

Introduction to SS464: The State of Homeland Security Entering 2006

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The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

- The Constitution of the United States of America, Article IV, Section 4

America has not suffered a significant terrorist attack since 9/11, but is America safe? Have national, state, and local homeland security policies been effective? Or are we merely biding time? Have political leaders charted a prudent and balanced course between security, liberty, and other national priorities? Or has official Washington gradually reverted to business-as-usual, with policy bounded by the politically feasible rather than the urgent demands of the threat?

The Nation's Homeland Security Efforts to Date

Hurricane Katrina has focused the public's attention on the government's preparedness to respond to catastrophic incidents, and has increased the scrutiny on our nation's homeland security effort writ large. Critics claim that, in spite of time, money, and political promises, the nation is no safer today than after 9/11. On December 5, 2005, the ten former members of the 9/11 Commission, working together as a private group called the 9/11 Public Discourse Project (PDP), released a 5-page final report, which included a 1-page report card assigning mediocre or failing grades to the federal government's implementation of almost all of the 41 recommendations in the *9/11 Commission Report* released in July 2004.

America has certainly expended enormous effort since 9/11:

- Federal spending on homeland security has more than tripled, and defense spending has risen 40% since 2001. Homeland security remains the fastest growing portion of the federal budget. State and local governments have spent billions more.
- The Congress has passed a broad range of landmark legislation, including the USA PATRIOT Act, the Aviation and Transportation Security Act, the Enhanced Border Security and Visa Reform Act, the Homeland Security Act, and the Intelligence Reform and Terrorism Prevention Act.
- The President and Congress have dramatically reorganized the federal government: a new Cabinet department (DHS), a new intelligence architecture (a Director of National Intelligence, and the National Counterterrorism Center), a new military command (U.S. Northern Command), and a host of new subordinate agencies and entities such as the Transportation Security Administration, the Terrorist Screening Center, the National Targeting Center, the National Joint Terrorism Task Force (JTTF) and 96 regional JTTFs around the country, the Homeland Security Advanced Research Projects Agency, and the Domestic Nuclear Detection Office, to name but a few.

- The President has promulgated a broad range of presidential directives and executive orders, covering topics from incident management, to infrastructure protection, to terrorist screening, to bioterrorism.
- Federal departments and agencies have initiated or expanded an enormous number of initiatives and programs (some of them controversial), including systems to track the entry and exit of foreign visitors (such as US-VISIT), novel arrangements with the private sector (such as the Customs Trade Partnership against Terrorism), a Homeland Security Information System connecting the federal government and all fifty states, dramatic expansion of the Strategic National Stockpile, creation of a Federally Funded Research Development Center (FFRDC) for homeland security, and strengthened procedures for reviewing visa applications.
- The U.S. Government has negotiated a long list of international agreements related to homeland security, including “smart border” action plans and a new Security and Prosperity Partnership with Canada and Mexico, agreements to put DHS inspectors in thirty-seven foreign ports (including the world’s twenty-five largest), adoption of a wide range of security initiatives at four successive G-8 Summits and Asian Pacific Economic Conferences (APEC), an agreement with a skeptical European Union to share passenger data on international air travelers, international agreements to create machine-readable passports with embedded biometric information, and improved arrangements for sharing terrorism intelligence information with foreign governments. Despite the Bush Administration’s unilateralist reputation, the US government has had substantial success in working through established international organizations (the International Maritime Organization, the International Civil Aviation Organization, and the World Customs Organization) to create internationally recognized standards and procedures in such areas as aviation security, electronic cargo manifesting, and use of biometric technology.
- State and local governments have developed new incident management procedures, conducted thousands of training exercises, spent billions improving their emergency response capabilities, have expanded or established counterterrorism divisions within their police departments, and have strengthened their habitual working relationships with federal counterparts (for example, coordinating with federal law enforcement and intelligence authorities through the 96 JTTF’s established by the FBI in cities nationwide).

While the magnitude of the national effort is certainly impressive, its effectiveness remains uncertain. Television reporters, seeking to test border security, have successfully shipped radiological material past US inspectors, who still are only able to physically inspect less than five percent of the cargo that enters the United States (though DHS’ Bureau of Customs and Border Protection reviews electronic manifests of 100% of cargo bound for the United States, 24 hours before that cargo departs the foreign port; and inspects a percentage of cargo using X-ray and Gamma-ray equipment). Hazardous chemical facilities and shipments in the United States remain dangerously vulnerable, even though a successful attack could kill tens of thousands of Americans. Federal homeland security grants to state and local governments are based less on threat assessments than on Congressional logrolling and individual Congresspersons’ efforts to win federal dollars for their own state or district. Not a single one of twenty-seven visa-waiver countries met the United States’ October 2004 deadline to embed biometric data into machine-readable passports. The United States requires visas of travelers from nineteen countries for which Canada requires no visa, even though US policy allows tens of thousands of people to cross the US-Canada border every day without a passport. DHS has failed to field an improved computer pre-screening system for air passengers. An internal Department of Justice report released last year revealed that, as of April 2004, the FBI had not reviewed or translated more than 123,000 hours of audio recordings in languages associated with terrorists. Also last year, after three years of effort, and hundreds of millions of dollars,

the FBI announced that its program to modernize the Bureau's information technology systems (Trilogy) was a complete failure and would require starting from scratch, leaving the FBI to rely, incredibly, on the same system of paper files and antiquated computer systems that it had prior to 9-11. While the Terrorist Screening Center has made progress, it has yet to fully integrate terrorist watchlists maintained by several federal agencies. There is no international system to track lost and stolen passports. States (not to mention most other countries) continue to issue driver's licenses and other "breeder" documents which meet no reliable scientific standards of security and integrity (though the Intelligence Reform Act sets, for the first time, federal standards in this area). In 2003, a power outage across the northeastern United States revealed that localized attacks can cascade across fragile, interdependent infrastructures, at enormous economic cost. The Grace Commission report on the failure to find weapons of mass destruction in Iraq has identified serious problems with America's intelligence capabilities, and, in spite of the Intelligence Reform bill, long-standing cultural differences and the complexity and difficulty of institutional reform continue to inhibit information sharing and coordination between the CIA, FBI, DHS, and other departments and agencies.

An area that has been the subject of intense scrutiny is immigration policy. Since 9/11, it has become more difficult for non-US persons to enter the United States. Foreign students face significant backlogs in getting student visas, particularly from the 28 countries the United States has designated as "countries of concern" (all of which have predominately Muslim populations). While the United States educates more foreign students than any other country, many Western countries have more foreign students as a percentage of students overall – and that gap is growing. The decline in foreign students in the United States not only decreases the opportunity to spread American values and respect for liberal democracy, but significantly hampers America's technological edge – foreign students and other foreign visa holders account for more than one-third of the scientists working in America's leading laboratories, including the national laboratories and other federally-funded research institutions critical to national security. International business travelers, vital to a globalized economy, have also experienced difficulty. But US borders remain as permeable as ever. In late-September 2005, the Pew Hispanic Center (based on analysis primarily from US Census Bureau surveys) announced that since 2000, for the first time in US history, illegal immigration has outpaced legal immigration. Are restrictive US immigration policies undermining international respect for the United States, hurting American business, and diminishing America's technology leadership, while channeling more and more people to seek entry into the United States illegally? If so, do restrictive immigration policies make sense given the enormous cost of complex new border systems such as US-VISIT?

Hurricanes Katrina and Rita

Hurricanes Katrina and Rita have exposed critical gaps in our national preparedness for catastrophic events and will continue to test America's ability to recover from such events. While Hurricane Katrina struck a uniquely vulnerable American city that was less prepared for disaster than many other large cities, it did so with three full days of warning after making landfall as a Category 1 in Florida. In spite of this warning, the response at all levels was a failure. Hurricanes Katrina and Rita were the first events that the President has declared "incidents of national significance" under the Nation's post-9-11 incident management architecture, established by the Homeland Security Act of 2002 and Homeland Security Presidential Directive-5, and the storms posed the first serious test of the new National Response Plan coordinated and published by DHS in 2004. The President has directed his Homeland Security Advisor to conduct an investigation into the failed federal response, Congress has established special joint committees to investigate, and the media and public are scrutinizing the actions of agencies and officials at all levels – the City of New Orleans, the State of Louisiana, and the federal government. The President has openly raised the question of whether the US military should assume responsibility for responding to disasters, opening a long-standing debate on the role of active duty forces within the United States.

Katrina adds one more chapter in one of the most significant periods (post 9-11) in the evolution of American federalism. National policy since 9-11 has vested state and local governments with unprecedented roles in what has always been the federal government's exclusive responsibility, under Article IV of the Constitution, to protect the country from invasion. Katrina underscores Americans' rising expectations that the federal government should assume more and more responsibility for the so-called "police powers," reserved for the states under the Constitution, to provide for the health, safety, and welfare of their citizens.

Security and Liberty

Perhaps no issue reflects Americans' differing views on the direction of homeland security policy than the debate over the USA PATRIOT Act, which passed in October 2001 with little deliberation and overwhelming majorities in both houses of Congress. The Congress recently voted to extend, by six months, important "sunset provisions" of the Act that were set to expire on December 31, 2005. This last-minute agreement came after months of contentious hearings, and temporarily forestalled a threatened Democratic filibuster to block the Senate from voting on PATRIOT Act reauthorization provisions already passed by the House. According to many officials and counterterrorism experts, the PATRIOT Act has been a critical factor in lowering the long-standing "wall" between the intelligence and law enforcement communities, allowing the government to "connect the dots" and prevent another significant terrorist attack within the United States. They highlight that the Act updates wiretap laws written in the telephone age (for instance, authorizing warrants for roving wiretaps instead of taps on individual phone numbers), gives the government authorities to fight terrorism which it already possessed to fight organized crime and drugs (for instance, authorizing warrants for secret 4th Amendment searches), and includes substantial provisions for judicial oversight. On the other hand, critics argue that the PATRIOT Act grants the government alarming new powers to invade the privacy of citizens, such as secretly obtaining financial information or accessing library records. Fear that the government will abuse these powers has combined with other concerns (Guantanamo detainees, military tribunals, the designation of American citizens captured on U.S. soil as enemy combatants, the Abu Ghraib prison scandal, charges that interrogation tactics used by US intelligence agents amount to torture, and revelations that the President secretly authorized the National Security Agency to eavesdrop on communications between US citizens at home and terrorist suspects abroad) to fuel a perception that the government has pursued security at the expense of liberty, and ceded its international moral authority on human rights.

In September 2005, a federal appeals court ruled on the case of Jose Padilla, a US citizen apprehended in Chicago in early 2002, not charged with a crime, and incarcerated for over three years in a U.S. Navy brig in Charleston, South Carolina. The court upheld the President's power to indefinitely detain U.S. citizens captured on U.S. soil without any criminal charges, holding that such authority is vital during wartime to protect the nation from terrorist attacks. The case was ultimately bound for the Supreme Court, which would have produced a landmark ruling on the powers of the executive during wartime. Recently, however, the Administration transferred Padilla from the custody of the Department of Defense to the Department of Justice, and charged him with conspiracy to murder U.S. nationals, conspiracy to provide material support to terrorists and providing material support to terrorists, under an existing indictment against four fellow suspects (one a Canadian citizen) that the Department of Justice asserts were members of a North American al Qaeda terrorist cell. It is unclear whether or when the Supreme Court may consider the question of the President's power to declare US citizens as enemy combatants. In the meantime, the federal appeals court ruling remains the law of the land, though it is probably unlikely that the President will use this authority again unless another major terrorist attack occurs within the United States.

The Challenge of Homeland Security – Setting Priorities

According to the 9/11 Commission, “it is [not] possible to defeat all terrorist attacks against Americans, every time and everywhere.” Terrorists can attack anytime, any place, virtually anywhere, with near total surprise. Homeland security poses a fundamental challenge: how does the Nation make rational, reasonably objective choices about where, how thoroughly, and how fast to build specific capabilities and mitigate specific vulnerabilities, given that we cannot possibly build all needed capabilities and mitigate all vulnerabilities, everywhere, to one hundred percent, at the same time? Have the billions Congress has appropriated for aviation security since 9/11 made America safer, or merely shifted the risk of terrorist attack from civil aviation to other targets, such as our ports, chemical industry, or shopping malls? Nearly everyone agrees that homeland security requires setting and balancing priorities.

The point on which many do not agree is how. Should the Nation prioritize the offense, as the current administration believes, focusing resources on defeating our terrorist adversaries overseas while proceeding cautiously on expensive security upgrades at home? Or, as Steve Flynn argues, is the saying that “the best defense is a good offense” an excuse for failing to invest enough in critical vulnerabilities such as chemical site security? Which more effectively reduces national risk: \$3.1 billion for a squadron of F-22 fighters, or \$3.1 billion for port security? How much of the cost should the federal government bear; the states; the private sector? Should the federal government set standard procedures and performance measures for first responders, responsibilities that have been historically the province of state and local governments? Should the private sector foot the entire insurance bill for signature buildings such as New York City’s Freedom Tower, or should the government bolster insurance protections for terrorist targets? Are market forces sufficient to compel companies to protect their networks and facilities, or should the government intervene more aggressively and mandate security measures? Should the federal government supersede state and local governments during major disasters, thus assuming responsibility for the states’ so-called constitutional “reserved powers” or “police powers” to provide for the health, safety, and welfare of their citizens? Homeland security poses a broad range of policy choices.

The Complexity of Homeland Security – the Intersection of Foreign Policy and Domestic Policy

In our federalist system of government, the foreign and national security policy realm primarily involves a single constitutional jurisdiction (outside the sovereign territory of the United States), while the homeland security policy realm intersects directly with more than 87,000 federal, state, local, and tribal jurisdictions. The President’s constitutionally enumerated powers in the national security arena are his most formidable (even considering Congress’ rarely exercised but exclusive power to declare war); the President’s powers in the domestic arena, per the deliberate design of our Founding Fathers, are among the most circumscribed of chief executives of democratic governments, and Congress is historically twice as likely to oppose the President’s domestic policies than his foreign policies. National security policy aims to proactively create and seize opportunities; the goal of homeland security policy is primarily to deny opportunities to our adversaries. And even in the infrequent circumstance that national security policy *directly* impacts the daily lives of Americans’ (for example, base realignment and closure), it does so to a far less tangible degree than nearly all homeland security policies, which touch almost every aspect of American life: from obtaining a driver’s license to electronically transferring funds; from boarding an airplane to attending a baseball game.

These distinctions reflect the foreign-domestic divide (a legal seam, not primarily a geographic one) that complicates our efforts to fight terrorism. The constitutional and statutory authorities that enable the executive to act so decisively outside our borders are very different than the authorities that tend to constrain the executive within our borders. The legal protections afforded to citizens and non-citizens

alike within the United States change dramatically outside the United States. This is not a semantic distinction, but an inherent characteristic of sovereignty, and an essential feature of a system of government devoted to guaranteeing the liberty of its citizens. Finally, national security and foreign policy are the responsibility of a “huddle” of key agencies, with clear lines of statutory authority and responsibility: in particular, the Secretary of State for foreign affairs, and the Secretary of Defense for waging war. Homeland security involves a far more diverse collection of agencies, with overlapping authorities, and with primary or important missions other than security, including the Departments of State, Treasury, Defense, Justice, Interior, Agriculture, Commerce, Health and Human Services, Transportation, Energy, Veterans Affairs and Homeland Security, plus a host of independent and subordinate agencies.

The Road Ahead

It has been four years since America awoke to the strategic reality of this age – that a handful of individuals, armed with little more than cunning and resolve, can carry-out catastrophic attacks on our own soil. Regardless of our eventual success against Al Qaeda and the broader war on terror, this strategic reality will never go away. Homeland security is a permanent requirement. More than 200 years ago, Alexander Hamilton penned a famous Federalist Paper to argue that the Constitution would protect against conflict at home, so that geography could protect the Nation from conflict abroad. Times have clearly changed. But Hamilton’s warning remains prophetic:

Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war – the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security, to institutions, which have a tendency to destroy their civil and political rights. To be more safe they, at length, become willing to run the risk of being less free.

- Alexander Hamilton, Federalist Paper No. 8