

SCUSA 60 THEME:
“MEASURING PROGRESS AND DEFINING NEW CHALLENGES”

HOMELAND SECURITY

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

The Department of Homeland Security (DHS) embarks on its fifth year anniversary guided by its mission to protect the nation and its infrastructure from dangerous people and goods by providing a nimble, effective response system and culture of preparedness. Although the U.S. has not suffered another major terrorist attack at home since 9/11, many question the very measurable and significant expenditures over the past five years compared to the often intangible and unknowing benefits. In 2005, Hurricane Katrina focused the public's attention on the government's preparedness to respond to catastrophic incidents, and increased the scrutiny on our nation's homeland security effort writ large -- resulting in the Post Katrina Emergency Management Reform Act. Although the response to several lesser hurricanes seems to indicate an improvement, critics claim that, in spite of time, money, and political promises, the nation is no safer today than after 9/11.

America has certainly expended enormous effort since 9/11:

- Federal spending on homeland security has more than tripled, reaching \$50B in FY2009; and defense spending has risen 40% since 2001. Homeland security is 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

Portions of this paper are drawn from Chris Hornbarger, "National Strategy: Building Capability for the Long Haul," in Russell Howard, James Forest, and Joanne Moore. *Homeland Security and Terrorism: Readings and Interpretations*. New York, NY: McGraw-Hill, 2005.

Intelligence, and the National Counterterrorism Center), a new military command (U.S. Northern Command), and a host of new subordinate agencies and entities (the Transportation Security Administration, the Terrorist Screening Center, the National Targeting Center, the National Joint Terrorism Task Force and 96 JTTFs around the country, the Homeland Security Advanced Research Projects Agency, and the Domestic Nuclear Detection Office, to name 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 greatly 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 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. The 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, despite the Domestic Nuclear Detection Office (DNDO) deployment of more than 1,000 radiation detection devices to the nation’s land and sea ports of entry.

Hazardous chemical facilities and shipments in the United States remain dangerously vulnerable, even though a successful attack could kill tens of thousands of Americans. DHS has failed to field an improved computer pre-screening system for air passengers. The U.S. still does not know when or if visitors depart the country, despite Congress's mandating an exit screening to track when people have overstayed their visas. An internal Department of Justice report released in 2004 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 – years later they are still behind. After the public failure of their “Trilogy” information system improvement in 2004, the FBI is only now awarding a one billion dollar, 10 year, contract to build the world’s largest database of people’s characteristics with yet unproven technology.¹ While the Terrorist Screening Center has made progress, it has yet to fully integrate terrorist watchlists maintained by several federal agencies. In 2004, the Intelligence Reform Act set state requirements and national standards for driver’s licenses and other “breeder” documents. To date only \$6 million of \$90 million dollars has been provided to reach compliance with a deadline extension reaching into 2010.² The Robb-Silberman 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 Act, long-standing cultural differences and the complexity and difficulty of institutional reform continue to inhibit information sharing and cooperation between the CIA, FBI, and other departments and agencies.

Security

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. 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. Deaths of immigrants attempting to cross the hazardous desert terrain along the Southwest border have ballooned. 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 new border systems such as US-VISIT?

¹ <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/21/AR2007122102544.html>

² http://www.ncsl.org/standcomm/sctran/History_of_DL_Reform.htm

In November 2005, the President launched a proposal for comprehensive immigration reform that would combine more stringent physical security along US land-borders (particularly the Southwest border), increased enforcement at worksites that employ illegal immigrants, a temporary worker program to allow foreign workers to legally work in the country for a limited period of time, and a path to citizenship for otherwise law abiding illegal immigrants already in the United States. While the President's approach ultimately stalled, the arguments are still instructive and are bound to recur at some point after the new administration takes office. The President's plan rested on the realities (according to some) or fallacies (according to others) that the United States will never be able to physically prevent immigrants from crossing the border if they want to badly enough, and that the vast majority of those who enter the country illegally do so for economic reasons and pose no risk to security. For fear of deportation, the estimated eleven million persons who are here illegally stay "under the radar:" they don't pay taxes, report suspicious activity within their communities, or report abusive employers who violate workplace safety and labor laws. They also vastly swell the "interior enforcement" challenge that confronts federal immigration authorities. By opening a path to citizenship and allowing people to come to the United States on temporary work visas, the President hoped to shrink this population, allowing authorities to focus on those who are more likely to be criminals or security threats. Opponents say that the President's plan amounts to amnesty for those who have broken our laws, and that the proper approach is full enforcement of immigration laws. The issue has divided both parties, and a variety of bills remain stalled in both chambers of Congress. The President has ordered the Army, using National Guard troops provided by the state governors, to begin patrolling large sections of the border. Fencing is being added with a goal of 670 miles along the southwest boarder by the end of 2008.³ The issue has had important international implications, greatly affecting our relationship with Mexico, whose cooperation is essential for preventing terrorists from entering North America. It is no accident that the day *after* Felipe Calderon was declared the official winner of Mexico's presidential election, President Bush outlined new provisions to beef-up the security components of his immigration proposal.

Freedom vs. Security

Perhaps no issue reflects Americans' differing views on the direction of homeland security policy than the debate over the proper balance between security and individual liberties. This debate has intensified steadily over the years, initially centering on the USA PATRIOT Act, and broadening to encompass a long list of concerns: Guantanamo detainees; military tribunals; the designation of American citizens captured on US soil as enemy combatants; the Abu Ghraib prison scandal; war crimes in Haditha; secret CIA prisons; "alternative interrogation methods" and whether to "clarify" Common Article 3 of the Geneva Conventions; rendition of terrorism suspects to countries that allegedly engage in torture; eavesdropping by the National Security Agency (without court order) on communications between persons within the United States and terrorism suspects abroad; and acquisition of international banking records to investigate terrorist financing; private telecommunication companies turning over customer's telephone and internet information to requesting government agencies.⁴ Together, these issues have fueled a perception – at home and abroad – that the government has pursued security at the expense of liberty, and ceded its international moral authority on human rights.

³ http://www.dhs.gov/xlibrary/assets/budget_bib-fy2009.pdf

⁴ <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/15/AR2007101501857.html>

After a lengthy and possibly unconstitutional incarceration, Jose Padilla, a US citizen apprehended in Chicago in early 2002, was convicted in August 2007 in Federal court of terrorism conspiracy, not the terrorist plot of detonating a radiological device. Along the way to this conviction, a Federal Appeals 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.

In November of 2005, the *New York Times* revealed that the President had authorized the National Security Agency to eavesdrop on communications between persons within the United States and terrorism suspects abroad, without seeking a court order under the Foreign Intelligence Surveillance Act (FISA) of 1978. Critics declare the NSA Terrorism Surveillance Program a blatant violation of FISA, which set up a secret court to carry out the judicial branch's responsibilities in cases involving espionage and terrorism. The President has asserted that the program has been necessary to prevent terrorist attacks, and legal under Congress' Authorization for the Use of Military Force (AUMF), which passed in the immediate wake of 9/11 and authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks ... in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." A recent change to this program is the Protect America Act which states communications between two foreign entities which passes through the US communication system is not subject to FISA.⁵

In March of 2006, Congress passed and the President signed legislation reauthorizing almost all of the USA PATRIOT Act's provisions, and setting new 2009 "sunset" deadlines on the more controversial surveillance provisions. The PATRIOT Act passed in October 2001 with little deliberation and overwhelming majorities in both houses of Congress. According to some, the 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 9/11. They argue 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.

In August 2008, the first war crimes trial at Guantanamo Bay, seven years after the 9/11 attacks, sentenced Salim Hamdan, Osama bin Laden's driver, to only five and a half years (most of which has already been served) for providing material support to terrorism. Hamdan was acquitted of the more serious charge of conspiring with al-Qaida to attack the U.S. Hamdan's sentence now highlights the next challenge – will he, and others, be released at the conclusion of their sentence and if so where will they be released; or will they be held until the conclusion of the war despite the trial findings?

Finally, in September, the President acknowledged the existence of secret CIA prisons around the globe, and that he had authorized intelligence agents to use "alternative interrogation methods" that had been integral in preventing several terrorist attacks. The President has proposed legislation that would legalize such methods and would clarify that the United States'

⁵ <http://www.whitehouse.gov/news/releases/2007/08/20070806-5.html>

interpretation of Common Article 3 of the Geneva Conventions, which stipulates how governments treat prisoners such as terrorists, saboteurs, and war criminals.

Uncertainty

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? Are the real risks clearly understood and communicated by the government, or are we merely prioritizing based on what the public, and hence constituents, fear most? 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? What is more important: 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 constitutionally and historically reserved for 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 mandate security measures? Should the federal government supersede state and local governments during 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 seven 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

RECOMMENDED READINGS

- Bush, George W., *National Strategy for Homeland Security*. Washington, DC: The White House, July 2002, accessible at <http://www.whitehouse.gov/homeland/book/index.html> (original strategy for context)
- Bush, George W., *National Strategy for Homeland Security*. Washington, DC: The White House, October 2007, accessible at <http://www.whitehouse.gov/infocus/homeland/nshs/2007/index.html>
- Department of Homeland Security, “FY2007 Annual Performance Highlights Report,” Washington, DC: The Department of Homeland Security, 2009 accessible at http://www.dhs.gov/xlibrary/assets/cfo_highlightsfy2007.pdf
- Ervin, Clark. “All Too Quiet on the Homeland Front,” Op-ed in the New York Times, September 10, 2008 accessible at http://www.nytimes.com/2008/09/11/opinion/11ervin.html?_r=2&oref=slogin&oref=slogin
- Flynn, Stephen. “The Neglected Home Front,” in *Foreign Affairs*. Washington, D.C.: Council on Foreign Relations, August/September 2004, accessible at <http://www.foreignaffairs.org/20040901faessay83504/stephen-e-flynn/the-neglected-home-front.html>
- Flynn, Stephen. “Homeland Security Report Card.” Washington, D.C.: Council on Foreign Relations, October 25, 2006, accessible at <http://www.cfr.org/publication/11814/#2>
- Flynn, Stephen. “Weighing on Non-Missile Threat to the US Homeland.” Washington, D.C.: Testimony Before the National Security and Foreign Affairs Subcommittee, March 5, 2008, accessible at http://www.cfr.org/publication/15669/prepared_testimony_before_the_national_security_and_foreign_affairs_subcommittee_committee.html?breadcrumb=%2Fissue%2F444%2Fhomeland_security
- United States House of Representatives, Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, Oversight Hearings on the USA PATRIOT Act (a series of hearings from April 14, 2005 through May 26, 2005), accessible at <http://judiciary.house.gov/committeestructure.aspx?committee=6>

Additional Resource

TEX: Taxonomy for Education and eXploration, Integrative Center for Homeland Security, Texas A&M University. Accessible at <http://homelandsecurity.tamu.edu/framework> (excellent resource that is categorized by issues in HLS)