionally, CBP officers at primary inspection locations do not have access to the Interpol database.<sup>514</sup> Further, the VWP lacks an exit component, and therefore cannot identify participants who choose to abscond. Senator Feinstein stressed that issue: “[t]he US-VISIT Program knows who comes in, but they do not know who goes out. That part of the program is not functioning. To make it worse, no one can tell us when it will be functioning.”<sup>515</sup>

Further, DHS lacks an intermediate sanction mechanism to force compliance with VWP standards. Mr. Rosenzweig testified, “[DHS is] not in a position to make a unilateral demand, and the only hammer we have is the rather stringent one of compelling a country to drop out, which has very significant foreign policy [ramifications] . . . .”<sup>516</sup> In other words, if a country fails to comply with the VWP requirements, DHS only has two choices: (1) permanently expel that country from the program or (2) allow the violation to go unpunished. Senator Feinstein acknowledged this dilemma, but stated, “I feel very strongly that if a country does not meet the statutory requirements for visa waiver, they should not be allowed to come into the program. This again, I repeat, is the soft underbelly.”<sup>517</sup>

Fifth, border inspectors lack familiarity with the cultures, languages, and trends in document fraud among foreign nationals from VWP member countries. This precludes inspectors from properly interviewing these nationals at U.S. ports of entry.

Each of these security issues must be evaluated and neutralized so that the VWP does not create vulnerabilities to United States security.

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<sup>511</sup> Hearing of Sept. 7, 2006, at 8 (transcript) (statement of Dianne Feinstein).

<sup>512</sup> Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (2002).

<sup>513</sup> Hearing of Sept. 7, 2006, at 23 (transcript) (statement of Paul Rosenzweig).

<sup>514</sup> During the hearing, Mr. Rosenzweig testified that DHS plans to provide Interpol access to all CBP officers at primary airports by the third quarter of 2007. Hearing of Sept. 7, 2006, at 28 (transcript) (statement of Paul Rosenzweig).

<sup>515</sup> Hearing of Sept. 7, 2006, at 7 (transcript) (statement of Dianne Feinstein).

<sup>516</sup> Hearing of Sept. 7, 2006, at 25 (transcript) (statement of Paul Rosenzweig).

<sup>517</sup> Hearing of Sept. 7, 2006, at 9 (transcript) (statement of Dianne Feinstein).

*GAO Recommendations to Improve VWP Security*

Following a review of the VWP's security procedures, the GAO recommended that several steps be taken to address the vulnerabilities. The GAO report outlined at least five areas of concern:

- 1) DHS must promulgate clear regulations so VWP countries know how to report security information to the United States.<sup>518</sup> The GAO report stated that VWP countries did not know how or to whom to report lost passport information. In addition, the VWP does not require lost and stolen, or blank and issued, travel documents to be reported. Further, DHS had not set deadlines by which the information had to be reported. Clear rules would eliminate confusion and facilitate information sharing.<sup>519</sup>
- 2) DHS should include other organizations within its country review process to add valuable perspectives on securing the VWP. The GAO found a lack of cooperation with foreign embassies, and DHS forensic document analysts needlessly prevented improvement in the processes that secure the VWP.<sup>520</sup>
- 3) Congress should pass laws to establish deadlines by which DHS must complete country assessments and report its findings to Congress. Under the current system, DHS reports to Congress in an untimely fashion, misstates security risks, and incorporates untimely data in its reports.<sup>521</sup>
- 4) The VWP Oversight Unit needs more resources. Under the current level of funding, the unit cannot monitor risks on a continual basis. Rather, it is limited to reporting past security issues found during prior country assessments. With additional resources, DHS could establish 24-hour foreign government contacts that could advise DHS as soon as security leaks were located.<sup>522</sup>
- 5) The VWP should increase DHS capability to screen individual passenger threats instead of primarily relying on countrywide metrics.<sup>523</sup> Although DHS plans to provide airport CBP officers with Interpol access by the end of 2007, further efforts should be made to provide Interpol information to all CBP officers at primary inspection points.<sup>524</sup> This capability would provide real-time information regarding lost and stolen passports to officers to prevent dangerous foreign nationals from entering the country.

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<sup>518</sup> Hearing of Sept. 7, 2006, at 43 (transcript) (statement of Jess Ford).

<sup>519</sup> Mr. Rosenzweig testified that by April 2007, DHS will have standards for direct reporting of lost and stolen passports. Hearing of Sept. 7, 2006, at 22 (transcript) (statement of Paul Rosenzweig).

<sup>520</sup> Hearing of Sept. 7, 2006, at 41 (transcript) (statement of Jess Ford).

<sup>521</sup> Hearing of Sept. 7, 2006, at 43 (transcript) (statement of Jess Ford).

<sup>522</sup> Hearing of Sept. 7, 2006, at 42 (transcript) (statement of Jess Ford).

<sup>523</sup> Hearing of Sept. 7, 2006, at 13 (transcript) (statement of Paul Rosenzweig).

<sup>524</sup> Hearing of Sept. 7, 2006, at 30 (transcript) (statement of Paul Rosenzweig).

### *Related Concerns: Cargo on Passenger Airlines*

While not directly related to the VWP, flaws in the screening of cargo on passenger airlines pose a security concern for all travelers. Each passenger must undergo screening procedures, but items placed in the plane's cargo-hold (belly-checked cargo) are rarely searched.<sup>525</sup> Business opposition, fueled by concerns about proprietary information and competition, has allowed for this dangerous practice to continue.<sup>526</sup>

Despite concerns of businesses, the United States should adopt the Enhanced Known Shipper Program. The Known Shipper Program is primarily a paper trail following the custody of the cargo. The new enhanced program, however, would involve physical inspections of cargo and a package profiling system that performs a risk assessment on each piece of cargo to determine if a search is warranted. The riskiest 40 percent of the cargo would automatically be subject to search. Coupled with a random search feature, the enhanced program could prove a useful tool for screening belly-checked cargo.<sup>527</sup>

Additionally, the Enhanced Known Shipper Program could be implemented without delay or expense for shippers. Search techniques could vary based on the contents of packages, and alternative techniques that have proven themselves useful in other countries could be adopted (e.g., high-energy X-ray, CT scan, spectral analysis, K-9 units, and sub-pressure simulators).<sup>528</sup> Furthermore, search criteria could be tailored based on periodic risk assessments and seasonal considerations. The flexibility of the program would be its greatest asset.<sup>529</sup>

### *Moving Forward*

As Chairman Kyl noted, “[t]he bottom line at this point, nearly five years after the horrible incidents of September 2001, is that while we have taken a lot of steps to improve the security of our country, and in particular, travel from abroad on aircraft, there is obviously still a long way to go.”<sup>530</sup> The Subcommittee's hearing offered important insights on how to address a number of flawed security procedures plaguing the VWP and belly-checked cargo screening operations. If these flawed security procedures are not addressed, Congress should take appropriate action before terrorists have an opportunity to capitalize on the complacency of DHS and passenger airlines.

Following the hearing, Senators Kyl and Feinstein wrote to the Secretary of Homeland Security urging his Department to improve security measures of the Visa

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<sup>525</sup> Hearing of Sept. 7, 2006, at 47 (transcript) (statement of Leon Laylagian).

<sup>526</sup> Hearing of Sept. 7, 2006, at 48 (transcript) (statement of Leon Laylagian).

<sup>527</sup> Hearing of Sept. 7, 2006, at 53 (transcript) (statement of Leon Laylagian).

<sup>528</sup> Hearing of Sept. 7, 2006, at 48 (transcript) (statement of Leon Laylagian).

<sup>529</sup> Hearing of Sept. 7, 2006, at 54 (transcript) (statement of Leon Laylagian).

<sup>530</sup> Hearing of Sept. 7, 2006, at 5 (transcript) (statement of Jon Kyl).

Waiver Program in ways outlined by the Government Accountability Office.<sup>531</sup> Also, Senators Kyl and Cornyn sent a letter to the President requesting, among other things, an additional \$193 million to fund the US-VISIT Entry-Exit Program.<sup>532</sup> Lastly, to ensure that customs officials receive the training needed to screen foreign nationals effectively, Senator Kyl helped secure \$17.9 million for the Federal Law Enforcement Training Center to be used for a language arts facility and information technology upgrades.<sup>533</sup>

## **Federal Strategies to End Border Violence**

### *Introduction*

To raise public awareness of the increasing levels of violence along the southern border, the Mexican military incursions into the United States, and the rise in the number of criminals coming across the border, the Subcommittee held a joint hearing with the Judiciary Committee's Subcommittee on Immigration, Border Security, and Citizenship on March 1, 2006, entitled "Federal Strategies to End Border Violence."<sup>534</sup>

Two panels provided testimony at the hearing. Panel one consisted of (1) David Aguilar, Chief, Office of the Border Patrol, U.S. Customs and Border Protection, Department of Homeland Security; (2) Paul Charlton, United States Attorney, District of Arizona, U.S. Attorney's Office; and (3) Marcy M. Forman, Director, Office of Investigations, U.S. Immigration and Customs Enforcement, Department of Homeland Security. Panel two consisted of (1) Larry A. Dever, Sheriff, Cochise County, Arizona; (2) A. D'Wayne Jernigan, Sheriff, Val Verde County, Texas; (3) Lavoyger Durham, Manager, El Tule Ranch; and (4) T.J. Bonner, President, National Border Patrol Council.

### *Behavioral Developments Amongst Illegal Aliens*

Illegal aliens crossing the border have begun to act differently than in the past.<sup>535</sup> Sheriff A. D'Wayne Jernigan explained, "[t]hirty years ago . . . we were dealing with a much different class of people. They were very docile, very submissive. At worst, they would turn and flee from you and flee back into Mexico."<sup>536</sup> Now, sheriffs' deputies and Border Patrol agents are facing combative individuals.<sup>537</sup> Sheriff Larry Dever emphasized, "[law

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<sup>531</sup> Letter from Jon Kyl and Dianne Feinstein, Senators, U.S. Senate, to Michael Chertoff, Secretary, Department of Homeland Security (Sept. 18, 2006) (on file with Authors).

<sup>532</sup> Letter from Jon Kyl and John Cornyn, Senators, U.S. Senate, to George Bush, President, United States of America (July. 24, 2006) (on file with Authors).

<sup>533</sup> Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680 (2005).

<sup>534</sup> *Federal Strategies to End Border Violence: Joint Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security and the Subcomm. on Immigration, Border Security, and Citizenship of the Senate Comm. on the Judiciary*, 109th Cong., 2d Sess. (Mar. 1, 2006) (S. Hrg. 109-556, Serial No. J-109-60) [hereinafter "Hearing of Mar. 1, 2006"].

<sup>535</sup> Hearing of Mar. 1, 2006, at 42 (statement of A. D'Wayne Jernigan).

<sup>536</sup> Hearing of Mar. 1, 2006, at 42 (statement of A. D'Wayne Jernigan).

<sup>537</sup> Hearing of Mar. 1, 2006, at 42 (statement of A. D'Wayne Jernigan).

enforcement] anticipate[s] that we will be in a fight, a violent confrontation in every interdiction effort, with running gun battles down congested public roadways [and] populated residential areas.”<sup>538</sup>

According to Chief Aguilar, about 139,000 of the aliens apprehended on the border in 2005 were criminal aliens seeking to reenter the United States illegally.<sup>539</sup> That number is particularly disturbing when one considers that for every illegal alien apprehended, three others enter the United States successfully.<sup>540</sup> Senator Kyl noted, “[w]e cannot ignore the fact that at least 10 percent of the aliens apprehended along the border are criminals.”<sup>541</sup> These individuals demonstrate greater resilience than criminal aliens of the past and appear to have been trained in escape and evasion techniques.<sup>542</sup> They are also well supplied, as Border Patrol agents routinely seize guns, ammunition, and drugs from them.<sup>543</sup> The increase of incursions by criminal aliens has corresponded with the influx of other than Mexican (OTM) aliens along the southern border, an alarming trend as many come from countries that pose a terrorist threat.<sup>544</sup>

### *Increasing Violence along the Southern Border*

Violence by illegal aliens towards Border Patrol agents and support personnel is on the rise.<sup>545</sup> “In fiscal year 2005, [Border Patrol] experienced 778 assaults . . . a 108 percent increase from the previous year,”<sup>546</sup> Chief Aguilar said. Law enforcement officers are subjected daily to assaults perpetrated by illegal aliens.<sup>547</sup> At the hearing, Chief Aguilar provided photographs that depict the severity of the violence. One showed a Border Patrol agent receiving 25 stitches from being hit in the head by a rock and another was of a Border Patrol vehicle that had been hit by 23 rounds from an AR-15 rifle.<sup>548</sup>

What is perhaps more alarming is that violent acts against U.S. citizens and property owners are on the rise as well. In February 2005, two alien smugglers were convicted for racing through Sierra Vista, Arizona, at speeds exceeding 100 miles per hour and causing a collision that killed two U.S. citizens and three of the illegal aliens whom they were transporting.<sup>549</sup> At the El Tule Ranch in South Texas, about 75 miles north of the

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<sup>538</sup> Hearing of Mar. 1, 2006, at 31 (statement of Larry Dever).

<sup>539</sup> Press Release, Department of Homeland Security, Press Conference with Secretary Michael Chertoff, Chief of the Border Patrol David Aguilar, and Acting Director of the Office of Detention and Removal John Torres on the Secure Border Initiative (Dec. 1, 2005) ([http://www.dhs.gov/xnews/releases/press\\_release\\_0799.shtm](http://www.dhs.gov/xnews/releases/press_release_0799.shtm)).

<sup>540</sup> *The Need for Comprehensive Immigration Reform: Strengthening our National Security: Joint Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security and the Subcomm. on Immigration, Border Security, and Citizenship of the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (May 17, 2005) (S. Hrg. 109-65, Serial No. J-109-20), at 16 (statement of Dianne Feinstein) [hereinafter “Hearing of May 17, 2005”].

<sup>541</sup> Hearing of Mar. 1, 2006, at 3 (statement of Jon Kyl).

<sup>542</sup> Hearing of Mar. 1, 2006, at 32 (statement of A. D’Wayne Jernigan).

<sup>543</sup> Hearing of Mar. 1, 2006, at 5 (statement of John Cornyn).

<sup>544</sup> Hearing of Mar. 1, 2006, at 34 (statement of Lavoyger Durham).

<sup>545</sup> Hearing of Mar. 1, 2006, at 36 (statement of T.J. Bonner).

<sup>546</sup> Hearing of Mar. 1, 2006, at 8 (statement of David Aguilar).

<sup>547</sup> Hearing of Mar. 1, 2006, at 9-10 (statement of David Aguilar).

<sup>548</sup> Hearing of Mar. 1, 2006, at 10 (statement of David Aguilar).

<sup>549</sup> Hearing of Mar. 1, 2006, at 12 (statement of Paul Charlton).

Mexican border, 200 to 300 illegal aliens cross the border each night.<sup>550</sup> These aliens terrorize the people of South Texas, burglarizing ranches and homes as they cross and taking guns to arm themselves.<sup>551</sup> Ranchers are fired upon and subjected to gang beatings.<sup>552</sup> The danger from foraging aliens is so great that border citizens now place food, water, and supplies around their property to discourage aliens from breaking into their homes.<sup>553</sup>

### *Mexican Military Incursions Across the Southern Border*

At the hearing, Senator Kyl noted the seriousness of Mexican military incursions: “there is significant danger associated when military units face each other.”<sup>554</sup> Chief Aguilar stressed that most incursions were accidental but still pose a dangerous dilemma for agents along the border.<sup>555</sup> In March 2000 in Santa Teresa, New Mexico, Border Patrol agents were fired upon by nine Mexican soldiers.<sup>556</sup> In February 2006, a Mexican military helicopter flew one-half mile into the United States for over 20 minutes and only returned to Mexico after the Border Patrol contacted the Mexican government.<sup>557</sup> Mexican authorities send assurances that they are concerned and are trying “to mitigate and keep these incidents from occurring.”<sup>558</sup>

### *Increased Sophistication of Gangs, Criminal Organizations, Smugglers, and Tunneling Operations*

Gangs, criminal organizations, and cartels are well-trained and well-equipped.<sup>559</sup> As Chief Aguilar stated, “[the] expanded control of our borders has resulted in a greater reluctance of entrenched criminal organizations to give up areas in which they have . . . historically operated.”<sup>560</sup> Gangs and criminal organizations are staking out remote, less protected areas, increasing the need for law enforcement in rural areas.<sup>561</sup> Members of criminal organizations are being observed and apprehended in uniforms similar to those of the Mexican military.<sup>562</sup> In January 2006, three sport utility vehicles crossed the border in Hudspeth County, Texas.<sup>563</sup> Although there is no confirmation of involvement by Mexican military, Mexican military vehicles were sighted aiding their escape across the

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<sup>550</sup> Hearing of Mar. 1, 2006, at 34 (statement of Lavoyger Durham).

<sup>551</sup> Hearing of Mar. 1, 2006, at 32 (statement of A. D'Wayne Jernigan).

<sup>552</sup> Hearing of Mar. 1, 2006, at 34 (statement of Lavoyger Durham).

<sup>553</sup> Hearing of Mar. 1, 2006, at 44 (statement of A. D'Wayne Jernigan).

<sup>554</sup> Hearing of Mar. 1, 2006, at 16 (statement of Jon Kyl).

<sup>555</sup> Hearing of Mar. 1, 2006, at 16 (statement of David Aguilar).

<sup>556</sup> Hearing of Mar. 1, 2006, at 41 (statement of T.J. Bonner).

<sup>557</sup> Hearing of Mar. 1, 2006, at 16 (statement of David Aguilar).

<sup>558</sup> Hearing of Mar. 1, 2006, at 9 (statement of David Aguilar).

<sup>559</sup> Hearing of Mar. 1, 2006, at 11-12 (statement of Paul Charlton).

<sup>560</sup> Hearing of Mar. 1, 2006, at 8 (statement of David Aguilar).

<sup>561</sup> Hearing of Mar. 1, 2006, at 8 (statement of David Aguilar).

<sup>562</sup> Hearing of Mar. 1, 2006, at 4 (statement of Dianne Feinstein).

<sup>563</sup> Hearing of Mar. 1, 2006, at 14 (statement of Marcy Forman).

border into Mexico.<sup>564</sup> Immigration and Customs Enforcement is investigating the incident.<sup>565</sup> Mr. Bonner believes that, despite Mexican assurances, “[f]or the government of Mexico to claim that some of these incursions were not their soldiers is just ridiculous.”<sup>566</sup>

Human smugglers have shown disdain for the lives of U.S. law enforcement, citizens, and their human cargo.<sup>567</sup> “One study estimates that 80 percent of all illegal aliens who enter this country become victims of crime before they ever get here and that crimes continue after they cross the border.”<sup>568</sup> Smugglers often rape the illegal immigrants they transport<sup>569</sup> and exploit them financially upon arrival.<sup>570</sup> Competition between smugglers also results in victimization of the innocent, as is evidenced by an incident in November 2003 during which rival groups fought a high-speed gun battle that resulted in four deaths and numerous injuries.<sup>571</sup>

Tunneling operations have also exhibited greater sophistication.<sup>572</sup> At the hearing, Senator Feinstein noted that, since 2001, U.S. law enforcement officials have found over 40 border tunnels.<sup>573</sup> The 2005 discovery of a San Diego tunnel is illustrative of how complex these tunneling operations are: “[The tunnel] went down 60 to 80 feet. It was ventilated, had electricity, and contained a rail system to ferry contraband back and forth.”<sup>574</sup> Over 2,300 pounds of marijuana were seized when the tunnel was raided, and it is unknown what other contraband or persons had already been smuggled into the United States.<sup>575</sup> At the hearing, Senator Feinstein expressed her shock to discover that tunneling is not a crime and noted that she and Senator Kyl were introducing legislation to help curb the practice of border tunneling.<sup>576</sup> That legislation, the Border Tunneling Prevention Act, was included in the Homeland Security Appropriations Act for 2007, which the President signed into law on October 4, 2006.<sup>577</sup>

### *U.S. Responses*

The U.S. government has taken steps to reduce violence caused by criminal organizations along the border. First, the Department of Homeland Security (DHS)

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<sup>564</sup> Hearing of Mar. 1, 2006, at 8-9 (written statement of Marcy Forman).

<sup>565</sup> Hearing of Mar. 1, 2006, at 9 (written statement of Marcy Forman).

<sup>566</sup> Hearing of Mar. 1, 2006, at 37 (statement of T.J. Bonner).

<sup>567</sup> Hearing of Mar. 1, 2006, at 12 (statements of Paul Charlton and Larry Dever).

<sup>568</sup> Hearing of Mar. 1, 2006, at 31 (statement of Larry Dever).

<sup>569</sup> Hearing of Mar. 1, 2006, at 31 (statement of Larry Dever).

<sup>570</sup> Hearing of Mar. 1, 2006, at 38 (statement of T.J. Bonner).

<sup>571</sup> Hearing of Mar. 1, 2006, at 12 (statement of Paul Charlton).

<sup>572</sup> Hearing of Mar. 1, 2006, at 4 (statement of Dianne Feinstein).

<sup>573</sup> Hearing of Mar. 1, 2006, at 4 (statement of Dianne Feinstein).

<sup>574</sup> Hearing of Mar. 1, 2006, at 4 (statement of Dianne Feinstein).

<sup>575</sup> Hearing of Mar. 1, 2006, at 4 (statement of Dianne Feinstein).

<sup>576</sup> Hearing of Mar. 1, 2006, at 5 (statement of Dianne Feinstein); Border Tunneling Prevention Act, S. 2355, 109th Cong. (2006).

<sup>577</sup> Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, 120 Stat. 1355 (2006).

established the Border Enforcement and Security Task Force.<sup>578</sup> Second, U.S. Immigration and Customs Enforcement (ICE) investigations have become more prevalent: “[s]ince 2003, ICE investigations . . . have resulted in more than 5,400 arrests, 2,800 criminal indictments, and 2,300 criminal convictions,”<sup>579</sup> Ms. Forman said. Furthermore, in 2005 these investigations led to the seizure of nearly \$1 billion of currency and assets tied to criminal aliens who operate along the border.<sup>580</sup> Finally, an increased Border Patrol presence has led to a significant drop in criminal activity on Tohono O’Odham tribal lands.<sup>581</sup>

### *Subcommittee Recommendations*

Interior enforcement measures should be bolstered to address this combative criminal element that is becoming more prevalent along the southern border.<sup>582</sup> As of March 2006, the Border Patrol had 240 outstanding requests for federal support<sup>583</sup> and requested an additional 30,000 agents to complete its mission successfully.<sup>584</sup> Also, greater emphasis should be placed on the deployment of fencing and surveillance technology along the U.S.-Mexico border.<sup>585</sup> Lastly, the federal government should take steps to reduce the economic incentives associated with illegal immigration, criminalize the hiring of illegal aliens, and makes use of a tamper-resistant employment authorization cards which would allow the Border Patrol to focus enforcement efforts on the criminal and terrorist element trying to enter the United States undetected.<sup>586</sup>

Additionally, the rising problems of border violence and illegal activities will not be solved without Mexico’s active cooperation.<sup>587</sup> Mexico has no border patrol; the creation of a bi-national Border Patrol in cooperation with Mexico is in discussion.<sup>588</sup>

Increased cooperation between state and local governments and federal immigration officials will aid in criminal enforcement along the border.<sup>589</sup> To facilitate this cooperation, funding for the State Criminal Alien Assistance Program (SCAAP) must be increased.<sup>590</sup> SCAAP qualifies state and local law enforcement for cost reimbursements.<sup>591</sup> Nationwide, there are currently 18 agreements, known as 287(g) agreements, which provide

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<sup>578</sup> Hearing of Mar. 1, 2006, at 13 (statement of Marcy Forman).

<sup>579</sup> Hearing of Mar. 1, 2006, at 14 (statement of Marcy Forman).

<sup>580</sup> Hearing of Mar. 1, 2006, at 14 (statement of Marcy Forman).

<sup>581</sup> Hearing of Mar. 1, 2006, at 26 (statement of David Aguilar).

<sup>582</sup> Hearing of Mar. 1, 2006, at 40 (statement of T.J. Bonner).

<sup>583</sup> Hearing of Mar. 1, 2006, at 20 (statement of David Aguilar).

<sup>584</sup> Hearing of Mar. 1, 2006, at 41 (statement of T.J. Bonner).

<sup>585</sup> Hearing of Mar. 1, 2006, at 27-28 (statements of John Cornyn and David Aguilar).

<sup>586</sup> Hearing of Mar. 1, 2006, at 37 (statement of T.J. Bonner).

<sup>587</sup> Hearing of Mar. 1, 2006, at 18 (statement of Dianne Feinstein).

<sup>588</sup> Hearing of Mar. 1, 2006, at 18 (statement of David Aguilar).

<sup>589</sup> Hearing of Mar. 1, 2006, 45 (statement of Jeff Sessions).

<sup>590</sup> Hearing of Mar. 1, 2006, at 45 (statement of Larry Dever).

<sup>591</sup> Hearing of Mar. 1, 2006, at 45 (statement of Larry Dever).

support for state and local law enforcement and cooperation with federal officials.<sup>592</sup> At the hearing, Senator Sessions expressed concern about the lack of these agreements, calling for more federal cooperation with and support to state and local law enforcement.<sup>593</sup>

Effective interior enforcement also requires increasing resources for detaining and removing illegal aliens.<sup>594</sup> Senator Sessions observed that for state and local officers to get a response from ICE, “basically the rule . . . was [if] it was 15 or more [illegal aliens], we might come and pick them up; otherwise, basically don’t bother to call.”<sup>595</sup> To this point, Senator Kyl posited, “it wouldn’t take very much in the way of resources to have some old school buses and some retired officers who could easily be deputized under current statutes to take custody of [the illegal aliens].”<sup>596</sup> Other impediments, such as the 17-year-old injunction preventing DHS from applying expedited removal proceedings to the citizens of El Salvador, must also be addressed.<sup>597</sup>

More effective interior enforcement would put a greater strain on the judicial system,<sup>598</sup> thus increased funding and capacity for the criminal justice system must accompany interior enforcement increases.<sup>599</sup> The two most necessary actions for the United States to deal with border violence and illegal immigration are (1) securing the border from illegal alien crossings and Mexican military incursions and (2) implementing a program that reduces the economic incentives that motivate illegal immigration and institutes an effective employment verification system.<sup>600</sup>

## **Worksite Enforcement in the Immigration Debate**

### *Introduction*

At a Subcommittee briefing on March 15, 2006, Austin T. Fragomen, Jr., a managing partner at the law firm of Fragomen, Del Rey, Bersen and Loewy, shared his thoughts on how to create a viable worksite enforcement program as part of comprehensive immigration reform. He distributed a position paper from the American Council on International Personnel (ACIP), entitled *Worksite Enforcement in the Immigration Reform Debate*.<sup>601</sup>

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<sup>592</sup> Hearing of Mar. 1, 2006, at 22 (statement of Jeff Sessions).

<sup>593</sup> Hearing of Mar. 1, 2006, at 22 (statement of Jeff Sessions).

<sup>594</sup> Hearing of Mar. 1, 2006, at 24 (statement of Jeff Sessions).

<sup>595</sup> Hearing of Mar. 1, 2006, at 24 (statement of Jeff Sessions).

<sup>596</sup> Hearing of Mar. 1, 2006, at 25 (statement of Jon Kyl).

<sup>597</sup> Hearing of Mar. 1, 2006, at 28 (statement of John Cornyn).

<sup>598</sup> Hearing of Mar. 1, 2006, at 33 (statement of A. D’Wayne Jernigan).

<sup>599</sup> Hearing of Mar. 1, 2006, at 33 (statement of A. D’Wayne Jernigan).

<sup>600</sup> Hearing of Mar. 1, 2006, at 39 (statement of Jon Kyl).

<sup>601</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

Until 1986, worksite raids by immigration officials resulted in the deportation of illegal workers without serious consequences for the employer.<sup>602</sup> In 1986, the Immigration Reform and Control Act added civil and criminal penalties against employers and required employees to demonstrate their work eligibility.<sup>603</sup> Mr. Fragomen criticized this 1986 immigration reform, saying that it resulted in massive document fraud because there was no central database or national identification.<sup>604</sup> The program was so complicated that it was unenforceable. (Employees could use over 29 combinations of documents to prove their identity and work eligibility.)<sup>605</sup> Political pressure and scarce resources resulted in immigration enforcement focused on paperwork violations and criminal organizations.<sup>606</sup> In response to this emphasis, employers created processes to ensure they meticulously completed immigration forms and avoided harsh consequences for paperwork violations, while largely failing to prevent illegal immigrants from working.<sup>607</sup>

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act gave employers a safe harbor from penalties if they made a good faith effort to comply with the verification.<sup>608</sup> That policy change shifted immigration enforcement to focus on investigating employers suspected of collaborating with smugglers.<sup>609</sup>

Mr. Fragomen compared employment opportunities drawing illegal migrants to the United States to a magnet.<sup>610</sup> To counteract this effect, worksite enforcement is needed to buttress comprehensive immigration reform. Overwhelming support exists for enhancing immigration enforcement; however, any worksite enforcement program needs to reduce document fraud and be easy for employers to administer.<sup>611</sup> Employers do not want a dual system of manual verification and electronic verification. Employers are looking for certainty when they hire employees. They want a fast and efficient system that verifies whether employees are eligible to work. To accomplish this, the federal government must have the responsibility of determining who is legitimately authorized to work.

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<sup>602</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>603</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986); American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>604</sup> Briefing by Austin T. Fragomen, Jr. to the Terrorism, Technology, and Homeland Security Subcommittee Staff on Creating a Viable Worksite Enforcement Program as Part of Comprehensive Immigration Reform in Washington, DC (March 15, 2006) [hereinafter "Briefing on March 15, 2006"].

<sup>605</sup> Briefing on March 15, 2006.

<sup>606</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>607</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>608</sup> Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996); American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>609</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>610</sup> See also American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>611</sup> See generally American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006); See also Society for Human Resources Management, *The 2006 Access to Human Capital and Employment Verification Survey Report* (Mar. 2006), available at <http://www.shrm.org/surveys/>.

Once a new system is in place, higher penalties for willful violations would be appropriate if employers are given a safe harbor when they receive a positive confirmation from the system. The penalties should be for actual violations, not paperwork violations.<sup>612</sup>

#### *Problems with the USCIS Basic Pilot Program*

Mr. Fragomen also addressed the practical policy questions of worksite enforcement.<sup>613</sup> Over 2,300 employers use the United States Citizenship and Immigration Services (USCIS) Basic Pilot program to verify electronically whether potential employees are authorized to work.<sup>614</sup> Currently, the USCIS Basic Pilot program uses information from separate databases.<sup>615</sup> This causes inaccuracies and delays — some information takes at least two weeks to reach the USCIS Basic Pilot system after it is entered.<sup>616</sup> To expand the USCIS Basic Pilot program to all U.S. employers, the system must be able to handle between 5.6 million and 7.1 million employers — according to data from the Government Accountability Office (GAO) and U.S. Census Bureau, respectively.<sup>617</sup> The Department of Homeland Security database also needs to be linked with the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) and the USCIS immigration-benefits databases, and these databases need to be available online and provide real-time information.<sup>618</sup> An independent auditor, such as the GAO, should determine that the system is reasonably reliable and accurate, and the National Institute of Standards and Technology should set the technological standard for the system, as it did for US-VISIT.<sup>619</sup>

Another problem with the USCIS Basic Pilot program is that employers cannot use it until the employee is on the payroll.<sup>620</sup> The standards for the USCIS Basic Pilot program need to be developed to provide prompt responses when requests cannot be immediately verified. Because the databases are not linked, GAO reports that the USCIS Basic Pilot program cannot be used for 15 percent of requests, requiring intensive manual labor to verify employees within the statutory deadline of 10 days.<sup>621</sup> This means that employers must employ someone for up to ten days before they know whether that employee is eligible to work.

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<sup>612</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>613</sup> Briefing on March 15, 2006.

<sup>614</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>615</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>616</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>617</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>618</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>619</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>620</sup> Briefing on March 15, 2006.

<sup>621</sup> Briefing on March 15, 2006; American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006); The GAO report also indicated that the USCIS does not have enough staff to handle an significant increase in manual verification requests; Government Accountability Office, *Immigration Enforcement: Preliminary Observations on Employment Verification and Worksite Enforcement Efforts*, GAO-05-822T at 11 (Jun. 21, 2005), available at <http://www.gao.gov/new.items/d05822t.pdf>.

Mr. Fragomen and the ACIP recommend reducing document fraud by limiting the documents that prove identity and work authorization. “Feeder” documents used to obtain identification, such as birth certificates, are especially vulnerable to fraud. The number of documents that prove both identity and work authorization needs to be reduced. Any identification used to prove identity should have biometric identifiers and be machine readable. Opponents say that this identification document would become a national identification card; proponents respond by pointing out that the card would only be used by those seeking employment.<sup>622</sup> Another criticism is that the card would be very expensive, with one estimate that cards with biometric data would cost between \$25.2 billion and \$81.3 billion.<sup>623</sup>

### *Recommendations*

To achieve an effective worksite enforcement program, Congress and the Administration should create a multi faceted worksite enforcement program: First, Congress should create an electronic employment eligibility verification system (System);<sup>624</sup> this system should link to an online database and require job applicants to present biometric identification to protect the integrity of the process and protect against document fraud.<sup>625</sup> Second, the System should be able to gain access to both the immigration and social security databases;<sup>626</sup> the enforcement system should also reduce the number of acceptable identification documents to a tamper-proof social security card and another secure form of identification.<sup>627</sup> Third, in light of GAO’s finding that the USCIS Basic Pilot program could not handle a large increase in usage, the System should be phased in slowly;<sup>628</sup> the first phase should include industries with national security implications.<sup>629</sup> Fourth, GAO should independently certify that the System is reliable and accurate to ensure its functionality.<sup>630</sup> Fifth, the Department of Homeland Security should offer incentives to employers who have a history of compliance to allow federal law enforcement to focus on national security;<sup>631</sup> participating employers should not face enhanced penalties until the system is verifiably accurate.<sup>632</sup> Sixth, Congress must appropriate sufficient funds to establish a system with state-of-the-art technology to minimize or eliminate delays or outages in the System.<sup>633</sup> Lastly, federal law enforcement

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<sup>622</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>623</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006) (using the low and high estimates for the British national identity card to predict the cost of a similar card for the estimated 149 million workers in the United States).

<sup>624</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>625</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>626</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>627</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>628</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>629</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>630</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>631</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>632</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>633</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

must aggressively prosecute violating employers to protect the free market against unfair advantages.<sup>634</sup>

Worksite enforcement is an essential component to border control.<sup>635</sup> Without strong enforcement, the underground market for illegal labor will prevent any true reform.<sup>636</sup> Agencies must work together to combat illegal labor.<sup>637</sup>

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<sup>634</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>635</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>636</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

<sup>637</sup> American Council on International Personnel, *Worksite Enforcement in the Immigration Reform Debate* (Mar. 2006).

## OPENNESS IN GOVERNMENT

### Openness in Government

#### *Updating the Freedom of Information Act*

In the debate over balancing effective counter-terrorism techniques with individual civil liberties, members of the Subcommittee found common ground in a shared desire to protect the public's right to information when it reexamined openness in government laws. Senators Kyl and Feinstein authorized Senators Cornyn and Leahy to lead the Subcommittee in a hearing on March 15, 2005, entitled "Openness in the Government and Freedom of Information: Examining the OPEN Government Act of 2005," to examine the current implementation of the Freedom of Information Act (FOIA) as well as pending legislation that would strengthen the public's access to government information.<sup>638</sup> Legislative proposals include the Faster Freedom of Information Act of 2005, which would commission an advisory committee to recommend changes to FOIA and the Openness Promotes Effectiveness in our National Government Act of 2005 (OPEN Government Act), which would provide easier access to government information by giving agencies strong incentives to comply with open government laws in a timely fashion.<sup>639</sup>

Six witnesses testified at the hearing: (1) Katherine M. "Missy" Cary, Assistant Attorney General and Chief, Open Records Division, Office of the Texas Attorney General's Office; (2) Walter Mears, former Washington Bureau Chief and Executive Editor, Associated Press; (3) Mark Tapscott, Director, Center for Media and Public Policy, the Heritage Foundation; (4) Lisa Graves, Senior Counsel for Legislative Strategy, the American Civil Liberties Union; (5) Meredith Fuchs, General Counsel, National Security Archive, George Washington University; and (6) Thomas M. Susman, partner, Ropes and Gray, LLP.

#### *State Model*

Ms. Cary shared her experiences on administering Texas's open government laws, which served as a model for the OPEN Government Act.<sup>640</sup> In response to Senator Cornyn's question about how to handle information requests effectively, Ms. Cary stated, "[i]t is a top-down commitment. . . [i]f [the] executive head of [an] agency is supportive of prompt release of public information . . . then things move very quickly."<sup>641</sup>

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<sup>638</sup> *Openness in Government and Freedom of Information: Examining the OPEN Government Act of 2005: Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security of the Senate Comm. on the Judiciary*, 109th Cong., 1st Sess. (Mar. 15, 2005) (S. Hrg. 109-69, Serial No. J-109-7), at 1 (statement of John Cornyn) [hereinafter "Hearing of Mar. 15, 2005"].

<sup>639</sup> Hearing of Mar. 15, 2005, at 4 (statement of John Cornyn).

<sup>640</sup> Hearing of Mar. 15, 2005, at 7 (statement of John Cornyn); *id.* at 9-11 (statement of Katherine Minter Cary).

<sup>641</sup> Hearing of Mar. 15, 2005, at 23 (statement of Katherine Minter Cary).

Ms. Cary also expressed support for a waiver provision in the OPEN Government Act.<sup>642</sup> Under Texas law, if a governmental agency wants to withhold information but fails to follow the legal procedures for doing so, the agency forfeits its right to use disclosure exceptions.<sup>643</sup> Ms. Cary testified that this pro-openness system has been “realistic, fair, and workable” and has operated without “dire consequences” for the last 32 years.<sup>644</sup> The proposed federal waiver provision would similarly “strike the careful balance as not to negatively affect third parties’ rights or violate strict confidentiality.”<sup>645</sup>

Another successful Texas pilot project incorporated into the OPEN Government Act is a government hotline easily accessible by members of the public that would enable administrators to track these requests easily.<sup>646</sup> Ms. Cary testified that the Texas hotline, charged with helping citizens understand open government laws, has been “a resounding success, both from the perspective of requesters and from governmental entities.”<sup>647</sup> A similar system found in the OPEN Government Act would give citizens the “customer service, attention, and access they deserve from their public servants.”<sup>648</sup>

### *Media Concerns*

Mr. Mears, Executive Editor of the Associated Press, alerted the Subcommittee that there has been a 60 percent increase in security classification of documents since 9/11.<sup>649</sup> In response to Senator Cornyn’s question about how to balance security interests with the media’s mission,<sup>650</sup> Mr. Mears stated, “[journalists] don’t want security information. We don’t want to equip terrorists with information that could hurt this country. But neither do we want to be deprived of information that the people of the United States ought to know.”<sup>651</sup> For example, the 9/11 Commission Report found that publicity of the August 2001 arrest of would-be twentieth hijacker Zacharias Moussaoui at a Minnesota flight school might have derailed the entire plot.<sup>652</sup> Ms. Fuchs commented on this finding, “an essential component of national security is an informed citizenry.”<sup>653</sup>

Mr. Tapscott pointed out that the typical journalist does not use the FOIA function very often because it takes too long and often results in litigation.<sup>654</sup> Mr. Tapscott said he thought the two most serious problems with the FOIA laws are (1) the lack of

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<sup>642</sup> Hearing of Mar. 15, 2005, at 9 (statement of Katherine Minter Cary).

<sup>643</sup> Hearing of Mar. 15, 2005, at 9 (statement of Katherine Minter Cary).

<sup>644</sup> Hearing of Mar. 15, 2005, at 9 (statement of Katherine Minter Cary).

<sup>645</sup> Hearing of Mar. 15, 2005, at 9 (statement of Katherine Minter Cary).

<sup>646</sup> Hearing of Mar. 15, 2005, at 10 (statement of Katherine Minter Cary).

<sup>647</sup> Hearing of Mar. 15, 2005, at 10 (statement of Katherine Minter Cary).

<sup>648</sup> Hearing of Mar. 15, 2005, at 10 (statement of Katherine Minter Cary).

<sup>649</sup> Hearing of Mar. 15, 2005, at 24 (statement of Walter Mears).

<sup>650</sup> Hearing of Mar. 15, 2005, at 24 (statement of John Cornyn).

<sup>651</sup> Hearing of Mar. 15, 2005, at 24 (statement of Walter Mears).

<sup>652</sup> The National Commission on Terrorist Attacks Upon the United States, *9/11 Commission Report* (2004), at 276.

<sup>653</sup> Hearing of Mar. 15, 2005, at 1 (written statement of Meredith Fuchs).

<sup>654</sup> Hearing of Mar. 15, 2005, at 14 (statement of Mark Tapscott).

consequences for not granting a FOIA request when information should be disclosed; and (2) the lack of a neutral arbiter to mediate disputes between agencies and requesters.<sup>655</sup>

Mr. Tapscott recommended addressing the lack of consequences for not granting a FOIA request with the waiver provision, which would be triggered by an agency's failure to meet a FOIA deadline if the information requested does not involve national security, personal privacy, or proprietary commercial information.<sup>656</sup> For an agency to overcome the waiver, the Act would require the agency to present clear and convincing evidence that it missed the deadline for good cause.<sup>657</sup> Mr. Tapscott also supported a provision that would empower the Office of Special Counsel, an independent agency, to take disciplinary action against agencies that fail to fulfill their duties under the open government laws.<sup>658</sup>

To address the lack of a neutral arbiter to mediate disputes, Mr. Tapscott suggested creating an Office of Government Information Services within the Administrative Conference, an independent nonpartisan agency.<sup>659</sup> Such an office would oversee the administration of FOIA, including the mediation of disputes between agencies and requesters.<sup>660</sup>

### *Business Concerns*

Thomas Susman testified that the marketplace functions more efficiently when information flows freely.<sup>661</sup> He showed how businesses use FOIA both offensively and defensively.<sup>662</sup> For example, businesses use FOIA to obtain information relating to, and in anticipation of, a significant rulemaking that can affect products or entire industries.<sup>663</sup> Businesses also use the law to assist clients with litigation and agency contracts.<sup>664</sup>

Like Mr. Tapscott, Mr. Susman believed that the OPEN Government Act would make FOIA administration smoother by establishing an Office of Government Information Services, which would assist the public in resolving disputes over access to information as an alternative to litigation.<sup>665</sup> Moreover, he expressed support for a provision that would enable plaintiffs to recover fees and costs in FOIA cases.<sup>666</sup> He pointed to cases where agencies have unlawfully withheld information from requesters

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<sup>655</sup> Hearing of Mar. 15, 2005, at 3 (written statement of Mark Tapscott).

<sup>656</sup> Hearing of Mar. 15, 2005, at 3 (written statement of Mark Tapscott).

<sup>657</sup> Hearing of Mar. 15, 2005, at 3 (written statement of Mark Tapscott).

<sup>658</sup> Hearing of Mar. 15, 2005, at 3 (written statement of Mark Tapscott).

<sup>659</sup> Hearing of Mar. 15, 2005, at 3 (written statement of Mark Tapscott).

<sup>660</sup> Hearing of Mar. 15, 2005, at 4 (written statement of Mark Tapscott).

<sup>661</sup> Hearing of Mar. 15, 2005, at 2 (written statement of Thomas Susman).

<sup>662</sup> Hearing of Mar. 15, 2005, at 1 (written statement of Thomas Susman).

<sup>663</sup> Hearing of Mar. 15, 2005, at 1 (written statement of Thomas Susman).

<sup>664</sup> Hearing of Mar. 15, 2005, at 2 (written statement of Thomas Susman).

<sup>665</sup> Hearing of Mar. 15, 2005, at 20 (statement of Thomas Susman).

<sup>666</sup> Hearing of Mar. 15, 2005, at 21 (statement of Thomas Susman).

merely as a delay tactic.<sup>667</sup> Mr. Susman argued that, if requesters were reimbursed whenever their lawsuits succeeded in making governmental agencies disclose information, business would be able to use FOIA as an efficient way to get valuable business-related information and not as a last resort.<sup>668</sup>

### *Public Interest Concerns*

Senator Leahy stated that Congress depends on the American people to work with Congress to oversee the functions of government.<sup>669</sup> Lisa Graves testified that individuals and public interest organizations have, from time to time, been more successful in getting information out of the Executive Branch than Congress.<sup>670</sup> For example, she said that the American Civil Liberties Union received around 35,000 documents on the issue of military treatment of prisoners through a FOIA lawsuit.<sup>671</sup>

Ms. Graves said she believed that the OPEN Government Act would bring FOIA “into the 21st Century” by applying its rules to those situations where agency record keeping has been outsourced to outside contractors.<sup>672</sup> Moreover, in recognition of the newsgathering power of the Internet and the advent of web logs written by individuals, she also supported a provision in the Act that would enable those not affiliated with a media company to obtain information under FOIA at the same reduced expense as media corporations.<sup>673</sup>

These measures were also supported by Mr. Tapscott. He viewed the Act as “an effective resource for restoring our government to its appropriate size and functions” and testified that having robust open government laws is essential to “fighting waste, fraud, and corruption in government and in protecting public safety.”<sup>674</sup> In a poll taken during the week of March 15, 2005, over two-thirds of Americans said that it was “crucial” to have access to public records.<sup>675</sup> More than half said that the government should have more robust open government laws.<sup>676</sup>

### *Legislative and Executive Action*

On June 24, 2005, the Senate passed S. 1181, formerly section 8 of the OPEN Government Act. S. 1181 refines the scope of 5 U.S.C. § 552(b)(3), which allows for

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<sup>667</sup> Hearing of Mar. 15, 2005, at 21 (statement of Thomas Susman).

<sup>668</sup> Hearing of Mar. 15, 2005, at 4 (written statement of Thomas Susman).

<sup>669</sup> Hearing of Mar. 15, 2005, at 25 (statement of Patrick Leahy).

<sup>670</sup> Hearing of Mar. 15, 2005, at 25 (statement of Lisa Graves).

<sup>671</sup> Hearing of Mar. 15, 2005, at 25 (statement of Lisa Graves).

<sup>672</sup> Hearing of Mar. 15, 2005, at 15 (statement of Lisa Graves).

<sup>673</sup> Hearing of Mar. 15, 2005, at 4 (written statement of Lisa Graves).

<sup>674</sup> Hearing of Mar. 15, 2005, at 4 (written statement of Mark Tapscott).

<sup>675</sup> Robert Tanner, *Poll: Most Americans Want More Open Government*, USA TODAY, Mar. 13, 2005, at 16A.

<sup>676</sup> Robert Tanner, *Poll: Most Americans Want More Open Government*, USA TODAY, Mar. 13, 2005, at 16A.

statutory exemptions from FOIA. Specifically, S. 1181 mandates that Congress cite directly 5 U.S.C. § 552(b)(3) to create an exemption from FOIA. Senator Cornyn said that requiring Congress to refer directly to this section will ensure that exemptions to FOIA are created “in the light of day” and provide “an opportunity to argue for or against the new exemption — rather than have new exemptions creep into the law unnoticed.”<sup>677</sup>

On March 17, 2005, the Faster FOIA Act of 2005 passed the Senate Judiciary Committee. Also, on December 14, 2005, President Bush issued an Executive Order to improve the implementation of FOIA.<sup>678</sup> The Executive Order directs agencies to “ensure citizen-centered and results-oriented agency FOIA operations.”<sup>679</sup>

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<sup>677</sup> Rebecca Carr, *Congress Cloaks More Information in Secrecy*, COX NEWS SERVICE, June 3, 2005 (quoting John Cornyn).

<sup>678</sup> Improving Agency Disclosure of Information, Exec. Order No. 13,392, 70 Fed. Reg. 75,373 (Dec. 14, 2005).

<sup>679</sup> Improving Agency Disclosure of Information, Exec. Order No. 13,392, 70 Fed. Reg. 75,373 (Dec. 14, 2005).

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**APPENDIX: HEARINGS DURING THE 109TH CONGRESS**

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**UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON TERRORISM, TECHNOLOGY, AND HOMELAND SECURITY**

Terrorism and the EMP Threat to Homeland Security

8 March 2005

**WITNESSES:**

Dr. Lowell L. Wood, Jr.  
Acting Chairman  
Congressional EMP Commission

Dr. Peter Vincent Pry  
Senior Staff  
Congressional EMP Commission

Dr. Peter M. Fonash  
Acting Deputy Manager  
National Communications System  
Department of Homeland Security

Strengthening Enforcement and Border Security: The 9/11 Commission Staff Report on  
Terrorist Travel

*Joint Hearing with the Subcommittee on Immigration, Border Security, and Citizenship  
of the Senate Judiciary Committee*

14 March 2005

**WITNESSES:**

**PANEL 1:**

Ms. Elaine Dezenski  
Acting Assistant Secretary for Policy  
Bureau of Transportation Security  
Department of Homeland Security

Mr. Tom J. Walters  
Acting Assistant Commissioner  
Office of Training and Development  
U.S. Customs and Border Protection  
Department of Homeland Security

**PANEL 2:**

The Honorable Doris Meissner  
Former Commissioner  
Immigration and Naturalization Service  
Department of Justice; and  
Senior Fellow  
Migration Policy Institute (Washington, DC)

Ms. Janice Kephart  
Former Counsel  
The 9/11 Commission; and  
Senior Consultant  
The Investigative Project (Washington, DC)

Openness in Government and Freedom of Information: Examining the OPEN  
Government Act of 2005

15 March 2005

**WITNESSES:**

Ms. Katherine M. “Missy” Cary  
Assistant Attorney General and Chief  
Open Records Division  
Texas Attorney General’s Office

Mr. Walter Mears  
Former Washington Bureau Chief and Executive Editor  
Associated Press (Washington, DC)

Mr. Mark Tapscott  
Director  
Center for Media and Public Policy  
The Heritage Foundation (Washington, DC)

Ms. Lisa Graves  
Senior Counsel for Legislative Strategy  
American Civil Liberties Union (New York, NY)

Ms. Meredith Fuchs  
General Counsel  
National Security Archive  
George Washington University (Washington, DC)

Mr. Thomas M. Susman, Esq.  
Partner  
Ropes & Gray, LLP (Washington, DC)

Strengthening Interior Enforcement: Deportation and Related Issues

*Joint Hearing with the Subcommittee on Immigration, Border Security, and Citizenship  
of the Senate Judiciary Committee*

14 April 2005

**WITNESSES:**

**PANEL 1:**

Mr. Jonathan Cohn  
Deputy Assistant Attorney General  
Civil Division  
Department of Justice

Mr. Victor X. Cerda  
Acting Director of Detention and Removal Operations  
U.S. Immigration and Customs Enforcement  
Department of Homeland Security

**PANEL 2:**

Mr. David Venturella  
Former acting Director of Detention and Removal Operations  
U.S. Immigration and Customs Enforcement  
Department of Homeland Security

Mr. Lee Gelernt  
Senior Staff Counsel  
Immigrants' Rights Project  
American Civil Liberties Union (New York, NY)

A Review of the Material Support to Terrorism Prohibition Improvements Act

20 April 2005

**WITNESSES:**

Mr. Barry Sabin

Chief

Counterterrorism Section

Criminal Division

Department of Justice

Mr. Daniel Meron

Principal Deputy Assistant Attorney General

Civil Division

Department of Justice

Mr. Andrew McCarthy

Senior Fellow

Foundation for the Defense of Democracies (Washington, DC)

Strengthening Border Security Between Ports of Entry: The Use of Technology to Protect  
the Borders

*Joint Hearing with the Subcommittee on Immigration, Border Security, and Citizenship  
of the Senate Judiciary Committee*

28 April 2005

**WITNESSES:**

Mr. David Aguilar

Chief

Office of the Border Patrol

U.S. Customs and Border Protection

Department of Homeland Security

Dr. Kirk Evans

Director

Mission Support Office

Homeland Security Advanced Research Projects Agency

Science and Technology Directorate

Department of Homeland Security

The Need for Comprehensive Immigration Reform: Strengthening Our National Security

*Joint Hearing with the Subcommittee on Immigration, Border Security, and Citizenship  
of the Senate Judiciary Committee*

17 May 2005

**WITNESSES:**

The Honorable Asa Hutchinson  
Former Under Secretary for Border and Transportation Security  
Department of Homeland Security; and  
Chair  
Homeland Security Practice  
Venable, LLP (Washington, DC)

Ms. Margaret D. Stock  
Assistant Professor of Law  
United States Military Academy (West Point, NY)

Mr. Mark K. Reed  
CEO and President  
Border Management Strategies, LLC (Tucson, AZ)

The Southern Border in Crisis: Resources and Strategies to Improve National Security

*Joint Hearing with the Subcommittee on Immigration, Border Security, and Citizenship  
of the Senate Judiciary Committee*

7 June 2005

**WITNESSES:**

**PANEL 1:**

Mr. David Aguilar

Chief

Office of the Border Patrol

U.S. Customs and Border Protection

Department of Homeland Security

Mr. Wesley Lee

Acting Director

Detention and Removal Operations

U.S. Immigration and Customs Enforcement

Department of Homeland Security

**PANEL 2:**

Mr. C. Stewart Verdery

Principal

Mehlman Vogel Castagnetti, Inc. (Washington, DC); and

Adjunct Fellow

Center for Strategic and International Studies (Washington, DC)

Terrorism: Emergency Preparedness

26 October 2005

**WITNESSES:**

The Honorable Slade Gorton  
Former Senator  
U.S. Senate; and  
Member  
9/11 Commission; and  
Commissioner  
9/11 Public Discourse Project

Mr. Wayne Thomas  
Vice-President of Homeland Security  
Innovative Emergency Services, Inc. (Baton Rouge, LA)

Mr. Henry Renteria  
Director  
California Governor's Office of Emergency Services

Mr. Matthew Bettenhausen  
Director  
California Office of Homeland Security

Dr. Michael O'Hanlon  
Senior Fellow and Co-Holder  
Sydney Stein Chair  
Foreign Relations Policy Studies Program  
Brookings Institution (Washington, DC)

Federal Strategies to End Border Violence

*Joint Hearing with the Subcommittee on Immigration, Border Security, and Citizenship  
of the Senate Judiciary Committee*

1 March 2006

**WITNESSES:**

**PANEL 1:**

Mr. David Aguilar  
Chief of the Border Patrol  
U.S. Customs and Border Protection  
Department of Homeland Security

Mr. Paul Charlton  
United States Attorney  
District of Arizona  
U.S. Attorney's Office

Ms. Marcy M. Forman  
Director  
Office of Investigations  
U.S. Immigration and Customs Enforcement  
Department of Homeland Security

**PANEL 2:**

Mr. Larry A. Dever  
Sheriff  
Cochise County, Arizona

Mr. A. D'Wayne Jernigan  
Sheriff  
Val Verde County, Texas

Mr. Lavoyger Durham  
Manager  
El Tule Ranch (Falfurrias, TX)

Mr. T.J. Bonner  
President  
National Border Patrol Council

Detecting Smuggled Nuclear Weapons

27 July 2006

**WITNESSES:**

Mr. Vayl Oxford  
Director  
Domestic Nuclear Detection Office  
Department of Homeland Security

Dr. Steve Aoki  
Deputy Under Secretary of Energy for Counterterrorism  
Department of Energy

Dr. Peter Nanos  
Associate Director of Research and Development  
Defense Threat Reduction Agency  
Department of Defense; and  
Former Director  
Los Alamos National Laboratory  
National Nuclear Security Administration  
Department of Energy; and  
Retired Vice-Admiral  
U.S. Navy

Dr. Michael Levi  
Fellow for Science and Technology  
Council on Foreign Relations (New York, NY)

Dr. Fred Ikle  
Former Under Secretary for Defense Policy  
Department of Defense; and  
Former Director  
U.S. Arms Control and Disarmament Agency; and  
Distinguished Scholar  
Center for Strategic and International Studies (Washington, DC)

Keeping Terrorists Off the Plane: Strategies for Pre-Screening International Passengers  
Before Takeoff

7 September 2006

**WITNESSES:**

Mr. Paul S. Rosenzweig  
Counselor to the Assistant Secretary for Policy  
U.S. Customs and Border Protection  
Department of Homeland Security

Mr. Jayson P. Ahern  
Assistant Commissioner  
Office of Field Operations  
U.S. Customs and Border Protection  
Department of Homeland Security

Mr. Jess T. Ford  
Director  
International Affairs and Trade  
Government Accountability Office

Mr. Leon Laylagian  
Executive Vice-President  
Passenger-Cargo Security Group (Washington, DC)