

SUMMARY OF HOUSE HOMELAND SECURITY BILL (H.R. 5005)

Minority Staff Committee on Government Reform U.S. House of Representatives

On July 26, 2002, the House passed H.R. 5005, legislation creating a new Department of Homeland Security. Although there is a need for homeland security legislation, it is not clear that H.R. 5005 is the legislation that is needed. In fact, the bill may create more problems than it solves.

The new Department envisioned by H.R. 5005 is complex and cumbersome. An organizational chart shows that after the creation of the new Department, there will be over 160 federal agencies and offices with responsibilities for homeland security. This is even more federal agencies and departments with homeland security responsibilities than exist today.

This new bureaucracy will be expensive. The Administration has asserted that this new Department “would not ‘grow’ government” and that any costs would be paid for by “eliminating redundancies.”¹ According to the Congressional Budget Office (CBO), however, just creating and managing the new Department will cost \$4.5 billion. And this does not include “additional spending that may be necessary to prevent terrorist attacks, reduce the nation’s vulnerability to attacks, and recover from any attacks.”²

One major defect in this bill is that it would transfer to the new Department a vast array of responsibilities that have nothing to do with homeland security, such as administering the National Flood Insurance Program and cleaning up oil spills at sea. Giving the new Department dozens of unrelated responsibilities will bloat the size of the bureaucracy and dilute the new Department’s counter-terrorism mission.

Another major defect is that the bill lacks a strong mechanism to coordinate the activities of the many federal agencies with major homeland security functions. This coordination has to occur at the White House level to be effective, but this bill does not give the White House Office of Homeland Security the budgetary powers it needs to do its job.

A third problem is that the bill includes broad exemptions from our nation’s most basic “good government” laws, such as civil service laws and the Freedom of Information Act.

The committees of jurisdiction were able to work in a bipartisan way to achieve some substantial improvements to the President’s bill. Unfortunately, the final legislation reported by

¹President George W. Bush, *The Department of Homeland Security*, 17 (June 2002) (online at <http://www.whitehouse.gov/deptofhomeland/>).

²Congressional Budget Office, *Cost Estimate: H.R. 5005, Homeland Security Act of 2002*, 9 (July 23, 2002).

the House reversed many of these gains. Even worse, the House added new provisions that weaken our national security. One new provision approved by the House delays deadlines for improving airline safety. Another new provision exempts defense contractors and other large corporations that make “anti-terrorism” technologies from liability – even for intentional wrongdoing.

The following discussion summarizes the major deficiencies in H.R. 5005 as passed by the House, as well as other provisions affecting the jurisdiction of the Government Reform Committee.

I. MAJOR DEFICIENCIES IN H.R. 5005

A. Failure To Strengthen the Office of Homeland Security in the White House

The most critical homeland security challenge is – and will continue to be – coordinating the efforts of the entire federal government as part of a comprehensive national strategy. Even after creation of the new Department, there will be over 100 agencies and offices in other departments with important homeland security functions. These agencies include the FBI, the CIA, the Defense Department, and the National Guard.

Effective coordination of these disparate agencies is a function that must be done at the White House level. The starting point for this coordination should be the executive order that established the Office of Homeland Security within the White House, which President Bush issued last October. This order appropriately created a White House-level office charged with coordinating intelligence-gathering, preparedness, prevention, protection of critical infrastructure, and response and recovery across the entire government. The main shortcoming of the executive order, however, is that it did not give the Director of the Office sufficient authority to implement these functions.

An amendment was offered on the floor by Rep. Waxman to codify the Office of Homeland Security in statute, to give the Director of the Office authority over agency budgets, and to ensure that the Director was confirmed by the Senate and subject to congressional oversight. This amendment was rejected.

The House bill does include a new title X which establishes within the White House a Homeland Security Council consisting of the heads of major agencies. The purpose of this council is to advise the President on matters of homeland security. The Council is not given a veto over agency budgets and is not subject to congressional oversight.

B. Deadline Extension for Airport Explosive Detection Systems

In a step backward for homeland security, the House-passed bill extends the deadline for screening baggage for explosives at airports. Under current law, the Transportation Security

Administration (TSA) is required to have explosive detection systems installed in airports no later than December 31, 2002. Section 409 of the House bill would change this deadline to December 31, 2003.

C. Civil Service

Under section 730 of the President's proposal, the new Secretary was authorized to waive all provisions of the nation's civil service laws, including those that prohibit patronage, protect whistleblowers, provide for collective bargaining rights, and ensure health and retirement benefits. Section 761 of the House bill restores some of these title 5 protections. For example, it preserves the prohibition on patronage and existing whistleblower protections. But it specifically allows the Secretary to waive any of the provisions of chapters 43, 51, 53, 71, 75, and 77 of title 5.

The provisions that the Secretary may waive under section 761 include important civil service protections and employee rights, such as:

- The provisions in chapter 53 that provide federal employees with cost of living increases (section 5303) and locality pay increases (section 5304);
- The provisions in chapters 75 and 77 that set out notice and appeal rights for employees whose rights have been violated;
- The provisions in chapter 71 that guarantee basic collective bargaining rights, such as the right to have union representatives present at grievances (section 7114), and the prohibition on unfair labor practices (section 7116).

Section 761 includes language, added on the House floor through an amendment offered by Rep. Quinn, that provides for consultation with employee representatives during the creation of the human resources system for the new Department. According to union representatives, the amendment's focus on "consultation" is also a step backward from current law. When agencies such as the new Department are freed from title 5's pay system, as section 761 provides, the courts have required the agencies to "negotiate" – not just "consult" – with employee representatives when establishing alternative pay systems. This amendment takes this "negotiation" right away from the employees.

The House rejected an amendment by Rep. Morella that would have ensured that federal workers transferred to the new Department can retain their collective bargaining rights unless their functions change. In effect, the Morella amendment would have prevented the President from abusing his authority under existing law (5 U.S.C. § 7103(b)) to strip an agency's employees of collective bargaining rights if the President determines that their work involves counterintelligence, investigative, or national security matters. In place of the Morella amendment, the House adopted an amendment by Rep. Shays that largely restates existing law.

Section 732(b) of the President's bill gave the Secretary unlimited authority to enter into contracts with individuals for personal services, in effect allowing the Secretary to use at-will employment contracts to bypass title 5. Section 732 of the House bill replaces that language with language from the Government Reform Committee print that restricts this new authority to contracts needed to address "urgent homeland security needs." The new language also limited the duration of these contracts to one year.

Section 804 of the President's bill allowed the Secretary to apply the employment system of any agency transferred into the new Department to new hires. That same language is included in the House bill at section 812. Language recommended by the Government Reform Committee that would have prohibited the employment system of the Transportation Security Agency (which guarantees few employee rights) from being adopted agency-wide was not included in the House-passed bill.

D. Immunity From Liability for Corporate Wrongdoing

The House bill, at sections 752-755, includes a new subtitle F entitled the "Support Anti-terrorism by Fostering Effective Technologies Act" (SAFETY Act). This language, which was not included in any committee drafts or in the President's proposal, significantly limits the legal liability of the sellers of "qualified anti-terrorism technologies" designated by the Secretary of Homeland Security. It establishes a three-tiered scheme of protection to sellers of any product or service which is designed or adapted to prevent, detect, identify, deter, or limit the harm of terrorism. Qualified technologies can include a vast array of products, ranging from detection devices to vaccines. Under an amendment adopted on the House floor, even "services" such as security services can be considered qualified technologies.

The first tier of protection gives "government contractor" immunity to corporations selling anti-terrorism technologies for claims arising from an act of terrorism. To be eligible for this immunity, a seller must submit its product design for approval by the Secretary, who is exclusively responsible for determining whether the product will perform as intended, conforms to the seller's specifications, and is safe for use as intended. Once a product is approved and placed on an "Approved Product List for Homeland Security," the seller enjoys a nearly absolute presumption of immunity. This presumption can only be overcome if a plaintiff shows that the seller acted fraudulently or with willful misconduct in submitting information to the Secretary prior to its approval. This immunity applies not only to goods and services sold to the government, but also to those sold to the general public.

Sellers of anti-terrorism technologies who are not totally protected by the government contractor defense – presumably because they acted fraudulently or with willful misconduct in submitting information to the Secretary – enjoy a second tier of protection from lawsuits. Sellers of qualified anti-terrorism technologies cannot be held liable for punitive damages under any circumstances, even in instances of willful misconduct. They also cannot be sued in state courts.

The third tier of protection for corporations that supply anti-terrorism technologies caps their total liability at the amount of liability insurance held by the corporation. Moreover, the subtitle also limits the amount of liability insurance that these corporations must obtain to a level that is “reasonably available from private sources” on such terms as will not “unreasonably distort the sales price” of the product.

E. Limitations on Liability of Airline Security Firms

A special immunity provision was added in the House for the airline security companies that are potentially responsible for allowing terrorists on board flights on September 11. Under current law, the liability of airlines regarding the events of September 11 is limited to the amount of their insurance. Under section 781 of the House bill, airline security companies are given similar liability protection.

F. FOIA and FACA Exemptions

Section 204 of the President’s bill provided that information voluntarily provided to the new Department would be exempt from disclosure under the Freedom of Information Act if it related to infrastructure vulnerabilities or other vulnerabilities to terrorism.

The House bill in sections 721-725 expanded this provision into a new subtitle C entitled the “Critical Infrastructure Information Act of 2002.” In addition to exempting information about critical infrastructure from disclosure under FOIA, the House bill provides that this information may not:

- Be used in any civil enforcement action arising under federal or state law without written consent;
- Be subject to any agency rule or judicial doctrine regarding *ex parte* communications with a decision-making official; or
- Be disclosed by a state or local government under state or local open government laws.

These new exemptions raise significant new problems. The prohibition on using voluntarily submitted information in enforcement actions could allow businesses to avoid fines for violating INS or Coast Guard regulations by doing a “document dump” on the new Department. Contrary to federalism principles, the prohibition of disclosure by state or local governments preempts state disclosure laws.

Under subtitle C, many of the communications from corporate lobbyists to the new Department will be exempt from disclosure. For example, information provided to the Department by airline lobbyists seeking special treatment by the Transportation Security Agency, by shipping company lobbyists seeking special treatment from the Coast Guard, or by a defense

contractor lobbyists seeking a multi-million dollar contract or grant will be exempt from disclosure whenever the communication is couched in terms of protecting critical infrastructure. In the Committee on Government Reform, this issue was raised and a provision was inserted in the bill that provided that the FOIA exemption would not apply to documents provided to the agency in the course of lobbying. This provision was dropped by the version of the bill approved by the House.

Section 731 of the President's proposal exempted advisory committees of the new Department from the Federal Advisory Committee Act (FACA), which requires open and announced meetings and opportunities for all viewpoints to be represented. In addition, section 731 of the President's proposal also exempted individuals who serve on those committees from several conflicts of interest laws, specifically 18 U.S.C. §§ 203, 205, and 207. The House bill, at section 762, allows the Secretary to waive application of FACA to a given advisory committee after the Secretary publishes the creation of the advisory committee, its purpose, and its membership in the Federal Register.

G. Federal Information Security Management

The House bill includes a new title XI containing the Federal Information Security Management Act drafted by Rep. Tom Davis. The title requires the Director of OMB to develop government-wide standards for information security. Language in section 1103 contains a "lower the bar" provision that could prevent the OMB Director from setting the highest possible security standards. At the request of the software industry, the language in section 1103 provides that the standards must "ensure that such standards and guidelines do not require specific technologies and solutions or products including any specific hardware or software solutions." This creates the opportunity for companies to challenge these standards if only one product meets the standards which could cause NIST to lower its standards rather than letting the market push other manufacturers to develop better software.

II. OTHER PROVISIONS RELATING TO THE GOVERNMENT REFORM COMMITTEE

A. Procurement

Under section 732(c) of the President's bill, the new Department would be exempt from all procurement statutes, including those requiring competitive bidding. Section 733 of the House bill rejects this approach, substituting instead Government Reform language that authorizes procurement flexibility for five years, based on the federal Emergency Procurement Flexibility Act introduced by Rep. Tom Davis and Chairman Burton. Under this authority, which may be used whenever the Secretary determines it is required to meet a homeland security need, the Secretary could raise the limit on government-issued credit cards from \$2,500 to \$5,000; raise the threshold for simplified acquisition procedures from \$100,000 to \$175,000; and

allow goods and services up to \$7.5 million to be purchased using special acquisition procedures for commercial items.

Section 732(a) of the President's proposal authorized the new Department to engage in "other transactions" for research and development (transactions "other" than Federal Acquisition Regulation (FAR) contracts, grants or cooperative agreements). Section 731 of the House bill is similar but includes additional safeguards which were part of the Government Reform bill. These safeguards limit the authority to five years, clarify that the authority can be used only for research or development that involves responding to terrorism or an emerging terrorist threat, and require a secretarial determination of need. In addition, the Inspector General is provided with audit rights, and an annual report by GAO is required.

The House included, as section 734, an Office of Small and Disadvantaged Business Utilization to ensure participation of such businesses in the new Department's procurement contracts. This language is identical to the language that passed in the Government Reform Committee. On the House floor, language was added which stated that the Secretary shall annually establish goals for participation by small business concerns.

At the conclusion of the House debate, the House adopted a motion to recommit offered by Rep. DeLauro that prevents the new Department from contracting with expatriate corporations. Included in the new section 735, this provision states that the Secretary may not enter into any contract with a subsidiary of a publicly traded corporation if (1) the corporation is incorporated in Barbados, Bermuda, the British Virgin Islands, the Cayman Islands, the Bahamas, Cyprus, Gibraltar, the Isle of Man, Monaco, or the Seychelles, and (2) the United States is the principal market for the public trading of the corporation's stock.

B. Property

Under section 732 of the President's proposal, the new Department was exempted from federal property laws and given broad authority to acquire and dispose of both real and personal property. In particular, this authority would have affected the 24,000 real property facilities owned by the Coast Guard. Under the President's proposal, the new Department could sell any of this Coast Guard property without restriction and retain the proceeds for any purposes.

The House bill does not include such language. Instead, section 741 of the House bill includes language recommended by the Transportation and Infrastructure Committee authorizing the Administrator of GSA to construct a public building for Department headquarters. It also authorizes such sums as may be necessary to pay the annual rent.

C. Chief Financial Officer (CFO)/Chief Information Officer (CIO)/Inspector General (IG)

In sections 103 and 602, the President's bill created a CFO, but did not apply the provisions of the CFO Act. As a result, the CFO would not be Senate-confirmed and none of the financial management requirements of that law, such as annual independent audits, would apply to the new Department. Sections 911 and 103 of the House bill apply the CFO Act; however, section 602 allows the CFO to report to the Secretary or a designee. Under the CFO Act, the CFO reports directly to the Secretary.

In sections 103 and 602, the President's bill created a CIO, but did not apply the Clinger-Cohen Act. As a result, none of the information management requirements of that law, such as assuring the security of information systems, would apply. Section 912 of the House bill applies the Clinger-Cohen Act; however, section 603 allows the CIO to report to the Secretary or a designee. Under the Clinger-Cohen Act, the CIO reports directly to the Secretary.

Section 710 of the President's bill created an IG modeled on IGs at the Departments of Treasury and Justice, providing the new Secretary authority to stop investigations by the IG. The President's bill stated that the Secretary shall notify the House and Senate within 30 days of any exercise of the authority under this section. The House bill, at sections 701 and 901, contains similar provisions. However, the House bill provides that the IG must also inform Congress of any interference with an investigation. The House bill also included in section 701 language from the Government Reform Committee that ensures that the IG has oversight responsibility for internal investigations performed by the Customs Service Office of Internal Affairs and the Secret Service Office of Inspections.

D. Privacy Officer

The House included, at section 205, an officer within the new Department who would assume primary responsibility for privacy policy, including assuring that the new Department complies with the Privacy Act and reports to Congress on privacy complaints. This language is identical to the language that passed out of the Judiciary Committee and is very similar to the language that passed out of the Government Reform Committee.

E. Office of Civil Rights

The House included, at section 604, an Office of Civil Rights within the new Department. This language is identical to the language that passed in the Government Reform Committee.

F. INS Ombudsman

Section 422 of the House bill includes a provision recommended by the Government Reform Committee that creates an ombudsman position in the Department of Justice to address

legitimate immigrant grievances. In addition, section 446 contains another Government Reform Committee recommendation to require a report on aggregate immigrant visas.

G. Counternarcotics Officer

Section 769 of the House bill creates the new position of counternarcotics officer. The primary responsibility of this official is to coordinate policy and operations within the Department and with other agencies with respect to drug interdiction.

H. State and Local Coordination

Under sections 790-799 of the House bill, the President must implement procedures to enhance information and intelligence sharing with state and local entities. In addition, under section 605, the Secretary must submit a plan to Congress for consolidating and co-locating regional or field offices of agencies transferred to the Department. Finally, under section 777, the Secretary must establish an Office for State and Local Government Coordination.

I. Role of the District of Columbia

Section 773 of the House bill states that the Secretary shall work in cooperation with the Mayor of the District of Columbia in order to integrate the District into planning for terrorist attacks. This language was requested by Delegate Norton.

J. Entry Visas

In section 403 of the President's bill, the Secretary was given authority to issue regulations regarding the approval and denial of visas, and this authority was to be executed through the Secretary of State. The House adopted this provision in section 403 and added to it. Under the House bill, the Secretary is also authorized to assign Department employees to diplomatic and consular posts to provide expert advice and training. This provision is based on language that was adopted by three committees, Judiciary, International Relations, and Government Reform. The House bill also provides that this Act does not create a private right of action to challenge any decision on denying entry visas. The House did not adopt a provision proposed by Rep. Burton and Rep. Weldon to severely restrict visa review programs in Saudi Arabia.

K. NIST

Section 202(4) of the President's bill transferred to the new Department the Computer Security Division of the National Institute of Standards and Technology and the functions related to this office from the Commerce Department. The House bill does not include this transfer.

L. Prohibition on National ID System

Section 814 of the House bill prohibits the establishment of a national identification system.