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**Sending the Bureaucracy to War**

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# Sending the Bureaucracy to War

Elena A. Baylis and David Zaring

## **Abstract**

Administrative law has been transformed after 9/11, much to its detriment. Since then, the government has mobilized almost every part of the civil bureaucracy to fight terrorism, including agencies that have no obvious expertise in that task. The vast majority of these bureaucratic initiatives suffer from predictable, persistent, and probably intractable problems - problems that contemporary legal scholars tend to ignore, even though they are central to the work of the writers who created and framed the discipline of administrative law.

We analyze these problems through a survey of four administrative initiatives that exemplify the project of sending bureaucrats to war. The initiatives - two involving terrorism financing, one involving driver licensing, and one involving the adjudication of asylum claims - grow out of the two statutes perhaps most associated with the war on terrorism, the USA PATRIOT Act of 2001 and the REAL ID Act of 2005. In each of our case studies, the civil administrative schemes used to fight terrorism suffer from the incongruity of fitting civil rules into an anti-civil project, the difficulties of delegating wide discretion without adequate supervision, and the problem of using inexpert civil regulators to serve complex law enforcement ends. We conclude that anti-terrorism should rarely be the principal justification for a new administrative initiative, but offer some recommendations as to when it might make sense to re-purpose civil officials as anti-terrorism fighters.

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## ARTICLE

### SENDING THE BUREAUCRACY TO WAR

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David Zaring\* and Elena Baylis†

#### INTRODUCTION

The war against terrorism is transforming our bureaucracy, and it is transforming it badly. Since 9/11, the government has mobilized not just its national security apparatus, but almost all of the myriad units of the federal civil administrative state to battle against a small and elusive foe.<sup>1</sup> Officials like state department of motor vehicles (DMV) employees and federal banking regulators have no obvious expertise in counter-terrorism. Nevertheless, in DMVs, in the Treasury Department, and in many, many other unlikely venues, all of the usual indicators of bureaucratic action – rulemakings, adjudications, licensing, and civil enforcement actions – have been put to the new and uneasy service of national security. In this article, we argue that the vast majority of these civil bureaucratic initiatives in the war against terrorism suffer from predictable, persistent, and probably intractable problems.

Everyone agrees that we should fight terrorism. The question is how we should do it – and who we should use for the job. While the debate over the war on terrorism thus far has focused on questions of civil liberties and executive authority, other fundamental questions have been overlooked: do our civil administrative agencies make effective, efficient foot soldiers in this war? Or, in transforming our bureaucracy to become a fighting unit, are we undermining its ability to serve the vital, if more prosaic, purposes for which it was intended?

A sober reevaluation of the costs and benefits of the approach the

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<sup>1</sup> As Rosa Brooks has observed, "Al Qaeda knows no borders, and its operatives wear no uniforms, operating by stealth more often than they operate openly." Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, And The Law Of Armed Conflict In The Age Of Terror*, 153 U. PA. L. REV. 675, 710 (2004); see also CLIVE WALKER, BLACKSTONE'S GUIDE TO THE ANTI-TERRORISM LEGISLATION x (2002) (defining terrorism like that practiced by al Qaeda as emerging "through non-national, global networks and with aspirations which are likewise distanced from place and time").

government has taken since 9/11 is overdue, particularly in light of the all-encompassing nature of the administrative anti-terrorism campaign. Almost every federal department and agency has adopted an anti-terrorism policy or initiative. The most mundane of state and local agencies have been asked to transform themselves into security providers and law enforcers.

Pursuant to the USA PATRIOT Act of 2001 (the "Patriot Act"),<sup>2</sup> passed shortly after 9/11 and recently reauthorized, financial regulators in the Department of the Treasury have passed rules, engaged in enforcement actions, and taken over American organizations in an effort to disrupt terrorist financing.<sup>3</sup> Pursuant to the REAL ID Act of 2005,<sup>4</sup> immigration adjudicators have been given broad, barely reviewable discretion to make asylum determinations with an eye to keeping terrorists out of the United States, and state motor vehicle departments have been tasked with new responsibilities for limiting access to drivers' licenses.<sup>5</sup>

In this article, we survey some of the bureaucratic initiatives taken on the authority of these two statutes and identify three characteristic problems with these efforts.<sup>6</sup> These problems test the capacity of the administrative state, and in doing so, tell us something about how that state works, especially how it works when tasked with unconventional new initiatives.

First, we identify the problem of fit, that is, the problem of using civil rules to find and deter terrorists – perhaps the quintessential non-civil actors. Administrative agencies tend to do their jobs in one of two ways: by creating rules of general applicability that govern the public at large, such as through a tax collection or driver's licensing regime; or by extending a benefit in exchange for voluntary cooperation such as granting licenses to financial institutions in return for voluntary compliance with reporting requirements.<sup>7</sup> These typical modes of action are ill suited to reach

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<sup>2</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified across the U.S. Code) [hereinafter the "Patriot Act"].

<sup>3</sup> See Part III, *infra*.

<sup>4</sup> REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (to be codified across Titles 8 and 49 U.S.C.).

<sup>5</sup> See Part II, *infra*.

<sup>6</sup> In doing so, we study three traditional forms of administration. But perhaps because of the difficulties of employing traditional administrative procedure to combat terrorism, new methods of administration have also been employed: networks of domestic and foreign officials to harmonize and coordinate law enforcement approaches and privatization of enforcement – mobilizing banks for asset freezes and monitoring. Indeed, as Anne-Marie Slaughter has noted, networks might be one of the more effective ways to determine "how to mesh antiterrorism legislation to minimize loopholes" in a multilateral world. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 208 (2004). We accordingly examine a more networked mechanism of administration in Part IV, *infra*.

<sup>7</sup> James Landis himself noted that the New Deal agencies he helped to design and justify were focused on "a general social and economic problem which cut across a vast number of businesses and occupations." JAMES LANDIS, THE ADMINISTRATIVE PROCESS 17 (1938). And contemporary observers continue to agree: "Government mandates and rulemaking generally apply across the board to individuals and businesses within broad categories." Business Roundtable, *Government since 9/11* 33, available at

terrorists who can opt out of regimes that depend on voluntary participation and who comprise a tiny segment of the public as a whole.<sup>8</sup> These problems of scale and coverage make the efforts to detect and deter terrorists something very different than customary bureaucratic work. We argue that, as a result, bureaucracy is almost always unfit to do counter-terrorism.<sup>9</sup>

Second, these anti-terrorist measures go to extraordinary lengths to privilege agency discretion, thereby reducing agency accountability and, predictably, resulting in increasingly arbitrary, unreviewable agency action. We call this the problem of overdiscretion. It is a maxim of administrative law that the authority delegated to administrative agencies should be paired with safeguards on the abuse of that authority.<sup>10</sup> Accordingly, administrative agencies have traditionally operated publicly and openly and usually pursuant to a tested and established framework of rules.<sup>11</sup> Agency rule-making is governed by requirements for public notice and comment,<sup>12</sup> while agency adjudication is subject to judicial review or, at a minimum, to supervision by senior executive branch officials.<sup>13</sup> But the administrative initiatives against terror routinely reduce what have traditionally been participatory, reviewable rule-making or adjudicatory processes to singular acts of discretion that are often undertaken in secret and thus effectively insulated from public view and from judicial, or even supervisory review. Furthermore, these measures often place this decision-making authority in the hands of mid-level or even street level bureaucrats, such as office directors in the Department of the Treasury in the case of the terrorist financing programs, or low level state employees in the case of the driver's

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[http://www.abanet.org/adminlaw/conference/2003/NewFrontier/BusRoundtable\\_cba.pdf](http://www.abanet.org/adminlaw/conference/2003/NewFrontier/BusRoundtable_cba.pdf)

<sup>8</sup> Cf. 1 MAX WEBER, *ECONOMY & SOCIETY* 212 (Guenther Roth & Claus Wittich, eds. 1968) (1921) (“[E]very genuine form of domination implies a minimum of voluntary compliance”)

<sup>9</sup> Nor are fit problems purely those belonging to the United States. See, for example, Lorne Sossin, *The Intersection of Administrative Law with the Anti-Terrorism Bill*, *THE SECURITY OF FREEDOM* 419-434 (R. Daniels et al., eds. 2001) (discussing the relationship between anti-terrorism initiatives and administrative law in Canada).

<sup>10</sup> See Richard B. Stewart, *The Reformation of Administrative Law*, 88 *HARV. L. REV.* 1669, 1675-79 (1975) (“[T]he courts, reacting in part to the Administrative Procedure Act and its history, [have] turned to a number of . . . techniques to control the exercise of administrative discretion [including] by undertaking a more searching scrutiny of the substantiality of the evidence supporting agency factfinding and by insisting on a wider range of procedural safeguards. . . . require[ing] reasoned consistency in agency decisionmaking. . . . [and] demand[ing] a clear statement of legislative purpose as a means of restraining the range of agency choice when fundamental individual liberties were at risk.” (footnotes omitted)). See generally 1 Kenneth Culp Davis, *ADMINISTRATIVE LAW TREATISE* 210-12 (1978).

<sup>11</sup> Katharina Pistor & Chenggang Xu, *Incomplete Law*, 35 *N.Y.U. J. INT’L L. & POL.* 931, 949 (2003) (“[R]egulators make and enforce law both ex post and ex ante”); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 *YALE L.J.* 65, 91 (1983) (“Transparency is usually bought at the price of incongruity or ex ante rulemaking costs”); see also, Michael Abramowicz, *Information Markets, Administrative Decisionmaking, and Predictive Cost-Benefit Analysis*, 71 *U. CHI. L. REV.* 933, 1000 (Summer 2004) (“Indeed, agencies already seek to improve the objectivity of their analyses by providing rigid ex ante rules for measuring costs and benefits.”)

<sup>12</sup> For which the Administrative Procedure Act famously provides. See 5 U.S.C. § 553 (2006).

<sup>13</sup> 5 U.S.C. § 554.



license programs created by the REAL ID Act.<sup>14</sup> The allocation of discretion down to bureaucrats all but insulated from oversight has, at least in the case of anti-terrorism regulation, become a license for arbitrariness.

Third, antiterrorism regulation has expanded agency powers to regulate beyond areas of agency expertise. Since 9/11, our bureaucracy has folded new industries into its regulatory purview and has adopted new investigative and rulemaking responsibilities – often responsibilities that are difficult to distinguish from criminal law enforcement. Max Weber posited that bureaucracies would develop rational and task-specific expertises.<sup>15</sup> But the new anti-terrorism responsibilities of agencies have ignored this Weberian maxim. Instead, agencies have been tasked with uncharacteristic, non-civil responsibilities, and have been told to do so without supervision. The result has been predictably inept.

As a result of the problems of fit, overdiscretion, and inexpertise, agencies asked to fight the war on terror consistently miss their targets. In fact, the fit between bureaucratic methods of regulation and terrorist patterns of behavior is so poor that civil bureaucrats typically do not even try to target terrorists directly. Instead, they target proxy groups in the hopes that somewhere among those proxies, terrorists may be found. The predictable result has been that these initiatives have burdened proxy groups, not terrorists. This proxy problem, as we call it, means that the administrative war on terror overwhelmingly burdens law abiders who willingly participate in civil administrative schemes.<sup>16</sup>

In this article, we first look at classical and modern theories of the purpose of administrative law, and consider what they have to tell us about the administrative war on terror. As a matter of scholarship, we think that the currently ascendant focus on the political choices made by agencies, and by those who delegate authority to them, overlooks vital questions of competence that occupied scholars like Weber and the mid-century legal process theorists. The conceptualization of administrative-law-as-political-arena fails to provide us with traction on important questions like whether administrative law is an appropriate way to pursue counter-terrorism.

Because the competence theorists understood that the justification

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<sup>14</sup> We borrow the term from MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* (1980), a landmark study evaluating the policy-making done by the lowest level government employees, such as the police or social workers.

<sup>15</sup> 1 MAX WEBER, *ECONOMY & SOCIETY* 217-21 (Guenther Roth & Claus Wittich, eds. 1968) (1921) (setting forth the principles of “legal authority with a bureaucratic staff,” which resulted in, *inter alia*, the “rule bound conduct of official business,” “specialized training” for government employees, and a “specialized sphere of competence” for administrators).

<sup>16</sup> Of course, it may be that Americans are willing to accept certain levels or types of false positives -- for example, that Americans feel it is worth over-restricting immigration from countries likely to produce terrorists. But in our efficiency and effectiveness oriented analysis of the bureaucratic war on terror, we find that the level of false positives in these systems is quite high indeed, and that the cost of adapting task-specific civil administration to deal with terrorists is accordingly much larger than it might, at first blush, seem to be.

for administrative action depends on a careful analysis of its prospects for success, we then offer a relatively thick description of four characteristic initiatives authorized by the Patriot and REAL ID Acts that exemplify the project of sending bureaucrats to war.

We analyze the costs and benefits of the mobilization of the broad panoply of administrative process pursuant to both statutes – rulemakings, enforcement actions, adjudications, and licensings – and show how the three paradigmatic problems of fit, overdiscretion, and inexpertise characterize the efforts of the DMVs, the Citizenship and Immigration branch of the Department of Homeland Security, and the Treasury Department, to implement their new mandates. We also survey some of the many other initiatives that agencies have taken since 9/11 to prosecute the war on terror to give readers a sense of the breadth of the phenomenon. We conclude with some recommendations about the appropriate place to locate administrative counterterrorism initiatives.<sup>17</sup>

Ordinary civil agencies are simply not very effective at fighting terrorism. Accordingly, anti-terrorism should very rarely be the principal justification for a new administrative initiative, although it is possible that some narrow terrorism-directed rules – locking cockpit doors, for example – will make sense. The better course for regulators and lawmakers, however, is not to look first to a proposed rule's purported effect on terrorism, but to ask whether the rule promotes some end that furthers the agency's regulatory responsibilities. If so – if antiterrorism benefits are incidental – then the rule may be justified, and the problems we have identified may be avoided. But if not, then the repurposing of a civil agency to wage war on terror should be viewed skeptically. We hope in the future that congressional oversight committees and senior executive officials will take the problems of administration seriously before ordering civil agencies to take on the uncomfortable and novel roles of soldiers of counter-terrorism.

#### I. THEORIES OF ADMINISTRATIVE LAW AND THE WAR ON TERROR

Our critique draws upon the work of classical theorists of administrative law, such as Max Weber and Henry Hart, as well as more contemporary commentators such as Colin Diver, who have identified the characteristics that enable agencies to function effectively: expertise and discretion bounded by oversight. What these observers understood, and what has been obscured by the rush to send civil agencies to war, is that a judgment about the legitimacy of agency action should be bounded not only by questions of political oversight and delegation, transparency, and democratic accountability, but also by a thick view of how agencies actually

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<sup>17</sup> See Part IV *infra*.





function, of what they are capable, and how they are structured. In this, our focus is primarily on the period and process of implementation, rather than on the moment or process of delegation: that is, it is our assertion that a crucial test of agency legitimacy is agency effectiveness. In this we stand with Alexander Hamilton, who posited over two hundred years ago that “the true test of a good government is its aptitude and tendency to produce a good administration.”<sup>18</sup>

Our case studies also stand as a counterpoint, and perhaps even a challenge, to much of the leading work justifying delegation to agencies, which tends to focus on political control rather than capacity as the fundamental test of the legitimacy of agency action; or at least so we will, somewhat tendentiously, argue. Our survey of this literature thus posits a transformation from theories of administration that have based the legitimacy of agencies on their capacity and expertise, to an approach that rests legitimacy on the political process of agency control. In the scholarship on the administration of the war on terror, this has meant that most observers have been thinking about political control of the war-fighting executive, rather than about the capabilities of executive agencies in helping to fight that war.

#### A. *Expertise And Discretion In Classical Theory*

Classical theorists of public administration evaluated its merit based on its capacity. Max Weber, although principally a describer, rather than a defender, of modern bureaucratic process, praised the agency as a mechanism for adopting rationalized, task-specific, expert, and depersonalized approaches to modern problems and depoliticizing the task of regulation. “The needs of mass administration make it today completely indispensable. The choice is only between bureaucracy and dilettantism in the field of administration.”<sup>19</sup> The legal process school that played such an important role in mid-century administrative law accepted and built upon the Weberian notion of bureaucratic expertise by focusing its attention on the competencies and division of authority between courts and agencies.<sup>20</sup> James Landis argued that the purpose of agencies was to provide expert

<sup>18</sup> THE FEDERALIST NO. 68 (Alexander Hamilton).

<sup>19</sup> 1 MAX WEBER, *ECONOMY & SOCIETY* 224 (Guenther Roth & Claus Wittich, eds. 1968) (1921). As Wolfgang Mommsen has explained, in Weber’s view, “[r]ational, consistent, bureaucratic rule based on a division of labor and strictly defined areas of responsibility was a more effective means of government than all historically successful forms of the exercise of power,” though, of course, Weber wasn’t always sure that this was such a good thing. WOLFGANG J. MOMMSEN, *MAX WEBER AND GERMAN POLITICS* 166 (1984 TR. MICHAEL S. STEINBERG).

<sup>20</sup> Timothy Stoltzfus Jost, *Health Law And Administrative Law: A Marriage Most Convenient*, 49 ST. LOUIS U. L.J. 1, 16-17 (2004) (symposium issue) (citing WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *INTRODUCTION TO HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* li, lx-lxii (1994); Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 577-79 (1992).)

supervision of the complicated problems and externalities presented by the modern economy.<sup>21</sup>

Expertise alone neither described nor justified the administrative state, however. Weber and the legal process scholars who followed him also emphasized the importance of organizational charts and the balance between discretion and oversight that they signified. To Weber, bureaucracies characteristically featured systems of supervision and subordination, and in this, few modern administrative scholars would disagree.<sup>22</sup> He stressed that government functions could only be coordinated and rationalized on the basis of regular recording and review of decisions and rules.<sup>23</sup> And legal process theorists took a similar view of the importance of organization. In this vein, Henry Hart declared that “each agency of decision ought to make those decisions which its position in the institutional structure best fits it to make.”<sup>24</sup> As Dan Tarlock has said, “The great project of modern administrative law has been to cabin the exercise of agency discretion.”<sup>25</sup>

In the United States, much of this supervision has been provided by judges. In fact, it is no exaggeration to say that the study of judicial review of discretionary decisions by agencies is at the very center of administrative law, and has occupied scholars since passage of the Administrative Procedure Act shortly after World War II.<sup>26</sup> The prerogative of supervision is also one that the courts themselves have jealously guarded.<sup>27</sup>

To the New Dealers, court supervision was never meant to be absolute, but nor was it meant to be perfunctory. Thurman Arnold’s preference for granting agencies relatively unbounded discretion to act in

<sup>21</sup> JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 19 (1938).

<sup>22</sup> 1 MAX WEBER, *ECONOMY & SOCIETY* 217, 221 (Guenther Roth & Claus Wittich, eds. 1968) (1921) (“the typical person in authority, the ‘superior,’ is himself subject to an impersonal order by orienting his actions to it in his own dispositions and commands....[T]he person who obeys authority does so, as it is usually stated, only in his capacity as a ‘member’ of the organization and he obeys only the law,” and the bureaucrat is “subject to strict and systematic discipline and control in the conduct of the office.”).

<sup>23</sup> 1 MAX WEBER, *ECONOMY & SOCIETY* 219 (Guenther Roth & Claus Wittich, eds. 1968) (1921) (“Administrative acts, decisions, and rules are formulated and recorded in writing, even in cases where oral discussion is the rule or is even mandatory. ... The combination of written documents and a continuous operation by officials constitutes the office which is the central focus of all types of modern organized action.”)

<sup>24</sup> Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 426 (1958).

<sup>25</sup> A. Dan Tarlock, *A First Look At A Modern Legal Regime For A "Post-Modern" United States Army Corps Of Engineers*, 52 *U. KAN. L. REV.* 1285, 1313 (2004); see also Terrence Dantith, *Contractual Discretion and Administrative Discretion: A Unified Analysis*, 68 *MODERN L. REV.* 554 (2005) (providing a theoretical justification for constraining agencies as a matter of contract).

<sup>26</sup> Not every theorist agrees, of course. Edward Rubin’s new work on Weber, *Beyond Camelot*, rejects a hierarchical model of the administrative state and posits a more networked approach to bureaucratic linkage. See EDWARD RUBIN, *BEYOND CAMELOT* (2006).

<sup>27</sup> Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 *VAND. L. REV.* 743, 751-65 (1992) (noting that courts have a strong presumption in favor of reviewability); Stephen I. Vladeck, ???, — *Tulsa L. Rev.* — (forthcoming 2007) (arguing that recent Supreme Court jurisprudence has encouraged the exercise of federal jurisdiction and carefully policed congressional attempts to limit that jurisdiction).

lieu of courts as task-specific doers of equity<sup>28</sup> was rejected by Felix Frankfurter and other early New Deal scholars, who urged an important role for courts, one that allocated oversight authority between courts and agencies on the basis of institutional competence.<sup>29</sup>

To be sure, these organizers of authority between courts and agencies found, as Colin Diver has suggested, that institutional competence may be a “terribly plastic” concept.<sup>30</sup> Nonetheless, to Diver and others, it remains “the only material we have” to make sense of the proper roles of agencies in the government.<sup>31</sup>

Two of the three problems that we think are inherent in sending the bureaucracy to war – overdiscretion, and inexpertise – are accordingly ones that administrative lawyers will find familiar. By commandeering civil agencies to pursue terrorists, our government has pushed agencies outside their Weberian mandate to be rationalized, expert, and ordered. And in offering national security to serve as an unreviewable trump card unfettering agency discretion, our government has undermined the capability-based relationship between oversight and discretion that these theorists thought was important.

Our claim about fit – which turns on the generality of civil administration – is, at least as applied here, pretty new, though we think it is related to Weber’s view that organization would mark much of modern life. To us, and perhaps to him, it is a function of the everyday of civil society, rather than the extraordinary acts of small and shadowy criminal enterprises.

### B. *The Turn Towards Politics, and Away From Capacity*

In recent scholarship, the focus of administrative law writers has not been on these classic questions of efficiency and effectiveness in implementation. Rather, their work has privileged an earlier moment in agency action, the moment of delegation, and has focused on the question

<sup>28</sup> Arnold rejected any fundamental or functional distinctions between the judiciary and agencies as institutions of governance except insofar as they served the symbolic dimensions of governance. He also showed little faith in process as a necessary and sufficient means to a functional administrative state. Rather, he saw procedural doctrines in the same way that a wily, creative attorney does: as a tool to move a decision maker to a desired outcome. Process, form, and structure were secondary to substantive policy and functional results. Mark Fenster, *The Birth Of A "Logical System": Thurman Arnold And The Making Of Modern Administrative Law*, 84 OR. L. REV. 69, 73 (2005).

<sup>29</sup> *Id.* at 124-28. James Landis, for example, argued that “the advantages of specialization in the field of regulatory activity seem obvious enough” and that “the need for expertness has become dominant.” JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 17 (1938).

<sup>30</sup> Colin S. Diver, Essay, *Sound Governance And Sound Law* (reviewing CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY*). 89 MICH. L. REV. 1436, 1449 (1991) (and concluding that institutional competence is a particularly appropriate lens to use when evaluating the institutional competences of courts and agencies).

<sup>31</sup> *Id.*



of political interests. While these are important questions, in our view this movement in the scholarship has had two problematic effects: it has tended to ignore the agency's implementation of its delegated authority and so has tended to distract scholars from the search for *good* administration, as opposed to democratically justifiable administration.

This shift in perspective might be exemplified by Richard Stewart's 1975 article on the transformation of administrative law since the New Deal.<sup>32</sup> Stewart showed how the New Deal revolutionized the purview of agencies by basing their legitimacy on their role as expert, task-specific regulators – a role that Weber and the legal process theorists understood.<sup>33</sup> But the expertise justification, Stewart argued, had given way to a much more political conception of an agency's role, and to a corresponding judicial view of their process as one designed to represent the varied interests involved in any form of agency interaction.<sup>34</sup>

Since Stewart, the politicized concept of agency action has informed the leading scholarly reconceptions of administrative law. As a result, political theorists have focused their attention primarily on the moment of delegation and on the battle amongst competing political interests for the power to define agency goals. Theorists do not agree where these competing interests resolve their disputes – the positive political theorists would probably point to Congress,<sup>35</sup> while the presidentialists would look to the Presidency,<sup>36</sup> while others concerned with the increasing prominence of privatized alternatives to traditional regulation might point to non-regulatory actors.<sup>37</sup> Stewart himself was concerned with judicial review.

Positive political theorists (mostly, but not entirely, political scientists) have focused their attention on congressional control of agencies, and have addressed the competence of agencies to act through the lens of

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<sup>32</sup> Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Positive political theorists, for example, have conceptualized the chief ways that Congress might supervise agencies in two ways: through "police patrol" and "fire alarm" oversight. Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 43 (1994) ("Positive political theory describes regulatory policymaking as a part of a world in which political actors function within institutions rationally and strategically in order to accomplish certain goals."); see also Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

<sup>36</sup> See Elena Kagan *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) ("[A]t different times, one [governmental entity] or another has come to the fore and asserted at least a comparative primacy in setting the direction and influencing the outcome of administrative process. In this time, that institution is the Presidency. We live today in an era of presidential administration."); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 883 (2003) ("[T]he White House clearly has used rulemaking review to put its own mark on particular agency rules increasingly often over the course of the past two decades, and at an accelerated pace during the Clinton administration.").

<sup>37</sup> See, e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 7 (1997) (promoting negotiated regulation as collaborative process producing better outcomes than rulemaking); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 31-42 (1982).

the way that Congress would oversee that interaction.<sup>38</sup> Presidentialists, on the other hand, have sited the political choices that agencies make with the president, and have characterized agency action as action subject to strong presidential control.<sup>39</sup> Still others have sought to make agencies themselves the center of political disputes by privatizing the interest group representation process, either through negotiated regulation,<sup>40</sup> or by opening up traditional areas of administration to contract and bidding by private parties.<sup>41</sup> Stewart himself has suggested that he now prefers market-oriented solutions to regulatory problems.<sup>42</sup>

In our view, this entire debate addresses only one of the questions that needs to be asked when it comes to understanding and critiquing the delegation of authority to carry out vast agendas like counter-terrorism to unrelated federal agencies. For while the question of the representation of executive, congressional and public interests in the war on terror is important, an equally important question is not what power is delegated to the agencies and how, but whether the agencies are an appropriate receptacle for that power. And this debate that has dominated attempts to define administrative law for the last thirty years does not offer us any traction on that question.

Furthermore, in each of these theories of the administrative state, the act of administration is conceived descriptively only in a thin way, as a purely political act. The interest group representation model of agencies viewed them as task-specific political actors, whose work could be justified only through the participation of the plurality of interests affected by the

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<sup>38</sup> For an overview by an administrative scholar, see generally Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1 (1994). McCubbins and his co-authors, as well as those who have followed them, have tended to conclude that congressional supervision of agencies is relatively effective. Indeed, they have argued that administrative procedure, by requiring a certain level of disclosure of agencies, was enacted by a rational Congress concerned with ensuring the efficacy of fire-alarm-style oversight:

Fire alarm oversight also requires that elected officials, once the fire alarm has sounded, investigate conflicting claims among constituent groups and an agency. To undertake this function, elected officials must have ready access to relevant information . . . . The APA helps to ensure that this information is provided through the openness provisions and the requirement that agencies allow affected parties to participate.

McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 199 (1990).

<sup>39</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 883 (2003).

<sup>40</sup> See, e.g., Patricia M. Wald, *ADR and the Courts: An Update*, 46 DUKE L.J. 1445, 1457 (1997). Jody Freeman, *supra* note \_\_, at 7, was another recent exponent of “reg-neg”, although Richard Stewart long ago considered the promise of the concept. See, e.g., Richard B. Stewart, *Regulation, Innovation and Administrative Law: A Conceptual Framework*, 69 CAL. L. REV. 1256, 1341 (1981).

<sup>41</sup> See generally Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003) (noting trend toward privatization in recent decades); See Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389 (2003).

<sup>42</sup> Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 451 (2003) (“Economic incentives are a logical next step . . . . Rather than using economic tools to discipline command regulators, [they] eliminate[] command regulation and use[] economic instruments to reconstitute the market itself for regulatory ends”).

charge given to agencies.

To really understand and justify agency tasks, one cannot only focus on the political aspect of who decides. Discretion is not only a grant of political power, but also a claim to organized competence. It is accordingly crucial to consider whether specific agencies can and do exercise the discretion they are given successfully to produce competent results.<sup>43</sup> Similarly, we should look at agency capabilities and expertise not merely as an expression of the competing interests of the represented public, but also as a function of efficiency and effectiveness.

### C. *War on Terror Scholarship: The Privileging of Politics and Rights*

American legal scholarship on the war on terror since 9/11 has focused primarily on the appropriate authority and roles of the executive, legislature, and judiciary, rather than on the agencies that make up our so-called fourth branch. Many scholars have grappled with the scope of executive power, as, for example, in Kim Lane Schepple's critique of "ever-expanding" exceptionalism, justifying executive overreaching during a time of perceived national emergency,<sup>44</sup> and Rosa Brooks' related indictment of unbounded executive claims to emergency powers as claims of "war everywhere," even, we assume, in the traditional administrative state.<sup>45</sup> Other writers have expressed concerns about post-9/11 intrusions on civil liberties,<sup>46</sup> and some have recognized that issues of institutional design, or a lack thereof in the case of broad delegations to the executive of terror-fighting authority, have exacerbated the problems of rights-protection.<sup>47</sup>

This focus on unbridled executive has found a response in Cass Sunstein's proposal that the most deferential doctrine of administrative law be used to bridle the executive – at least a little. In, "Administrative Law Goes to War," Sunstein asserts that "the logic of *Chevron* applies to the exercise of executive authority in the midst of war" and that principles of administrative law can help our governing institutions divide the powers to make war.<sup>48</sup> Thus, Sunstein, is engaged in a different inquiry than ours: he

<sup>43</sup> As Jerry Mashaw has explained, "from the perspective of bureaucratic rationality" – a perspective that we largely adopt – "administrative justice is accurate decisionmaking carried on through processes appropriately rationalized to take account of costs." JERRY MASHAW, BUREAUCRATIC JUSTICE 26 (1983).

<sup>44</sup> Kim Lane Schepple, *Law In A Time Of Emergency: States Of Exception And The Temptations Of 9/11*, 6 U. PA. J. CONST. L. 1001, 1003 (2004).

<sup>45</sup> Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, And The Law Of Armed Conflict In The Age Of Terror*, 153 U. PA. L. REV. 675, 704 (2003).

<sup>46</sup> See, e.g., DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY (2002).

<sup>47</sup> See, e.g., Brooks, *supra* note \_\_, at 738. MORE CITES HERE

<sup>48</sup> Sunstein, *supra* note \_\_, at \_\_. Sunstein is concerned specifically with certain nondelegation questions raised by Jack Goldsmith and Curtis Bradley in their recent article on the constitutional and international law bases of the war on terrorism, Jack Goldsmith & Curtis Bradley, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. \_\_\_\_ (forthcoming 2006), available at

is focusing on the military war in Iraq and the president's powers to make it, whereas here we confront the question of how our government will use its bureaucracy to the end of fighting the far more loosely defined war on terror.<sup>49</sup>

Similarly, some of those who have weighed in on the role of the judiciary in the war on terrorism have tackled the relationship between courts and executive agencies, while others have theorized about the appropriate role for courts in terror regulation through tort.<sup>50</sup> Still others have focused on particular problems that various agencies have faced when tasked with terror-fighting responsibilities, ranging from agency-by-agency critiques to broader concerns that administrative principles of open governance have been changed since the attacks.<sup>51</sup>

But these task- and issue-specific critiques address parts of the elephant. The broader question – the one addressed in this paper – is *how* the government should be mobilized to fight terrorism. Currently, it is a multi-front effort, including prosecutors, spies, and soldiers. We ask whether civil bureaucrats should be added to the list of fighters, not as a matter of individual rights or government powers, but as a matter of *capabilities*. These other questions, important as they are, can be answered only with an understanding of what is possible from the civil bureaucracy, rather than an image of what might be ideal.

## II. THE REAL ID ACT: ANTI-TERRORISM THROUGH ADJUDICATION

In May 2005, Congress passed the REAL ID Act,<sup>52</sup> legislation intended to “prevent another 9/11-type terrorist attack by disrupting terrorist travel.”<sup>53</sup> Here, we focus on the two central aspects of the REAL ID Act

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[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=702502](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=702502). In their article, Goldsmith and Bradley argue that “Although nondelegation concerns should not play a significant role in interpreting the AUMF, a clear statement requirement is appropriate when the President takes actions under the AUMF that restrict the liberty of non-combatants in the United States.”

<sup>49</sup> Nonetheless, this paper suggests that civil administration and war-making powers co-exist uneasily at best. We should be cautious, then, in assuming that the *Chevron* framework is the right one to use in analyzing warmaking authority. Although Sunstein supposes that “In war no less than peace, the inquiry into the authority of the President can be organized and disciplined if it is undertaken with close reference to standard principles of administrative law,” it is by no means clear that the rules of bureaucracy will be well suited to decisions prompted by needs of security, as the sorts of regulation that they try to do are a bit different. Sunstein, *supra* note \_\_, at \_\_.

<sup>50</sup> John C. Yoo, *Congressional Authorization and the War on Terrorism*, 71 GEO. WASH. L. REV. \_\_\_\_ (forthcoming, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=461721](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=461721). Tung Yin, *The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL RTS. J. 1061 (2005). While tort suits by victims constitute a form of regulation, they are one outside the scope of this paper, which focuses on the reorganizing of agencies, rather than courts, and on government-initiated, rather than privately-initiated regulation. See, e.g., [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=312451](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=312451)

<sup>51</sup> David A. Schulz, *How The Government's Response To 9/11 May Close The Doors To Open Government*, 20 COMM. LAW. 3, 3 (Winter, 2003). MORE CITES HERE TOO

<sup>52</sup> REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005) (“REAL ID Act” or “the Act”)

<sup>53</sup> U.S. House of Representatives Committee on the Judiciary, Sensenbrenner House Floor Statement on REAL ID Legislation (Feb. 9, 2005), available at <http://judiciary.house.gov/newscenter.aspx?A=433> (Rep.

that seek to implement anti-terrorist measures through the machinery of the administrative state: the new role imposed on state Department of Motor Vehicles (“DMVs”) in issuing driver’s licenses and the increased discretion given to the U.S. Citizenship and Immigration Service (“USCIS”) to turn away applicants for political asylum.<sup>54</sup>

In so doing, Congress has enlisted two agencies that serve wide swaths of the public to seek out a handful of terrorists, has enrolled an agency with a very narrow expertise (the DMV) to conduct far more sweeping tasks, and has engaged an agency that has proved itself inept in applying its ostensible expertise (the USCIS) to act with greater discretion than ever before. In a sense, the Act is a statement of unfettered optimism that agencies that have never before exhibited the capability or judgment to carry out complex, sensitive tasks will nonetheless now rise to the challenge. But from a more sober perspective, these measures seem at best misguided, at worst, counter-productive, and in any event, counter to basic principles of agency law.

#### A. *State DMVs and Driver’s Licensing*

A state DMV may be one of the very few administrative agencies that virtually every American visits at least once or twice in their lives. America’s love affair with the automobile is legendary, but warm feelings aside, driving is a necessity for most Americans. According to a 2002 national survey, 95% of Americans have a driver’s license, and the other 5% have an alternative DMV-issued ID.<sup>55</sup> Driver’s licenses have become the most commonly used form of identification, whether for buying cigarettes or alcohol, cashing a check, or of course, boarding a plane. For many Americans, the driver’s license is their only government-issued form of picture ID, making it the most important document in their possession, the one that enables them to go about every aspect of their daily lives.

##### 1. The New Regulatory Scheme

With the REAL ID Act’s driver’s license mandates, Congress targeted agencies whose reform would palpably affect virtually every person in the United States. The REAL ID Act directs states to adopt three major groups of changes in issuing driver’s licenses:

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Sensenbrenner sponsored the bill.); *see also* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005); 151 Cong. Rec. E. 225 et seq. (2005) (legislative history).

<sup>54</sup> REAL ID Act Titles I & II. Other provisions concern border security (§ 102 & Title III) and visas for H2-B temporary workers, nurses, and Australian nationals (Titles IV & V).

<sup>55</sup> AAMVA National Survey (April 2-4, 2002), available at [www.aamva.org](http://www.aamva.org).



(1) *New features of the driver's license card itself*, including display of identity information such as the person's full legal name and a digital photo; "common machine readable technology"; and "[p]hysical security features designed to prevent tampering, counterfeiting, or duplication";<sup>56</sup>

(2) *New standards for issuing licenses*, requiring DMVs to obtain and verify proof of identity, residence, and citizenship or legal immigration status; to confirm that license applicants are terminating any valid licenses they hold from other states; and to issue licenses that expire simultaneously with any temporary immigration status or, in any event, after no more than eight years;<sup>57</sup>

(3) *Verification, storage and sharing of vastly more personal information* than DMVs have maintained until now, including not only databases with motor vehicle and driver records, but also digital images of all presented identity documents, such as birth certificates and social security cards.<sup>58</sup>

The Act penalizes states that do not meet these standards by instructing federal agencies not to accept their licenses for "any official purpose,"<sup>59</sup> such as boarding a plane or entering a federal building. Noncompliant states must issue a special license that: "(A) clearly states on its face... and (B) uses a unique design or color indicator to alert Federal agency and other law enforcement personnel that it may not be accepted."<sup>60</sup> In light of the many United States citizens who do not have a passport or other federally accepted identification, it does not seem like a real option for states to refuse to acquiesce to these mandates.<sup>61</sup>

However, meeting the standards will not be easy. State officials say the REAL ID Act's requirements are "a nightmare" (Illinois), may require "extreme measures and possibly a complete reorganization" (Nebraska),

<sup>56</sup> The other required features are: birthdate, gender, license/card number, principal residence address, and signature. REAL ID Act § 202(b). DMVs must also "ensure the physical security" of card production locations and materials and undertake "appropriate security clearance requirements" for production employees. *Id.*, § 202(d)(7)-(8).

<sup>57</sup> *Id.* § 202(c)(1)-(3), (d)(6) & (d)(9). The required proof of identity and residence comprise: "(A) A photo identity document, except that a non-photo identity document is acceptable if it includes both the person's full legal name and date of birth. (B) Documentation showing the person's date of birth. (C) Proof of the person's social security account number or verification that the person is not eligible for a social security account number. (D) Documentation showing the person's name and address of principle (sic) residence." *Id.* § 202(c)(1). DMVs must obtain "valid documentary evidence" of a person's citizenship or legal immigration status in the United States and train employees in recognizing fraudulent documents. *Id.* § 202(c)(2)-(3) & d(9).

<sup>58</sup> The DMV must keep "digital images of identity source documents... in electronic storage in a transferable format" for at least 10 years; and paper copies for at least seven years. *Id.* § 202(d)(1)-(5). State motor vehicle databases must contain all driver's license and driver record data and must be accessible electronically to all other states. *Id.* § 202(d)(12)-(13).

<sup>59</sup> These penalties take effect three years after enactment. *Id.* § 202 (a)(1).

<sup>60</sup> *Id.* § 202(d)(11).

<sup>61</sup> A few states are considering opting out nonetheless. James Mayer, *Fight over rules could limit use of Oregon ID*, THE OREGONIAN, Jan. 15, 2006, at A01; Daniela Gerson, *Council to State: Opt Out of Law Barring Illegal Immigrants From Driver's Licenses*, THE NEW YORK SUN, Dec. 23, 2005, at 3.

and are “flat-out impossible” to implement in the time provided (Pennsylvania).<sup>62</sup> Cost estimates range from \$96 million (Pennsylvania) to hundreds of millions of dollars in the first few years (Washington and Virginia), numbers that make the Congressional Budget Office’s estimate of \$100 million nationwide look low even for an individual state.<sup>63</sup> Even seemingly minor requirements such as the mandate that driver’s licenses display a person’s full name will require expensive software upgrades to enable data fields that can accommodate extremely long names.<sup>64</sup> As of August 2005, only 8% of states were capable of verifying identity documents; only 6% could obtain and store digital, transferable images of those documents; and for 82%, implementing such programs will require serious financial expenditures, policy changes, and reprogramming.<sup>65</sup>

## 2. Fit

These measures are thus a quintessential example of the problem of fit. State DMVs’ driver’s licensing rules and procedures are not at all targeted to terrorists or terrorist activities. Rather, they are rules of general applicability that are in fact applied to almost every member of the public, and so terrorists represent an extremely small percentage of those affected by the REAL ID Act’s reforms. Moreover, because these measures do not target terrorists in any particularized way, the chances of effectively detecting or deterring them within the vast numbers of people who participate in this administrative system are equally small. At the same time, because of the massive scale of DMV operations, the REAL ID Act’s reforms represent a great expense and burden, both to the public and to the DMVs.

Indeed, it is difficult to imagine how DMVs could effectively target terrorists amongst all those applying for driver’s licenses, for driver’s licenses are not necessary for or characteristic of terrorist activities, nor are they resources that terrorists use or abuse in a distinctive way that makes them a red flag for terrorist activity. Driver’s licenses are also not the exclusive form of identification for any activity.<sup>66</sup> As has been frequently

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<sup>62</sup> Brian Bergstein, *National uniform driver’s license law is ‘nightmare*, USA TODAY, Jan. 12, 2006, available at [http://www.usatoday.com/tech/news/techpolicy/2006-01-12-uniform-drivers-license\\_x.htm](http://www.usatoday.com/tech/news/techpolicy/2006-01-12-uniform-drivers-license_x.htm); Korey Clark, StateNet Capital Journal, January 23, 2006.

<sup>63</sup> Bergstein, *supra* note \_\_; Clark, *supra* note \_\_; Editorial, *REAL ID Legislation Needs a Reality Check*, THE ROANOKE TIMES (Va.), Jan. 16, 2006, at B6.

<sup>64</sup> States also note other pragmatic difficulties: current identity documents do not necessarily display a person’s full name, nor is it clear in all jurisdictions what constitutes a person’s “legal” name. American Association of Motor Vehicles, “The REAL ID Act: Survey of the States on Implementation of Driver’s License and Identification Card Reform” 4 (August 2005), available at [www.aamva.org](http://www.aamva.org) (“AAMVA State Survey”); see also Bergstein, *supra* note \_\_.

<sup>65</sup> AAMVA State Survey, *supra* note \_\_, at 8 & 10.

Nor do even those commentators who support the REAL ID Act’s provisions favor adopting an exclusive form of ID. See Paul Rosenzweig & James Jay Carafano, Ph.D., “Federal Standards for State-Issued Identity

noted, the 9/11 terrorists could have purchased tickets and boarded planes with their passports or some other identification, and it is still perfectly legal for any person to get on a plane with non-driver's license identification.<sup>67</sup> Furthermore, as legal visitors to the United States, the 9/11 terrorists would have been eligible for driver's licenses, albeit temporary ones, under the REAL ID Act.<sup>68</sup>

In fact, the fit between a driver's licensing regime and identifying foreign terrorists may be even worse than the small number of terrorists in the population as a whole would predict. Foreign terrorists in particular seem to be, if anything, less likely than American citizens to need a state driver's license, either to carry on with their everyday lives or to carry out their terrorist activities. Although driver's licenses are the most readily available form of identification for the American public, foreign citizens of necessity already possess other forms of federally accepted identification when they enter the United States, such as passports. Foreign citizens may well have foreign driver's licenses as well, permitting them to legally drive, at least for short periods, within the United States.

The REAL ID Act's focus on bolstering an identity-based security system, is a poor fit for actual terrorist behavior in another sense. All that even the best security system that relies on identity as the securitizing mechanism can hope to do on its own is to accurately connect names to individuals. But because Al Qaeda and other terrorist networks are known to operate through sleeper cells, an individual's identity, however positively confirmed, is a weak test of that individual's terrorist propensities.<sup>69</sup> Indeed, by focusing attention on the possession of a driver's license card as evidence of government-vetted security, this new regime may be counterproductive, reducing the perceived need for other security measures and giving first time and previously unidentified terrorists a greater ability to act freely due to the perceived security of their driver's license document.

Furthermore, the scale of DMV agency action tends to exacerbate some of the potentially disabling glitches that lurk in virtually all identity-based security systems: fraudulent breeder documents, disabling false positives, and overwhelming amounts of data. As to the first problem, all identity cards, no matter how high tech, are no more reliable than what are called "breeder documents": the supporting documentation that an applicant must produce to obtain the card in the first place.<sup>70</sup> Here, the only

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Cards: A Reasonable Proposal," Backgrounder No. 1821 (Feb. 4, 2005) (Heritage Foundation), available at <http://www.heritage.org/Research/HomelandDefense/bg1821.cfm>.

<sup>67</sup>E.g., Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L & POL'Y REV. 349, 376 (2005)

<sup>68</sup> Review and Outlook: National ID Party, Wall Street Journal (Feb. 19, 2005), available at <http://www.opinionjournal.com/editorial/feature.html?id=110006316REVIEW & OUTLOOK>.

<sup>69</sup>Sobel, *supra* note \_\_, at 367; Roy, *supra* note \_\_ at 59.

<sup>70</sup> See generally Bijon Roy, *A Case Against Biometric National Identification Systems (NIDS): Trading Off*

documentation that is common to the entire American population (and thus the most rigorous form of documentation that can be demanded by a DMV in its driver's licensing regime) is the birth certificate, which remains as trivially easy to forge now as before the REAL ID Act.<sup>71</sup>

Similarly, the vast size of the pool of individuals in driver's license databases exacerbates the well-known problem of disabling error rates in identity databases. A somewhat comparable INS database established in the 1990s proved useless and had to be abandoned due to a 28% error rate, and identity databases based on computerized biometric recognition tend to yield error rates of between 10-66%.<sup>72</sup> Even if the DMVs' databases were to have a 99% accuracy rate, there would be a false positive for one of every 100 people going through the system – and where the DMVs are concerned, there are millions of people in the system. At such rates, DMVs would be swamped by the task of checking false positives.<sup>73</sup>

Finally, with millions of drivers in each state, and several breeder identity documents per driver, the number of documents that DMVs will need to process, store, and evaluate will quickly reach into the tens of millions. At this scale, it is likely that the departments will create an overload of information for security screening, just as the National Security Agency has found itself overwhelmed by the fire hose of data from its monitoring of electronic communications.<sup>74</sup>

### 3. Inexpertise

In order to serve what is, in effect, the entire public and to process thousands of people per day, DMVs operate at one extreme of trade-offs in agency values and characteristics, opting for efficiency over accuracy, and for public accountability over agency discretion. Non-discretionary standards for qualification are set by state legislatures and departments of transportation and applied in rote, assembly line fashion by low level state government bureaucrats, on the spot.<sup>75</sup> The rules for obtaining a driver's license or registering a car are low baseline, coarse grained rules of limited sorting ability: they do not attempt to optimize safety, driving ability, or any of the other values they promote, but merely to assure compliance with minimum standards. In addition, DMVs apply minimal scrutiny to public

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*Privacy Without Getting Security*, 19 WINDSOR REV. SOC. & L. ISSUES 45, 59-61 (2005). A social security card, also required by the REAL ID Act, itself can be obtained with a birth certificate, and the final requirement, proof of residence, does not offer any evidence of identity at all and typically requires nothing more than a form lease document, which can be obtained for a few dollars from any office supply store. REAL ID Act §202(c)(1).

<sup>71</sup> See "Legal Presence and DL/ID", AAMVA stakeholder meeting, available at [www.aamva.org](http://www.aamva.org).

<sup>72</sup> Richard Sobel, *The Demeaning of Identity and Personhood in National Identity Systems*, 15 HARV. J. L. & TECH. 319, 360 (2002).

<sup>73</sup> Roy, *supra* note \_\_, at 60-64.

<sup>74</sup> Scott Shane, *The Basics; For the E-Spy, Too Much Information*, THE NEW YORK TIMES, Aug. 28, 2005.

<sup>75</sup> E.g., 75 Pa. C.S. § 1501 et. seq. (2005).



compliance with these rules, typically accepting proffered documents and information at face value, depending on the notion that most of those who participate do so voluntarily and in good faith.

In brief, DMVs have developed a narrow, specialized expertise – registration, insurance, and safety of automobiles – and a distinctive approach to managing their massive mandate – maintaining a high volume, low budget operation. The results are striking: although DMVs are widely derided as inefficient and slow,<sup>76</sup> driver licensing is nonetheless, as compared to other types of agency functions, a relatively simple, swift adjudication process that requires no special training, and whose rules and implementation are accessible and understandable to the general public.

In this light, measures like the REAL ID Act's requirement that DMVs verify applicants' immigration status take DMVs outside their area of expertise and undermine their core purpose. If the purpose of driver's licenses is to assure basic driving ability, understanding of the rules of the road, and possession of appropriate insurance, this will force millions of illegal immigrants out of the licensing and insurance system.<sup>77</sup> If the REAL ID Act's purpose in promoting identity databases is to provide inclusive comprehensive records of those in the country, the absence of these millions from those records will thwart that purpose as well.

Such measures not only tend to undermine the agency's core mission of promoting automobile and driver safety and registration, but by putting DMV employees to the service of national security measures that they are not likely to carry out well, they risk undermining any potential effect of those measures as well. The REAL ID Act's mandated electronic databases of scanned breeder documents create fresh opportunities for fraud even as they close off others by creating "one stop shopping" in identity information and documentation for hackers, thieves – and terrorists.<sup>78</sup> These new databases could present a new target for terrorism, just as new, seemingly secure documents could serve as a Trojan horse for terrorist activity with their higher presumption of reliability. Inexpert DMV administration of identity documents and databases is not just self-

<sup>76</sup> "After spending 3-1/2 hours enduring the long lines, surly clerks and insane regulations at the Department of Motor Vehicles, I stopped at a toy store to pick up a gift for my son. I brought my selection - a Louisville slugger baseball bat - to the cash register. "Cash or charge?" the clerk asked. "Cash," I snapped. Then apologizing for my rudeness, I explained, "I've spent the afternoon at the motor-vehicle bureau." "Shall I gift wrap the bat?" the clerk asked sweetly, "or are you going back to the DMV?" "Nothing like the DMV," at <http://www.amazinghumor.com/jokes/politicaljokes/nothinglikethedmv.shtml> (Jan. 29, 2006).

<sup>77</sup> In advocating for such measures, proponents of stricter penalties for illegal immigrants undervalue the benefits of licensing a driver that accrue to the public by safeguarding them from unsafe or uninsured drivers. Compare Rosenzweig & Carafano, *supra* note \_\_, at 5-6 with "Legal Presence" *supra* note \_\_.

<sup>78</sup> Patrick Peterson, *Real ID Act spurs real concerns* FLORIDA TODAY, May 13, 2005, <http://www.floridatoday.com/apps/pbcs.dll/article?AID=/20050513/NEWS01/505130346/1006>; Roy, *supra* note \_\_, at 71; *see also* James Jay Carafano, et al., "Encrypt E-Passports," Web Memo #687 (Heritage Foundation publication Mar. 15, 2005) (conservative critique of inadequately safeguarded document technology), available at [www.Heritage.org/Research/HomelandDefense/wm687.cfm](http://www.Heritage.org/Research/HomelandDefense/wm687.cfm).

defeating, but dangerous.<sup>79</sup>

#### 4. Overdiscretion

Fundamental principles of administrative law would suggest that assignment of new authority, (and especially authority outside an agency's expertise) should be accompanied by increased external oversight of that authority. And yet at the same time that the REAL ID Act grants new spheres of authority to DMV employees, it offers no direction to these agencies as to the procedures they should follow, nor does it make any provisions for oversight or review. The REAL ID Act thus expands DMV discretion at the same time that it requires the agency to undertake tasks at which it is inexpert, and ultimately, places access to an essential public benefit at the mercy of street level DMV employees.

We might hope that the DMVs will not follow the patterns of other agencies like the Treasury Department<sup>80</sup> that have delegated their new responsibilities to low level bureaucrats with singular decision making authority. But given the volume of applications to be processed, and in light of the lack of any mandate of oversight or review in the Act, it is difficult to imagine that DMVs will act otherwise. Past actions of the New York DMV in exercising similar discretion offer a cautionary tale. When the New York DMV attempted to confirm the social security numbers of its licensees a few years ago – a step now required by the REAL ID Act but not required by federal law at that time – it found 600,000 incorrect or duplicate numbers. Its response was to send letters threatening to summarily suspend those licenses if valid social security numbers were not provided within 15 days, a move that, if implemented, would have summarily put hundreds of thousands of people in violation of drivers and insurance regulations without the slightest inquiry into the cause of these discrepancies, as well as throwing the driver's licensing system into chaos. A lawsuit was successful in preventing this action primarily because the judge found that the DMV was acting outside its discretion.<sup>81</sup> Now under the REAL ID, the New York DMV has this authority, but it is unlikely it has developed the capacity to exercise prudently the unfettered, inexpert discretion it has acquired.

#### 5. The Effect on Proxies

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<sup>79</sup> For a conservative analysis of measures necessary to protect data, see Paul Rosenzweig and Alane Kochems, "Data Protection: Safeguarding Privacy in a New Age of Technology," Legal Memorandum No. 16 (Heritage Foundation Mar. 23, 2005), available at [www.heritage.org](http://www.heritage.org).

<sup>80</sup> See discussion *infra* part III.

<sup>81</sup> See *Cubas v. Martinez*, Decision and Order of May 9, 2005, Index No. 113271/04, N.Y. Supr. Ct., at <http://www.nycourts.gov/press/dmvFinal.pdf>.

What is most striking about the REAL ID Act's new DMV mandates is that none of them have anything directly to do either with terrorist activities or with singling out and targeting behaviors that are red flags for terrorism -- nor are they intended to do so. If the mandates can be effectively implemented by our inexpert, unsupervised DMVs, what the REAL ID Act's measures will do is make it more difficult-- not impossible, but more difficult -- for an individual to obtain a driver's license reflecting a false name or other inaccurate information, to produce a persuasive duplicate of a state license, or to obtain a license without having legal status in the country. These regulations cannot touch, even if they are applied with absolute accuracy, those domestic and foreign terrorists who are not on watch lists and obtain IDs in their own names, who have the means to obtain false breeder documents or fake driver's licenses, or who do not require driver's licenses to carry out their terrorist activities.

As such, these measures target proxy groups: those who are unable to provide or unwilling to falsify the supporting documentation necessary to obtain the licenses. Advocates of the REAL ID Act's measures argue that this will have some indirect effects on terrorists that is itself enough to justify these sweeping reforms.<sup>82</sup> But the groups that the REAL ID Act's provisions are in fact most likely to capture are exactly the proxy groups they target, in this case, primarily illegal immigrants. While we may wish to limit illegal immigration, such measures should be justified on their own merits, according to the costs and benefits involved in targeting illegal immigration, not by putting the false weight of a national security finger on the scales of the cost-benefit analysis.<sup>83</sup>

Those who will be swept in by these regulations also include other vulnerable populations unable to meet one or more of the new requirements: "poor, elderly or disabled residents unable to produce the necessary documents,"<sup>84</sup> legal immigrants whose documents are difficult to verify, and devout members of faiths whose tenets forbid them to display their faces for photo identification.<sup>85</sup> Other members of the public will likely be caught up as well, whether through the DMV's inexpert, unsupervised administration or simply through the ordinary error rates in identity databases. The effect on these proxy groups and others is potentially dire:

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<sup>82</sup> Rosenzweig & Carafano, *supra* note \_\_, at 1-2.

<sup>83</sup> Conservative commentators agree that the immigration issue "really is separate from the national interest in more reliable and secure forms of identification" and "if regulating immigration and incentives affecting illegal immigration is the real purpose of congressional legislation, it ought to be addressed in separate legislation." *Id.* at 6.

<sup>84</sup> *REAL ID Legislation needs a reality check*, *supra* note \_\_.

<sup>85</sup> "Religious Accommodation in Driver's License Photographs: A review of codes, policies and practices in the 50 states," Council on American-Islamic Relations Research Center (2004), available at [www.cair-net.org/downloads/driversphoto.pdf](http://www.cair-net.org/downloads/driversphoto.pdf).

in addition to the loss of federally acceptable ID, denial of the driving privilege may amount in some areas to loss of the opportunity to work, attend school, and otherwise lead a responsible, self-sustaining existence.<sup>86</sup>

## 5. Conclusion

All in all, the DMV's driver's licensing system is an astonishingly poor fit for detecting and deterring terrorist activities. As a regime that affects the entire public, its reform imposes enormous financial costs on agencies intended to serve an entirely different purpose. As a system applicable to the public at large, it does not successfully target hallmarks of terrorist activity, and as a system involving such a vast number of people, it cannot by virtue of its sheer scope and size function effectively at identifying and isolating individuals who present security threats. The REAL ID Act's security imperatives push an agency from its classic bureaucratic task of rationalizing a narrow set of expert tasks to purposes and procedures in which it has no special expertise, and require discretionary decision-making from low-level bureaucrats accustomed to rote application of simple rules with no particular provision for oversight. It is a fundamental mismatch between discretion and oversight, and between task and expertise.

### *B. USCIS and Political Asylum*

*By tradition and conviction, our country is a welcoming society. America is a stronger and better nation because of the hard work and the faith and the entrepreneurial spirit of immigrants. Every generation of immigrants has reaffirmed the wisdom of remaining open to the talents and dreams of the world.*<sup>87</sup>

Political asylum is meant to provide a safe haven for refugees and a bulwark against genocide, crimes against humanity, torture, and other violations of human rights. In order to obtain asylum in the United States, an applicant must have experienced "persecution or [have] a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" in her home country (or, if the applicant is stateless, in her country of long-term residence).<sup>88</sup>

In addition to its humanitarian purpose, political asylum has also long served foreign policy and national security goals. Indeed, until 1980, asylum admissions were openly tied to foreign policy, as eligibility to apply

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<sup>86</sup> Raquel Aldana & Sylvia R. Lazos Vargas, "Aliens" in *Our Midst Post-9/11*, 38 U.C. DAVIS L. REV. 1683, 1717-18 (2005).

<sup>87</sup> President George W. Bush, Speech of Jan. 7, 2004, transcript available at [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=36498](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=36498).

<sup>88</sup> Immigration and Nationality Act, § 101(a)(42)(A) ("INA").





for asylum was determined by ad hoc legislation authorizing admissions from communist states and other Cold War enemies.<sup>89</sup> Today, admission of asylees still presents an opportunity to cultivate an image of the United States as a “beacon for freedom”<sup>90</sup> and to vilify the nations that refugees have fled.<sup>91</sup>

### 1. The New Regulatory Scheme

While the U.S. government has treated asylum as a means to secure its foreign policy goals through strategic asylum admissions, it has also feared that asylum introduces risk in the form of the admission of aliens from what are often, by virtue of the purpose and definition of asylum itself, hostile or even enemy states.<sup>92</sup> The REAL ID Act is a legislative expression of this fear, and it is not the first. In 1996, after the 1993 World Trade Center bombing and the murders of several CIA agents by foreign nationals, as well as the unrelated but nonetheless galvanizing Oklahoma City bombing (which was carried out by American citizens), Congress enacted the Anti-Terrorism and Effective Death Penalty Act, which, among other measures, eliminated judicial review of certain deportation orders, and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), which provided for mandatory detention of many asylum seekers, “expedited removal” of asylum seekers at the border, and imposed other limits on asylum applications.<sup>93</sup> The REAL ID Act also builds upon the post-9/11 USA PATRIOT Act of 2001 and the Intelligence Reform and Terrorist Prevention Act of 2004 (“IRTPA”), which introduced broader definitions of terrorism and terrorist associations for purposes of deportation and inadmissibility.<sup>94</sup>

In Title I of the REAL ID Act, “Amendments to Protect against Terrorist Entry,” Congress amended numerous sections of the Immigration and Nationality Act (“INA”), introducing certain crucial changes affecting

<sup>89</sup> Michael McBride, *Migrants and Asylum-Seekers*, 37 INT’L MIGRATION 289, 292-94 (1999); Ruth Ellen Wasem, “U.S. Immigration Policy on Asylum Seekers” 2 (CRS Report for Congress Feb. 16, 2005).

<sup>90</sup> President George W. Bush, Statement by the President in His Address to the Nation, (Sep. 11, 2001), available at [www.whitehouse.gov/news/releases/2001/09/20010911-16.html](http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html).

<sup>91</sup> In 2003, the top three countries for approved asylum claims were Colombia, China and Haiti, in contrast to the U.S.S.R., Vietnam, and Cuba during the Cold War. . U.S. Department of Homeland Security, Office of Immigration Statistics, FY2003 Yearbook of Immigration Statistics, at 47.

<sup>92</sup> Bill Ong Hing, *Defining America Through Immigration Policy* 233-35 (2004).

<sup>93</sup> Anti-Terrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, 110 Stat. 1214 (“AEDPA”); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (“IIRIRA”); David Martin, “The 1995 Asylum Reforms: A Historic and Global Perspective,” *Backgrounders*, Center for Immigration Studies, at 3 (May 2000).

<sup>94</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (“USA PATRIOT Act”). In debate over the IRTPA, Congress considered but did not enact many of the measures that eventually were included the REAL ID Act. Intelligence Reform and Terrorist Prevention Act of 2004, Pub. L. No. 108-458 (S. 2845), Title V (“IRTPA”).

how the USCIS processes asylum claims:

(1) *The Act makes the legal standard for attaining refugee status more demanding for all asylum applicants*, requiring asylum applicants to establish that “race, religion, nationality, membership in a particular social group, or political opinion... was or will be *at least one central reason* for persecuting the applicant;”<sup>95</sup>

(2) *It vests greater discretion in the administrative adjudicator* in assessing the applicant’s credibility and requiring corroborating evidence even of “persuasive” testimony;<sup>96</sup> and

(3) *It limits judicial review of the adjudicator’s expanded exercise of discretion* by preserving judicial review only for constitutional and legal claims (as required by a 2001 Supreme Court decision) and not for discretionary or factual findings.<sup>97</sup>

## 2. Fit

Like the REAL ID Act’s driver’s licensing provisions, its asylum provisions do not attempt to hone the asylum adjudication system’s ability to distinguish terrorist from non-terrorist applicants.<sup>98</sup> Instead, they change the baseline rules for a large population that is voluntarily providing information to the government in exchange for the benefit of political asylum. Like driver’s licensing, political asylum is neither necessary to terrorist activity, nor is it something that terrorists use in distinctive ways that are a red flag for terrorism. And as with driver’s licensing, the only way of searching for terrorists in the pool of asylum applicants is to examine each application, one by one. It is a large pool: while the political asylum process does not implicate virtually every person in the United States as does driver’s licensings, in 2003, the agency received applications

<sup>95</sup> REAL ID Act § 101(a)(3) (emphasis added); *compare with* Matter of T-M-B, 21 I. & N. Dec. 775, 777 (BIA 1997) (applicants must “produce evidence from which it is reasonable to believe that the harm was motivated, at least in part, by an actual or imputed protected ground”); Matter of Fuentes, 19 I. & N. Dec. 658 (BIA 1998) (same).

<sup>96</sup> REAL ID Act § 101(a)(3).

<sup>97</sup> The act also specifically bars courts from reversing requirements of corroborative evidence unless “a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.” REAL ID Act, §101(e). In addition, it vests discretion over asylum decisions in the Director of Homeland Security in addition to the Attorney General; eliminates a planned study on vulnerabilities in the asylum system; and, in a pair of changes benefiting asylum applicants, lifts the caps on applicants whose claims are based on coercive population controls and on the number of asylees permitted to change status to permanent residents each year. *Id.* §101(b)-(d) & (f)-(h).

<sup>98</sup> It is worth noting that in its non-asylum related immigration provisions, the Act also expands the prohibited connections to terrorism that bar all immigrants from admissibility. Of particular note is its new definitions of “material support” for a “terrorist organization,” which diverge from the criminal definitions of crucial terms and are of troubling breadth. REAL ID Act, § 103(b)-(c); *compare to* 18 USC §§ 2339a-2339b (as amended by the USA PATRIOT Act); *see also* ACLU Testimony on Material Support for Terrorism Laws: Section 805 of the Patriot Act and Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004 Before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security (5/10/2005), *available at* <http://www.aclu.org/safefree/general/17536leg20050510.html>.



for 61,660 applicants and family members, and during the period from 1996-2002 there was an average of 64,697 applications per year.<sup>99</sup>

Moreover, the fit between this pool and terrorists is a weak one. As the 9/11 commission staff has noted, “very few people” amongst the millions of annual immigrants to the United States pose any threat to national security.<sup>100</sup> Asylum applicants are no exception to this rule. Out of the roughly one million people who have applied for asylum since 1989, a 2005 study could identify only sixteen people with any nexus whatsoever to terrorism, a rate of approximately 1/1000 of one percent.<sup>101</sup>

Remarkably, this low, two-digit number may overstate the number of terrorists currently in the asylum system, because virtually every incident of convicted terrorists entering via the asylum system dates to the early 1990s, before mandatory FBI security checks and detention of virtually all entering asylum seekers made asylum an unappealing avenue into the United States.<sup>102</sup> Asylum is a voluntary system, and one that terrorists can and do opt out of. Indeed, the available evidence concerning asylum seekers’ propensity to engage in terrorist activity is anecdotal, not systematic: there is no data on the number of immigrants who engage in or support terrorist activity, much less on the number of asylum seekers who do so, nor any data comparing terrorist propensities among immigrants as opposed to citizens.<sup>103</sup>

Furthermore, if the fit between asylum seekers and terrorists is poor, the fit between the changes introduced by the REAL ID Act and terrorist behavior is worse. As in other agencies that depend on information volunteered by participants in exchange for a benefit, reforms to the general reporting standards applicable to all participants burden genuine, good faith participants as a matter of course, but tend to be easy for terrorists and other bad faith actors to evade by providing false information. Genuine asylum applicants often do not have corroborating evidence for their claim, having fled their countries without stopping to gather supporting documentation.<sup>104</sup>

<sup>99</sup> The number of applications has fluctuated substantially with peak levels in the hundreds of thousands of applications per year in the mid-1990s. 2003 Yearbook of Immigration Statistics at 45-46 & 56, available at <http://uscis.gov/graphics/shared/aboutus/statistics/Asylees.htm>.

<sup>100</sup> 9/11 Commission report at 383. Some of these immigrants come for brief visits, while others stay for longer periods.

<sup>101</sup> Not only this, this number includes some who had not even been so much as accused, much less convicted, of terrorist activities themselves, but who are “friends” or “associates” of known terrorists, as well as those who filed asylum claims as a last ditch measure while in the process of being deported. Janice L. Kephart, “Moving Beyond the 9/11 Staff Report on Terrorist Travel “ at 26-28, Center for Immigration Studies, Center Paper 24 (Sept. 2005). It is particularly striking that these numbers were produced by an author in support of the REAL ID Act’s measures.

<sup>102</sup> Lofgren, *supra* note \_\_, at 355-56, 366-37, & 375; Wasem, *supra* note \_\_, at 10.

<sup>103</sup> E.g., Philip Martin and Susan Martin, *Managing Migration to Prevent Terrorism*, 29 MIGRATION WORLD 19 (2001); Carl F. Horowitz, “An Examination of U.S. Immigration Policy and Serious Crime,” Center for Immigration Studies (April 2001).

<sup>104</sup> David Martin, *supra* note \_\_.



Nor can asylum applicants always demonstrate the motive of their persecutors and how “central” that motive is to their persecution.<sup>105</sup> As Representative Langevin argued, with some rhetorical hyperbole, in protest of the REAL ID Act’s restrictions, “Can we imagine sending a refugee back to face genocide in Sudan because he or she does not have a letter from the government explaining that religion was the reason his or her family was murdered?”<sup>106</sup> But by obtaining false documentation and providing false testimony, terrorists can readily appear to meet these standards. These measures thus present the quintessential problem of using civil rules to try to reach non-civil actors: those actors either opt out or simply refuse to play by the rules.

### 3. Inexpertise and Overdiscretion

The REAL ID Act’s asylum measures take an agency that is excoriated for its incompetence and abuse of discretion and grant it greater authority and discretion in the name of national security. In theory, the USCIS ought to have the expertise to accurately adjudicate asylum claims and exercise discretion judiciously, but when we look below the surface of the agency’s assigned capability and authority to assess how the agency actually exercises that capability and authority, the reality is quite different.

In fact, judicial review has long revealed our immigration agency to be a disorganized and beleaguered organization, notorious for backlogs and arbitrary and legally erroneous decisions.<sup>107</sup> While efforts to improve performance at the asylum officer level have reportedly born some fruit, not so at the level of immigration judges, the determinative finders of fact in any claims not immediately granted upon initial review. Federal judges reviewing asylum decisions have repeatedly found, in the words of Judge Posner, that “the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.”<sup>108</sup> In December 2005 and January 2006 alone, judges reviewing asylum decisions in the Third and Seventh Circuits castigated the involved Immigration Judges and the Board of Immigration Appeals that carries out administrative reviews for a pattern of arbitrary, unlawful, and biased rulings:

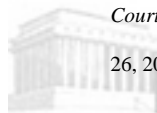
At the risk of sounding like a broken record, we reiterate our oft-

<sup>105</sup> *Id.*

<sup>106</sup> Rep. James R. Langevin of Rhode Island, 151 Cong. Rec. E. 247 (Feb. 10, 2005).

<sup>107</sup> Congress has repeatedly passed laws divesting the courts of appellate and habeas jurisdiction over immigration decisions; the REAL ID Act codifies a recent Supreme Court decision asserting that review of constitutional and legal claims must be available, while expressly stripping the courts of jurisdiction over any discretionary or fact-based claims. *INS v. St. Cyr*, 533 U.S. 289 (2001); REAL ID Act § 106(a). For an analysis of the judicial review provisions of the REAL ID Act, see Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 101 (2005).

<sup>108</sup> Adam Liptak, *Federal Courts Criticize Judges’ Handling of Asylum Cases*, THE NEW YORK TIMES, Dec. 26, 2005.



expressed concern with the adjudication of asylum claims by the Immigration Court and the Board of Immigration Appeals.... The performance of these federal agencies is too often inadequate.<sup>109</sup>

The REAL ID Act measures rely on raising the legal standards for asylum and increasing agency discretion in holding applicants to those standards. But USCIS's inadequacy in adjudicating claims suggests such an approach is likely to be counterproductive. As Patricia Freshwater has noted, "terrorists are already barred from any grant of asylum if their claims are accurately adjudicated. For this reason, the United States should have a security interest in providing the most accurate adjudication of asylum claims possible."<sup>110</sup> The REAL ID Act's focus on standards, corroborating evidence, and applicant credibility are red herrings: the weak link here is not the standards that the agency is asked to apply, but agency incompetence and abuse of discretion in applying them.

But remarkably, the REAL ID Act actually undermines the development of agency expertise, rather than bolstering it. Among its other measures, the REAL ID Act scuttled a study called for by the IRTPA in 2004 that was to have investigated how many asylum applicants have been in some way connected to terrorist activities and the effects of the relevant legal standards on those cases, if any. This is data that the agency might have used to develop real expertise in sussing out terrorists, or to conclude that the asylum system is not the place to be looking for them after all.<sup>111</sup> Instead, the REAL ID Act simply presumed that these linkages exist and cancelled the study,<sup>112</sup>

Furthermore, the REAL ID Act duplicates expert, directed investigation with USCIS's inexperienced, indirect evaluation process, for there is already an agency tasked with expert evaluation of security issues performing checks on asylum seekers: the FBI. Fingerprinting and an FBI security check are the first steps in evaluation of an asylum claim, as well as "multiple background checks in the terrorist, immigration, and law enforcement databases, notably the Interagency Border Inspection System (IBIS)," which links to seven other FBI, former INS, and State Department databases,<sup>113</sup> and an "expanded screening list"<sup>114</sup> against which foreign nationals can be checked. Layering inexperienced USCIS evaluation that is not

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<sup>109</sup> *Pasha v. Gonzales*, No. 04-4166 (7<sup>th</sup> Cir. Dec. 29, 2005); *Sukwanputra v. Gonzales*, at 17 (3<sup>rd</sup> Cir. Jan. 19, 2006) (on file with author).

<sup>110</sup> Patricia Freshwater, *The Obligation of Non-Refoulement under the Convention against Torture*, 19 *GEORGETOWN IMMIG. L.J.* 585, 592 (2005).

<sup>111</sup> IRPTA § 5403(a)-(b).

<sup>112</sup> REAL ID Act § 101(i); *see also* Statement of Rep. Jackson-Lee of Texas (Feb. 9, 2005), 151 Cong. Rec. H. 453 (2005).

<sup>113</sup> Wasem, *supra* note \_\_, at 10.

<sup>114</sup> George W. Bush, Speech of Jan. 7, 2004, transcript available at [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=36498](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=36498).

specifically directed at terrorist activity to expert FBI investigation of terrorist connections does not add value to the process.<sup>115</sup>

Similarly, core concepts of administrative law suggest that when agencies consistently carry out their tasks incompetently, and especially when internal agency oversight mechanisms prove ineffective, the balance between agency discretion and external oversight should shift toward greater oversight.<sup>116</sup> Here, it seems obvious that, as a matter of agency capability, these administrative adjudicators need more supervision, not less. But instead, the REAL ID Act increases agency discretion and limits judicial oversight of the very fact-based determinations that are at the heart of asylum claims.<sup>117</sup>

#### 4. Impact on Proxies

The REAL ID Act's provisions on political asylum target a particularly vulnerable group as proxies for terrorists: those who have been driven from their homes by violence and suffering and are at the mercy of another state to take them in. As Immigration Judge Denise Slavin, the current president of the National Association of Immigration Judges, has explained, asylum adjudications involve high stakes, "life-or-death decisions in terms of whether you're going to send someone back to a place where they may be killed."<sup>118</sup> Counterbalanced against the risks of granting fraudulent and particularly terrorist claims, therefore, is the grave risk of harm posed by the denial of genuine claims for applicants deported to face a threat of renewed persecution in their home countries.<sup>119</sup>

In passing the REAL ID Act, Congress targeted another kind of proxy: the political asylum process itself. These reforms take sides in a longstanding, ongoing debate over the proper legal and evidentiary standards in the political asylum process. Critics assert that the pre-REAL ID Act tests and evidentiary standards are too low to permit adjudicators to

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<sup>115</sup> Identified terrorists are already barred by statute from receiving asylum irrespective of the validity of their claims of persecution, as are those who are members of terrorist organizations, deemed terrorist risks, have advocated terrorist activity, or have given material support to a terrorist organization INA §§ 212(a)(3)(B) & 237(a)(4)(B).

<sup>116</sup> See discussion *supra* part A.

<sup>117</sup> This is particularly calamitous, as it follows upon a 2002 change in agency policy that curtailed the administrative process of review for asylum decisions, adopting new rules that, among other things, permit a single BIA member to issue a summary dismissal of an administrative appeal without any written opinion. Previously, panels of three board members would hear appeals and issue written decisions in each case. The changes are an effort to remedy a backlog of over 56,000 cases. Federal judges reviewing these cases on appeal have offered vitriolic criticism of this change, stating that the current process constitutes no review at all. John R.B. Palmer, et al., *Why are So Many People Challenging Board of Immigration Appeals in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, Cornell Law School Legal Studies Research Paper Series, at 5 & 25 (Sep. 21 2005) available at <http://ssrn.com/abstract=785824>.

<sup>118</sup> Liptak, *supra* note \_\_\_\_.

<sup>119</sup> David Martin, *supra* note \_\_\_\_, at 3.



effectively cull out fraudulent and terrorist applicants,<sup>120</sup> while others contend that the same tests and standards are so demanding as to obstruct recognition of legitimate claims.<sup>121</sup> Both point to the limited capacity of the adjudicative process to assess cases that are centered on the types of legal questions and subject to the limited evidence presented by asylum applicants. But if these critiques are correct, they should raise similar questions about the potential capacity of this system to distinguish terrorist from non-terrorist applicants, and about the effectiveness of the REAL ID Act reforms, no matter what standards are applied. Furthermore, the lack of any apparent connection between the REAL ID Act's new standards and terrorism per se, together with the connection to this longstanding debate in asylum law, suggest that, far from aiming for terrorists and hitting a proxy group, Congress may in fact be hitting exactly the target it had in its sights.

Beyond the effect on the proxy group and on political asylum, the focus on foreigners as a proxy for terrorists is dangerous for national security as well. The assumption that terrorists are necessarily foreigners has already been put to the lie in Britain, where the suspects in the July 2005 bombing attacks on London public transportation were "British, born and bred."<sup>122</sup> In the U.S., while the 9/11 attacks were particularly spectacular and deadly, "the number of domestic terrorist acts in the past five years far outweighs the number of international acts."<sup>123</sup> Pointing to domestic terrorists like William Krar, "an East Texas man who stockpiled enough sodium cyanide to gas everyone in a building the size of a high school basketball gymnasium before he was arrested in 2002,"<sup>124</sup> one terrorism expert warned that "[t]he government has a severe case of tunnel vision when it comes to domestic terrorism."<sup>125</sup> While we should not turn a blind eye to the risks of foreign terrorism, focusing our national security measures almost exclusively on foreign risks is to mistake the proxy for the

<sup>120</sup> Mark Krikorian, "Who Deserves Asylum?," 101 Commentary 52 (June 1996).

<sup>121</sup> Considering case studies of asylum seekers fleeing the Salvadoran and Guatemalan civil wars, Susan Bibler Coutin concluded that "continual violence, surveillance and interrogation made the causes of persecution unclear and defined average people as potentially subversive," creating a "gap between legal definitions of persecution and the repressive tactics that are directed at suspect populations." Susan Bibler Coutin, *The Oppressed, the Suspect and the Citizen: Subjectivity in Competing Accounts of Political Violence*, LAW AND SOCIAL INQUIRY 60, 65 (2001).

<sup>122</sup> Matthew Chance, *Britain's home-grown terrorists*, CNN, July 14, 2005, <http://www.cnn.com/2005/WORLD/europe/07/14/homegrown.terror/>.

<sup>123</sup> Kris Axtman, *The Terror Threat at Home, Often Overlooked*, THE CHRISTIAN SCIENCE MONITOR, Dec. 29, 2003, [www.csmonitor.com/2003/1229/p02s01-usju.html](http://www.csmonitor.com/2003/1229/p02s01-usju.html) (quoting Mark Pitcavage of the fact-finding department at the Anti-Defamation League).

<sup>124</sup> Larry Copeland, *Domestic Terrorism: New Trouble at Home*, USA TODAY (Nov. 14, 2004), available at [www.usatoday.com/news/nation/2004-11-14-domestic-terrorism\\_x.htm](http://www.usatoday.com/news/nation/2004-11-14-domestic-terrorism_x.htm); see also Terry Frieden, *FBI, ATF address domestic terrorism*, [www.cnn.com/2005/US/05/19/domestic.terrorism](http://www.cnn.com/2005/US/05/19/domestic.terrorism); "FBI Whistleblower: White Supremacists are Major Domestic Terror Threat," Interview of Mike German (June 13, 2005), available at [www.democracynow.org/article.pl?sid=05/06/13/145217](http://www.democracynow.org/article.pl?sid=05/06/13/145217).

<sup>125</sup> Axtman, *supra* note 123 (quoting Daniel Levitas, author of "The Terrorist Next Door: The Militia Movement and the Radical Right").

terrorist.

## 5. Conclusion

Targeting immigrants as proxies for terrorists may make us all feel safer, but these measures are unlikely to make us safer in fact, especially in the inexpert, unsupervised hands of the USCIS. Rather than focusing on improving the security measures that are already in place, taking measures to improve the expertise and capability of asylum adjudicators, or at least increasing oversight of their alarmingly arbitrary practices, the REAL ID Act's reforms seem guaranteed to introduce more risk into the system.

### III. THE PATRIOT ACT AND THE FINANCIAL WAR AGAINST TERROR

#### A. OFAC And The Evolution Of The Asset Freeze

Many commentators have worried about the civil liberties problems created by the Treasury Department's Office of Foreign Assets Control.<sup>126</sup> Because the agency is freezing the assets of organizations it suspects of cooperation with terrorists through a civil administrative process that involves none of the usual checks of the Fourth Amendment, their fears are not unwarranted.<sup>127</sup> But we think there are even more fundamental problems with OFAC's war on terror. The use of financial regulation to take and, in some cases, operate the property of American charities and individuals in the name of that war has been inexpert and unchanneled, as well as incongruous.<sup>128</sup>

In the following section, we describe the regulatory regime administered by OFAC. That regime is designed to prevent terrorists from using property – originally assets kept in regulated financial institutions,

<sup>126</sup> See, e.g., Nicole Nice-Petersen, Note, *Justice For The "Designated": The Process That Is Due To Alleged U.S. Financiers Of Terrorism* 93 GEO. L.J. 1387, 1388 (2005) ("The current procedures provided to U.S. entities under IEEPA fall far short of meeting basic due process requirements."); Laila Al-Marayati, *American Muslim Charities: Easy Targets In The War On Terror*, 25 PACE L. REV. 321, 321 (2005) (symposium issue) ("seriously affect the rights of Americans both to engage in charitable giving and to know that their government's efforts directly result in the increased safety and security of the American people").

<sup>127</sup> As the 9/11 commission staff has observed, "the use of administrative orders with few due process protections, particularly against our own citizens, raises significant civil liberty concerns and risks a substantial backlash." NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., MONOGRAPH ON TERRORIST FINANCING 50 (2004), available at [http://www.9-11commission.gov/staff\\_statements/911\\_TerrFin\\_Monograph.pdf](http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf) [hereinafter "9/11 COMMISSION MONOGRAPH"].

<sup>128</sup> OFAC did do some terrorism regulation before 9/11. AEDPA, passed in the mid-90s, authorizes the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, to designate an organization as a Foreign Terrorist Organization ("FTO"). See 8 U.S.C. § 1189(a). Designation as a FTO has significant consequences to an organization, its members, and its supporters, not least because of what OFAC is then authorized to do – namely, freeze all assets of a FTO in or controlled by a United States financial institution. See 8 U.S.C. § 1189(a)(2)(C). Additionally, representatives and certain members of FTOs may be barred from entry into the United States, see *id.* § 1182(a)(3)(B), and may play a role if FTO's supporters find themselves facing criminal prosecution. See 18 U.S.C. § 2339B(a)(1).



now any form of property – within the reach of Department of Treasury regulators.<sup>129</sup> It is a scheme that has turned regulators who tracked the assets of foreign countries with whom we were at war to regulators who grab the assets of individuals – often individual American citizens – who might wish us ill. In this section, we consider some of the administrative problems that the new regulatory scheme has created.

### 1. The New Regulatory Scheme

Twelve days after 9/11, the President issued an executive order declaring a national emergency and authorizing the Secretary of the Treasury to freeze the assets of groups or individuals that, among other things, that "assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism."<sup>130</sup> The president acted, he announced, "because of the pervasiveness and expansiveness of the financial foundation of foreign terrorists."<sup>131</sup> The authority for these freezes came from the International Emergency Economic Powers Act (IEEPA).<sup>132</sup>

Many of the powers granted to OFAC under IEEPA pre-dated 9/11, although 9/11 prompted the agency to reinterpret these powers. Pursuant to the pre-9/11 IEEPA, the President was granted the authority "to deal with any unusual and extraordinary threat ... to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat."<sup>133</sup> IEEPA gave the president the ability to "freeze" the assets of nations with whom the United States is either at war or had designated to be a national enemy. The statute also provided for the sanctioning of supporters and nationals of the enemy.<sup>134</sup>

The Patriot Act added to these powers the ability to "block" assets during the pendency of civil investigations into whether particular

<sup>129</sup> In addition to serving as a financial regulator, OFAC also issues export licenses and regulates some other aspects of the interaction between Americans and foreign nations with whom we are at or close to war.

<sup>130</sup> Exec. Order No. 13,224 § 1(d)(i). For more background, see John B. Reynolds, III, et al., *Export Controls And Economic Sanctions*, 37 INT'L LAW. 263, 265 (2003).

<sup>131</sup> Exec. Order No. 13,224. As one federal banking official explained to Congress, OFAC is acting "under presidential wartime and national emergency powers and authority granted by specific legislation to impose controls on transactions and freeze foreign assets under U.S. jurisdiction." Testimony of Herbert A. Biern, Senior Associate Director, Division of Banking Supervision and Regulation, on *The Bank Secrecy Act and the USA Patriot Act*, before the Comm. on Int'l Rel., U.S. House of Rep., November 17, 2004, available at <http://www.federalreserve.gov/boarddocs/testimony/2004/20041117/default.htm>

<sup>132</sup> 50 U.S.C. §§ 1701-1706.

<sup>133</sup> 50 U.S.C. § 1701(a).

<sup>134</sup> 50 U.S.C. § 1702(a)(1)(C). For a discussion, see Hon. Frederic Block, *Civil Liberties During National Emergencies: The Interactions Between The Three Branches Of Government In Coping With Past And Current Threats To The Nation's Security*, 29 N.Y.U. REV. L. & SOC. CHANGE 459, 524 (2005); Angela D. Hardister, *Can We Buy Peace on Earth?: The Price of Freezing Terrorist Assets in a Post-September 11 World*, 28 N.C.J. INT'L L. & COM. REG. 605 (Spring 2003).

individuals, entities, or organizations were engaged in these activities.<sup>135</sup> It also permitted designations to be justified and defended in court with classified, ex-parte evidence.<sup>136</sup>

After 9/11, the president announced the creation of a class of Specially Designated Global Terrorists (SDGTs) – a bureaucratic move that he declared was “a major thrust of our war on terrorism” and a “strike on the financial foundation of the global terror network.”<sup>137</sup> Executive Order No. 13,224 defined the term to include foreign terrorists, and anyone who “assists in, sponsors, or provides financial, material, or technological support for, or services in support of” terrorism; and also “agents” or persons “associated” with these terrorists.<sup>138</sup>

But while the reach of the SDGT regulations are broad, making a case for an asset freeze is not correspondingly deep.<sup>139</sup> The initial freeze of assets and property is “contingent on the signing of a piece of paper,” as the 9/11 commission staff put it – a blocking order pending investigation – by the director of OFAC, a mid-level government official, without any further administrative process or review.<sup>140</sup> No warrant is required for the

<sup>135</sup> Specifically, the Patriot Act amended the freezing and blocking powers of OFAC to permit it to investigate, *block during the pendency of an investigation*, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States. § 1702(a)(1)(B) (emphasis added).

<sup>136</sup> See 50 U.S.C. § 1702(c).

<sup>137</sup> The president’s remarks may be found at <http://archives.cnn.com/2001/US/09/24/ret.bush.transcript/>. Although SDGTs are the most common designation adopted by the government against terrorists, it is not the only one. Exec. Order No. 13,224 also created a category of “specially designated terrorists” or SDTs, and before 9/11, before the days when OFAC was freezing the assets of suspected individual terrorists, it developed a category of “foreign terrorist organizations” (FTOs) in the 1990s, many of whom it is now recharacterizing as SDGTs. The most recent version of the list is available on OFAC’s website. Office of Foreign Assets Control, *Specially Designated Nationals*, <http://www.treas.gov/offices/enforcement/ofac/sdn/index.shtml>. The Patriot Act and new Executive Order added a new structure to an already extant counter-terrorism financing regime. In 1995, President Clinton issued Executive Order 12,947, pursuant to the IEEPA, Exec. Order No. 12,947, which designated certain terrorist organizations, as “Specially Designated Terrorists,” and blocked all of their property and interests in property. The order also allowed for additional designations if an organization or person is found to be “owned or controlled by, or to act for or on behalf of” a specially designated terrorist. *See id.* The State Department handled FTO designations, though all have since been designated as SDGTs as well.

<sup>138</sup> Exec. Order No. 13,224 § 1. For more, see Nina J. Crimm, *High Alert: The Government’s War On The Financing Of Terrorism And Its Implications For Donors, Domestic Charitable Organizations, And Global Philanthropy*, 45 WILLIAM & MARY L. REV. 1341 1370-73 (2004); see also Nina J. Crimm, *Post-September 11 Fortified Anti-Terrorism Measures Compel Heightened Due Diligence*, 25 PACE L. REV. 203 (2005) (symposium piece reviewing developments in the financial regulation of terrorism, with particular attention to the compliance required by regulated industry).

<sup>139</sup> As Mariano-Florentino Cuéllar has noted, “Even when executive branch officials discuss asset freezes, they describe the basis for an asset freeze as merely a “belief” (which is consistent with the broad discretion provided by the statute).” Mariano-Florentino Cuéllar, *The Mismatch Between State Power And State Capacity In Transnational Law Enforcement*, 22 BERKELEY J. INT’L L. 15, 58 n.90 (2004).

<sup>140</sup> 9/11 COMMISSION MONOGRAPH at 112 (“This provision lets the government shut down an organization without any formal determination of wrongdoing. It requires a single piece of paper, signed by a midlevel government official.”) To be sure, OFAC officials describe the designation process has subject to some degree of internal review: As the agency’s director testified to Congress, “A completed OFAC evidentiary record on a particular target is submitted first for legal review, then to the Executive Office of Terrorist Finance and Financial Crimes, where OFAC officers work with that office to prepare the package for the Policy Coordinating

procedure, which, pursuant to the Patriot Act, is often initiated at the outset, rather than the culmination, of an investigation into whether SDGT targets are, in fact, associated with terrorism.

The remedy for those whose assets have been blocked during the pendency of an investigation lies in administrative or judicial review of the designation order.<sup>141</sup> But the preliminary nature of the government action, the arbitrary and capricious standard of review of agency “freezes,” as we’ll call them,<sup>142</sup> with an overlay of deference in national security matters, and the ability of the agency to keep much of the record for review classified – makes review likely to fail.<sup>143</sup> We are aware of no cases where plaintiffs have successfully challenged a designation and OFAC blocking order since the advent of the war on terror.<sup>144</sup> Reviews of OFAC’s post-investigation actions have a more checkered history in the courts – it is then that SDGTs can bring claims challenging the legality and sufficiency of the designation – but there, too, OFAC enjoys the benefits of deferential APA review.<sup>145</sup>

Since 9/11, OFAC has issued a regular series of lists of SDGTs and their alleged supporters.<sup>146</sup> As of 2004, the agency had designated 375 individuals or entities as SDGTs.<sup>147</sup> In the four months that followed 9/11 alone, 157 suspects were listed by the agency and assets valued at \$68

Committee (PCC). The PCC determines whether the USG should designate a particular entity or should pursue alternative legal or diplomatic strategies in order to achieve U.S. interests. As part of the PCC process, OFAC’s designation proposal will usually be vetted by the consultative parties specified by the EO [No. 13,224].” Testimony of R. Richard Newcomb, Director, Office of Foreign Assets Control, before the House Financial Services Subcommittee on Oversight and Investigations, June 16, 2004, available at <http://www.ustreas.gov/press/releases/js1729.htm>.

<sup>141</sup> See *Holy Land Foundation for Relief and Development v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2003) (describing the standard of review of designation decisions).

<sup>142</sup> They are “freezes” because the government seems to seize the asset, but, it has argued, not in a way that implicates the Fourth Amendment’s search and seizure provisions, because it does not search the property it has frozen. *Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F.Supp.2d 57, 67 (D.D.C. 2002).

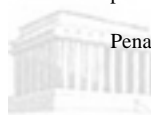
<sup>143</sup> Indeed, OFAC has taken the position that blocking orders pending investigation are not final agency action ripe for review. *Global Relief Foundation, Inc. v. O’Neill*, 315 F.3d 748, 751 (7<sup>th</sup> Cir. 2002) (“appellees’ suggestion of mootness is that GRF’s current requests are limited to its status pending final administrative resolution”). In a similar vein, the viability of novel constitutional claims that defendants may be able to dream up, makes judicial review problematic.

<sup>144</sup> As the district court noted in the *Holy Land Foundation* litigation, “If [OFAC’s] reasons and policy choices ... conform to certain minimal standards of rationality ... the rule is reasonable and must be upheld,” *Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F.Supp.2d 57, 67 (D.D.C. 2002); *Islamic American Relief Agency v. Unidentified FBI Agents*, 394 F.Supp.2d 34, 45 (D.D.C. 2005) (“This Court recognizes that the plaintiff is at an inherent disadvantage as it is not able to review and analyze the administrative record in its entirety, but rather is limited only to those portions of the administrative record that are not classified”). For an example of the kinds of claims that charities have raised against OFAC, see *Compl., BIF v. Ashcroft*, No. 02 CR 414, (N.D.Ill. 2002), paras. 40-48, available at <http://files.findlaw.com/news.findlaw.com/hdocs/docs/terrorism/bifashcroft013002cmp.pdf>.

<sup>145</sup> See *Holy Land Foundation for Relief and Development v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2003) (“the actions of the Treasury Department in designating HLF as a SDGT are governed by the judicial review provisions of the APA, 5 U.S.C. § 706(2)(A)”).

<sup>146</sup> OFAC lists its enforcement actions at [E:\Link to Enforcement Actions by Year-U.S. Treasury - Civil Penalties Information.htm](http://E:\Link to Enforcement Actions by Year-U.S. Treasury - Civil Penalties Information.htm).

<sup>147</sup> Newcomb, *supra* note 140.



million were frozen.<sup>148</sup> By 2004, Treasury Department officials were crowing that they had frozen \$200 million in assets since 9/11.<sup>149</sup>

Perhaps most notably, Treasury has announced investigations of a number of charities based in the United States, and subsequently frozen all of their property. We use the record of OFAC's practice against charities as a yardstick for evaluating the effectiveness of this civil administrative mechanism of terror-fighting.

## 2. Inexpertise

The sort of regulation that OFAC has been called upon to do since 9/11 is nothing like the regulation that the office was created to implement. The agency began as an administrative office that distributed export licenses and ensured that banks did not release the assets of foreign countries with whom the United States was at war.<sup>150</sup> It was created after World War II to enforce the dictates of the Trading with the Enemy Act (TWEA)<sup>151</sup> – and had, until the 1990s, defined “enemy” as nations with whom the United States was at war, either cold or hot.<sup>152</sup> OFAC oversaw the limits on trade with these nations, and ensured that the assets of the adverse country located in the United States were not repatriated. The office focused on states like Cuba. Between 1990 and 2003, OFAC conducted 10,683 Cuba-related investigations and imposed \$8 million in fines between 1990 and 2003; by comparison, during the same period, OFAC conducted 93 investigations into terrorists, and imposed only \$9,425 in fines.<sup>153</sup>

<sup>148</sup> Kevin Johnson, *U.S. Freezes Fewer Terror Assets*, USA TODAY, January 30, 2006, at A1. The pace of designation and asset freezes has since slowed somewhat, and recently, annual freeze order takes declined to \$4.5 million in 2005. *Id.*

<sup>149</sup> Testimony of Juan Carlos Zarate, Assistant Secretary Terrorist Financing and Financial Crimes U.S. Department of the Treasury Before the House Financial Services Subcommittees on Domestic and International Monetary Policy, Trade and Technology and Oversight and Investigations, available at [www.ustreas.gov/press/releases/js1971.htm](http://www.ustreas.gov/press/releases/js1971.htm) (claiming that OFAC had “seized over \$200 million of terrorist-related funds worldwide”).

<sup>150</sup> In its early history, OFAC was described as “a minor Treasury Department bureau.” *American Airways Charters, Inc. v. Regan*, 746 F.2d 865, 876, (D.C. Cir. 1982) (Greene, J. concurring).

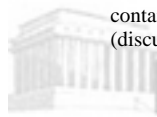
<sup>151</sup> As one commentator explained:

The statutory basis for U.S. economic sanctions in the twentieth century dates back to the enactment of the Trading with the Enemy Act (TWEA) in 1917, six months after the United States entered World War I. As originally enacted, the TWEA gave the President broad powers in times of war to regulate or prohibit transactions involving property in which a foreign country or national thereof had any interest. The TWEA was subsequently amended in 1933 to give the President authority to exercise his TWEA powers in response to peace-time national emergencies.

Stanley J. Marcuss, *Grist For The Litigation Mill In U.S. Economic Sanctions Programs*, 30 LAW & POL'Y INT'L BUS. 501-02 (1999). *see also* Rudolph Lehrer, Comment, *Unbalancing The Terrorists' Checkbook: Analysis Of U.S. Policy In Its Economic War On International Terrorism*, 10 TUL. J. INT'L & COMP. L. 333, 336 (2002) (discussing the history of the scheme).

<sup>152</sup> The United States also imposed sanctions pursuant to the foreign policy export control authority contained in the Export Administration Act, 50 U.S.C. app. § 2401-20. *See* Marcuss, *supra* note \_\_ at 502 (discussing this statutory scheme).

<sup>153</sup> Laura Donahue, *Anti-Terrorist Finance In The United Kingdom And United States* 27 MICH. J.



But beginning in the 1990s, and rapidly accelerating after 9/11, OFAC has shifted its focus from countries to individuals, most notably individuals and organizations inside the United States. With OFAC's new responsibilities has come hypertrophied growth. Between 1986 and 2004, the office expanded from ten employees to 144, while its budget has increased from almost nothing to \$22 million per year.<sup>154</sup> OFAC now blocks asset transfers of at least \$1 million, and as much as \$35 million, per week.<sup>155</sup> Treasury has also created an Office of Intelligence Analysis, which helps to prepare the cases on SDGTs.<sup>156</sup>

In placing new assets, including many nonfinancial assets, in the hands of financial regulators, this new scheme has put the agency in the odd position of overseeing – indeed, dispossessing – organizations and individuals that the government has concluded promote or support terrorism – or at least, are worth investigating further for those reasons, and on prosecuting, rather than cooperating, with regulated.<sup>157</sup>

The charitable cases exemplify the new responsibilities with which the agency has been tasked. Those responsibilities have placed the agency in the role of investigating ordinary Americans for links with terrorism, taking control of the property of those people it suspects might be so linked, and, in some cases, overseeing and running the property that it takes. It is all a very new role for banking regulators.

Three months after 9/11, OFAC took over three Islamic charities, the Holy Land Foundation, the Benevolence International Foundation, and the Global Relief Foundation, including the two largest in America. These three charities provided money to a diverse set of beneficiaries, including, of course, a number of worthy causes.<sup>158</sup> But not all the links the charities created with the Islamic world were suspicionless. The Holy Land Foundation was a principally Palestinian-oriented institution and its critics accused it of supporting Hamas, a Palestinian organization linked with terrorism.<sup>159</sup> The director of the Benevolence International Foundation

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INT'L L. 303, 435 n.349 (2003) (citing newspaper and government reports).

<sup>154</sup> See David Ivanovich, Case Puts Agency In Spotlight; Secretive Unit Of The Treasury Is Responsible For Keeping Economic Sanctions In Place, Feb. 26, 2006 HOUS. CHRON., available at <http://www.chron.com/dispatch/story.mpl/chronicle/3686135.html>; Newcomb, *supra* note \_\_\_\_.

<sup>155</sup> See Newcomb, *supra* note \_\_\_\_.

<sup>156</sup> See <http://www.ustreas.gov/offices/enforcement/oia/>.

<sup>157</sup> “The actual effectiveness of OFAC's regulatory programs ... is much more dependant upon voluntary implementation and compliance with its rules by the regulated community than on the agency's own enforcement actions.” Peter L. Fitzgerald, *Managing "Smart Sanctions" Against Terrorism Wisely*, 36 NEW ENG. L. REV. 957, 964 (2002) (symposium issue).

<sup>158</sup> The charities focused most of their efforts on providing short and long term relief to Muslim victims of natural disasters. See notes 158-160 (providing specific examples of the causes taken on by the Holy Land Foundation, the Benevolence International Foundation, and the Global Relief Foundation).

<sup>159</sup> The Holy Land Foundation for Relief and Development was a charity headquartered in Richardson, Texas. The charity's main objective was to help Palestinian refugees in the Middle East, but it provided humanitarian aid and relief to individuals and communities (primarily Muslim and Arab) in other Middle Eastern countries and the United States. For example, in 2000, the charity raised \$13 million to help Turkish earthquake

ultimately admitted to supplying non-military goods to Chechen and Bosnian rebels.<sup>160</sup> And the Global Relief Foundation had been linked to the Taliban-controlled Afghanistan, among other countries.<sup>161</sup> Later, OFAC moved to freeze the assets – pending investigation – of Al-Barakat, an organization primarily devoted to Africa, though it later acknowledged that they could find no evidence linking the organization to terrorism.<sup>162</sup> In 2004, OFAC froze the assets of Islamic American Relief Foundation, an African-centered charity,<sup>163</sup> and the U.S. branch of the Al-Haramain Islamic Foundation, a Saudi charity.<sup>164</sup> Most recently, OFAC blocked, pending investigation, access to the assets of KindHearts, a Toledo charity.<sup>165</sup>

All of these Islamic charities – each with multimillion dollar budgets and varied programs in a number of countries<sup>166</sup> – were shut down in every particular, and not only by freezing bank accounts, but also by freezing the rest of their property, including offices and the supplies in them – computers, files, pens and pencils. In the Holy Land Foundation freeze, OFAC removed all of the furniture from the charity's offices.<sup>167</sup> In the case of the Benevolence International Foundation, OFAC seized personal

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victims and Muslim refugees in Kosovo and Albania while also operating food pantries in places like Paterson, New Jersey. Adam Lisberg, *FBI Probes 2 Muslim Charities in North Jersey; Looking for Links to Terror Groups*, *The Record*, p.a18 (October 6, 2001).

<sup>160</sup> The Benevolence International Foundation (BIF) was a U.S. tax-exempt not-for-profit organization whose stated purpose was to conduct humanitarian relief projects throughout the world. The organization's website claimed to help "those afflicted by wars...providing short-term relief such as emergency food distribution, and then moves on to long term projects providing education and self-sufficiency to the children, widowed, refugees, injured and staff of vital governmental institutions." The BIF was incorporated in the State of Illinois on March 30, 1992 and operated around the world, in places like Bosnia, Chechnya, Pakistan, China, Ingushetia, Russia, and other nations. On [November 19, 2002](#), the group was classified as a terrorist group financier by the United States Department of Treasury. *Treasury Designates Benevolence International Foundation and Related Entities as Financiers of Terrorism*, U.S. Dept. of Treas., November 19, 2002 (<http://www.ustreas.gov/press/releases/po3632.htm>).

<sup>161</sup> The Global Relief Foundation (GRF), also known as Fondation Secours Mondial or FSM, was an Islamic charity based in [Bridgeville, IL](#) until it was raided and shut down on December 14, 2001 and labeled a "specifically-designated global terrorist" by the U.S. [Treasury Department](#) in 2002. Before being shut down, the group claimed its mission was to provide care, support and relief to people in need throughout the world. *Treasury Department Statement Regarding the Designation of the Global Relief Foundation*, U.S. Dept. of Treas., October 18, 2002 ([www.ustreas.gov/press/releases/po3553.htm](http://www.ustreas.gov/press/releases/po3553.htm)).

<sup>162</sup> For an analysis of the benighted Al-Barakat investigation, see 9/11 COMMISSION MONOGRAPH at 67-86. For the government's announcement of its action against IARA, see Press Release, U.S. Dep't of Treasury, Office of Public Affairs, Treasury Designates Global Network, Senior Officials of IARA for Supporting bin Laden, Others (Oct. 13, 2004), available at <http://www.ustreas.gov/press/releases/js2025.htm>, and for a critical analysis, see Laila Al-Marayati, *American Muslim Charities: Easy Targets In The War On Terror*, 25 PACE L. REV. 321, 327 (2005) (symposium issue).

<sup>163</sup> *Islamic American Relief Agency v. Unidentified FBI Agents*, 394 F.Supp.2d 34, 45 (D.D.C. 2005) (upholding designation of charity).

<sup>164</sup> *Al-Haramain Islamic Foundation, Inc. v. Bush*, CV 06-274KI Compl. (on file with authors).

<sup>165</sup> Lawsuit information tk, <http://www.cair-net.org/default.asp?Page=articleView&id=39012&theType=NB>.

<sup>166</sup> "In almost every case, the amount of money from any organization was estimated to be less than 10 percent of the group's proceeds." Douglas Farah, *Technological and Financial Responses to Terrorism*, 13 n.6, <http://www.douglasfarah.com/pdfs/NAF-Final.pdf>. GRF reported more than \$5 million in contributions to the IRS in 2000, 90% of which it sent overseas. Victoria B. Bjorklund, Jennifer I. Reynoso, & Abbey Hazlett, *Terrorism And Money Laundering: Illegal Purposes And Activities*, 25 PACE L. REV. 321, 335 (2005) (symposium issue). See also 9/11 COMMISSION MONOGRAPH at 53.

<sup>167</sup> *Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F.Supp.2d 57, 64 (N.D.Tex. 2002) ("OFAC ... removed from HLF headquarters, all documents, computers, and furniture")

computers as well as business records.<sup>168</sup> After designating Al Barakat as a SDGT, as one Treasury Department official explained, “Treasury agents ended up shutting down eight al Barakat offices in the United States” – mistakenly, as it turned out.<sup>169</sup>

This civil process became decidedly novel after OFAC officials had taken possession of the charities, because they then had to operate them.<sup>170</sup> OFAC has had to decide whether to permit the charities it has dispossessed to cover basic operating expenses like rent, or to pay for attorneys.<sup>171</sup> It has had to evaluate requests to apply the frozen funds to new charities, to decide whether to distribute religious literature impounded in the freeze,<sup>172</sup> and to venture into the housing market to satisfy the tax bills of those whose assets have been frozen.<sup>173</sup>

In freezing the assets of charities, OFAC did not move against financial institutions at all and found itself engaging in activities that looked a lot like criminal law enforcement. The fit between the powers that OFAC traditionally had as a bank regulator and the actions that it took as a quasi-criminal prosecutor is decidedly uneven. The dramatic effect that it had on Muslim charities in America – all of the charities seized have been paralyzed – is attributable in part to the strange relationship between OFAC’s civil powers and quasi-criminal responsibilities.

### 3. Overdiscretion

Inexpertise is not the only problem that OFAC has faced in administering its news rules. Observers, including the 9/11 commission staff, have expressed concerns about the problems inherent in OFAC asset

<sup>168</sup> *Benevolence Intern. Foundation, Inc. v. Ashcroft*, 200 F.Supp.2d 935, 936 (N.D.Ill. 2002).

<sup>169</sup> Jimmy Gurule, Under Secretary of Treasury for Enforcement, Update on Tracking the Financial Assets of Terrorists: One Year Later (Sept. 9, 2002), available at <http://fpc.state.gov/fpc/13337.htm>.

<sup>170</sup> For example, OFAC must decide whether to pay creditors of the charity. See Pamela M. Keeney, Comment, *Frozen Assets of Terrorists and Terrorist Supporters: A Proposed Solution to the Creditor Collection Problem*, 21 BANK. DEV. J. 301 (2004) (noting that asset freezes prevent creditors of the freeze targets from collecting their debts).

<sup>171</sup> See *Compl., BIF v. Ashcroft*, No. 02 CR 414, (N.D.Ill. 2002), paras. 23-25, available at <http://files.findlaw.com/news.findlaw.com/hdocs/docs/terrorism/bifashcroft013002cmp.pdf>. Cf. also Jill M. Troxel, Note, *Office of Foreign Assets Control Regulations: Making Attorneys Choose Between Compliance and the Attorney-Client Relationship*, 24 REV. LITIG. 637 (2005) (discussing OFAC regulations regulating the attorney-client relationship by expressly prohibiting some legal services and requiring a license for others); Anne Beck and Sylvia Tonova, *Current Developments 2003-2004: No Legal Representation Without Governmental “interposition”*, 17 GEO. J. LEGAL ETHICS 597 (2004) (discussing Executive Order No. 13,304, which prohibited the contribution of services to those whose funds had been blocked, and the effect on attorneys representing such clients).

<sup>172</sup> See *Compl.*, para. 9, *Al-Haramain Islamic Foundation v. Ashcroft*, No. 06 CV 583MO (complaint on file with author) (seeking distribution of “thousands of volumes of religious literature, including Qur’ans, written commentary on the life of the Prophet Muhammad, and other materials designed to explain Islam to both adherents and non-adherents”).

<sup>173</sup> Mark Freeman, *Seda Home Sold*, May 5, 2006 Mail Tribune at 5, available at <http://www.mailtribune.com/archive/2006/0505/local/stories/5maysedahousesold.htm>.

freezes, with their heavy effects and light process.<sup>174</sup> Because OFAC can destroy any entity with its freeze-before-investigation powers, and because designation decisions are not subject to much review, the post-9/11 agency has become a case study in overdiscretion.

The broad discretion OFAC has been afforded has been exacerbated by a failure of executive branch supervision, and an unwillingness to define its new regulatory powers with precision. The result has been a freezeures that have failed to result in any counter-terrorism prosecutions – evidence that OFAC was on to something when it acted against its suspects.<sup>175</sup>

First, it is not clear that OFAC's supervisors have been able to keep up with everything the agency has been doing in the post-9/11 explosion of its business. In October, the Government Accountability Office concluded that the Treasury Department "lacks meaningful performance measures to assess its terrorist designation and asset blocking efforts."<sup>176</sup>

Second, OFAC has not been willing to limit its discretion with guidance as to what exactly constitutes dealing with SDGTs – a degree of vagueness that has become a tradition with the agency.<sup>177</sup> As we will see, this vagueness has particularly burdened would-be Islamic donors, who have expressed exasperation and confusion as to which charities are at risk for freezeure orders.<sup>178</sup>

The results have been predictably unimpressive. Like most terrorist actions, the 9/11 attack was a low-tech, inexpensively financed operation, and efforts to freeze the assets of charities that – at best tenuously – were linked to al Qaeda, have been, at the very least, controversial.<sup>179</sup> The 9/11

<sup>174</sup> See, e.g., 9/11 COMMISSION MONOGRAPH at 112 ("Although in practice a number of agencies typically review and agree to the action, there is no formal administrative process, let alone any adjudication of guilt. Although this provision is necessary in rare emergencies when the government must shut down a terrorist financier before OFAC can marshal evidence to support a formal designation, serious consideration should be given to placing a strict and short limit on the duration of such a temporary blocking."); Laila Al-Marayati, *American Muslim Charities: Easy Targets In The War On Terror*, 25 PACE L. REV. 321 (2005) (symposium issue) (arguing that the freezes have victimized Muslims who had nothing to do with terror).

<sup>175</sup> BIF only resulted in one non-terrorism-related guilty plea, see *supra* note ?? and accompanying text, while the Global Relief Foundation was never prosecuted.

<sup>176</sup> Kevin Johnson, *U.S. Freezes Fewer Terror Assets*, USA TODAY, January 30, 2006, at A1 (quoting the GAO report).

<sup>177</sup> David Ivanovich, *Case Puts Agency In Spotlight; Secretive Unit Of The Treasury Is Responsible For Keeping Economic Sanctions In Place*, Feb. 26, 2006 HOUS. CHRON., available at <http://www.chron.com/disp/story.mpl/chronicle/3686135.html> ("OFAC experts say the agency keeps its rules vague").

<sup>178</sup> See *infra* notes \_\_ and accompanying text.

<sup>179</sup> In the words of the commission:

Nothing the hijackers did would have alerted any bank personnel to their being criminals, let alone terrorists bent on mass murder. Their transactions were routine and caused no alarm. Their wire transfers, in amounts from \$5,000 to \$70,000, were utterly anonymous in the billions of dollars moving through the international financial system on a daily basis. Their bank transactions, typically large deposits followed by many small ATM or credit card withdrawals, were entirely normal, especially for foreign students living in the United States. No financial institution filed a suspicious activity report (SAR) and, even with benefit of hindsight, none of them should have.





Commission has explained that so far, the asset freezes that have been enacted

were undertaken with limited evidence, and some were overbroad, resulting in legal challenges. Faced with having to defend actions in courts that required a higher standard of evidence than was provided by the intelligence that supported the designations in the first place, the United States ...[was] forced to “unfreeze” assets.<sup>180</sup>

The result of affording OFAC so much discretion to freeze assets – especially to freeze assets pending investigation – is that control over the important decisions to freeze has been delegated down. This putatively crucial component of the war on terrorism has been administered by mid-level bureaucrats in the Treasury Department who have been given the authority to interpret very broad grants of authority.

#### 4. Fit

Although OFAC’s conduct in the war on terror is perhaps most obviously a problem of inexpert banking supervisors taking on the law enforcement role of taking down suspected allies of the terrorists, and although that inexpertise has been exacerbated by a failure of either the executive branch or courts to adequately constrain the agency’s freeze powers, perhaps the most troubling aspect of repurposing the banking regulators to fight terrorism is the change in focus that it has required in the agency. Where before it monitored a regulated industry to ensure that Cuba, North Korea, and Vietnam and other foreign powers did not make use of American financial institutions, now its regulatory purview reaches far beyond banking. As the post-9/11 executive order has made clear, OFAC now has the capacity to expose extraordinarily serious regulatory punishment on anyone, domestic or foreign, suspected of association with terrorists.<sup>181</sup> But it is by no means clear that the agency’s supervision of a regulated industry has made it capable of searching for elusive links with terrorism among not just regulateds, but all Americans.

#### 5. The Effect On Proxies

OFAC’s sanctions depend on a second-order form of regulation of terrorists, by imposing watch requirements on institutions that the terrorists might use. But it is unlikely that terrorists will use charities or banks in an open, public way – let alone clear that terrorists depend to an important

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<sup>180</sup> 9/11 COMMISSION MONOGRAPH at 53.

<sup>181</sup> 9/11 COMMISSION MONOGRAPH at 47.

<sup>181</sup> See *supra* notes ?? and accompanying text.



degree on the abilities to move and launder substantial funds through banks or other institutions. Thus OFAC has become a heavy-handed regulator of proxies for terrorists, probably without actually curtailing the limited access that terrorists need to the financial system. Two proxies in particular have been affected: Muslims and financial institutions.

The part of the public most burdened by the new OFAC designations has been American Muslims, who are obligated by their religion to give to charity, but who have found their donations after 9/11 to be fraught with new risks.<sup>182</sup> The reaction of Islamic advocacy groups has been predictably negative.<sup>183</sup>

Moreover, as the number of individuals and organizations designated has grown, the record-keeping burdens on the banks – and, indeed, anyone who works with money, either formally or informally<sup>184</sup> – have grown. On January 12, 2006, OFAC issued guidance for banks for compliance with its requirements. The guidance requires banks to implement internal controls for identifying suspicious accounts and transactions, including a set of written procedures for new accounts, old accounts, and all transactions; an (at least) annual testing process of the compliance program, overseen by auditors; the designation of a “compliance officer” responsible for the day-to-day oversight of the OFAC compliance program; and the creation of a training program.<sup>185</sup> The penalties imposed by OFAC for failure to comply with these requirements range from the low five figures to over one million dollars.<sup>186</sup> Since 1993, the office has collected nearly \$30 million for compliance program violations.<sup>187</sup>

OFAC’s new guidance to financial institutions gives a sense of the amount of work banks are supposed to do to identify and find SDGT transactions. The Department of Justice has admitted that “OFAC sanctions are constantly changing and complex.”<sup>188</sup> A laundry list of consultants – ranging from linguistic psychologists to data-miners – have tried to fill this

<sup>182</sup> This charitable obligation is known as Zakat and is rooted in the Koran. For a discussion, see Laila Al-Marayati, *American Muslim Charities: Easy Targets In The War On Terror*, 25 PACE L. REV. 321 (2005).

<sup>183</sup> See, e.g., 9/11 COMMISSION MONOGRAPH at 111 (discussing this reaction); Sakeena Mirza and Ameena Qazi, “Robbing the Poor,” *al-Talib*, vol. 12, no. 3, at [http://www.al-talib.com/articles/v12\\_i3\\_a04.htm](http://www.al-talib.com/articles/v12_i3_a04.htm).

<sup>184</sup> As OFAC has said, “All U.S. persons must comply with OFAC regulations, including all U.S. citizens and permanent resident aliens regardless of where they are located, all persons and entities within the United States, all U.S. incorporated entities and their foreign branches.” OFAC, *Frequently Asked Questions*, <http://www.treas.gov/offices/enforcement/ofac/faq/#sbn>. There are no de minimis transactions permitted with designated entities.

<sup>185</sup> Financial Crimes Enforcement Network; *Anti-Money Laundering Programs for Dealers in Precious Metals, Stones, or Jewels*, 68 Fed. Reg. 8480-02 n.1 (Feb. 21, 2003). See also Joel Feinberg, *OFAC Issues Interim Final Rule Describing Sound Compliance Program*, MONDAQ BUS. BRIEFING, 2006 WLNR 1431613, Jan. 26, 2006.

<sup>186</sup> Newcomb, *supra* note 140.

<sup>187</sup> Newcomb, *supra* note 140.

<sup>188</sup> Lester M. Joseph, *Anti-Money Laundering Update*, 1378 PLI/CORP 627, 656 (2003) (describing the OFAC regime, offering the perspective of a senior criminal prosecutor in the Department of Justice).

gap by developing programs and training designed to help financial institutions keep track of the growing lists of individuals.<sup>189</sup> But such programs, are, of course, expensive.

Moreover, compliance is not just an issue for financial institutions. It is one for a broad array of domestic entities never before subject to the agency's control. Consider the difficulties of compliance with new guidance – rare guidance, for OFAC – to charities. In the case of charities, OFAC has suggested the adoption of a “risk-based” approach to the monitoring of charitable aid recipients.<sup>190</sup> Charities have been directed to conduct “due diligence” of their recipients (as well as of the charities' own personnel) to ensure that they are not on OFAC-generated watch lists, that the donor has some information about the identities of their aid recipients, as well as information about the use to which the aid will be put, and that the donor continues to monitor recipients after the aid has been given.<sup>191</sup>

These putatively voluntary guidelines for charities, in imposing a number of reporting and bookkeeping requirements to ensure that they do not become conduits for terrorist money, are similar to the requirements OFAC imposes on more traditional subjects of its regulation, like banks.<sup>192</sup>

As with banks, the government has made no guarantees that compliance with the guidelines will exempt charities from prosecution for money laundering.<sup>193</sup> The department has also issued “best practices”,<sup>194</sup> that charitable organizations might follow. This might create consistency across charities, but there is no indication that it would result in a particularly desirable regulatory regime.<sup>195</sup>

## 6. Postscript

<sup>189</sup> Choicepoint is the best know of the data miners. Bridger Insight, *Products*, <http://www.bridgerinsight.choicepoint.com/products.htm>. But see also Language Analysis Systems, *OFAC Compliance*, <http://www.las-inc.com/ofac/ofac-compliance.shtml> (asking whether financial institutions are “Struggling with Assessing OFAC Compliance Software?” and offering the service of linguist and psychologists in the name-matching process).

<sup>190</sup> See OFAC, *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities*, 70 Fed. Reg. 73,063, 73,063 (Dec. 8, 2005) (announcing an intention “to assist charities in developing a risk-based approach to guard against the threat of diversion of charitable funds for use by terrorists and their support networks”). See also Joseph W. Younker, *The “U.S. Department Of The Treasury Anti-Terrorist Financing Guidelines: Voluntary Best-Practices For U.S.-Based Charities”: Sawing A Leg Off The Stool Of Democracy*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 865, 866 (2004) (calling for “a flexible, risk-based test more in tune with the reality of the nonprofit sector”).

<sup>191</sup> OFAC, *Anti-Terrorist Financing Guidelines: Voluntary Best Practices For U.S.-Based Charities*, [http://www.treasury.gov/offices/enforcement/key-issues/protecting/docs/guidelines\\_charities.pdf](http://www.treasury.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf)

<sup>192</sup> Dept. of Treasury, *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities*, available at <http://www.treas.gov/press/releases/reports/po36072.pdf> (last visited Feb. 15, 2005).

<sup>193</sup> At any rate, the Department warned the charities that compliance of its guidelines should “not be construed to preclude any criminal or civil sanctions by the Department.” U.S. Department Of The Treasury, *Anti-Terrorist Financing Guidelines: Voluntary Best Practices For U.S.-Based Charities* (2006), available at <http://www.ustreas.gov/press/releases/docs/tocc.pdf> at 7.

<sup>194</sup> U.S. Department Of The Treasury, *Anti-Terrorist Financing Guidelines: Voluntary Best Practices For U.S.-Based Charities* (2006), available at <http://www.ustreas.gov/press/releases/docs/tocc.pdf>

<sup>195</sup> See Zaring, *supra* note \_\_ at \_\_ [NYU L Rev article forthcoming 2006].

As Treasury continues to designate individuals under the SDGT process – and, indeed, has paired its domestic process with an international one, using the United Nations and American allies to also designate individuals and organizations as subjects of global asset freezes<sup>196</sup> – it is worth considering the results of this new form of action by the Treasury Department so far.

It is unclear that any of the charities taken over by OFAC actually supported terrorism.<sup>197</sup> In no case have the charity “freezes” been followed by successful prosecutions for violating the criminal laws against terrorism – although one charity official pled guilty to providing nonmilitary goods to Chechen and Bosnian rebels, neither of which, of course, were responsible for the attacks of 9/11.

This is not surprising. As the 9/11 commission staff explained, the earlier designation of Al Qaeda and the Taliban in 1999 as “Foreign Terrorist Organizations” did not prevent the World Trade Center attack. As the Commission notes, “the sanctions were easily circumvented,” and it is surpassingly difficult to “find and seize the funds of a clandestine worldwide organization like al Qaeda.”<sup>198</sup>

To the extent that the regulations are effective at all, their effectiveness probably lies primarily in the sense that the government is doing something about terrorism when it freezes assets through the low-cost, lightly reviewed designation process.<sup>199</sup> Sanctions like those administered by OFAC “are frequently imposed to demonstrate political leadership or to claim the moral high ground for domestic or international political purposes.”<sup>200</sup> That process has also proven to be a surprisingly attractive means of obtaining international cooperation, in that the United Nations and American allies have also been willing to announce freezes of any assets of designated individuals located in their jurisdictions.<sup>201</sup>

<sup>196</sup> Testimony of Stuart A. Levey, Under Secretary, Terrorism and Financial Intelligence, U.S. Department of the Treasury Before the Senate Committee on Banking, and Urban Affairs, 872 PLI/Comm 587, 1165 (2004).

<sup>197</sup> As the 9/11 commission staff noted, “A senior government official who led the government’s efforts against terrorist financing from 9/11 until late 2003 believed the efforts against the charities were less than a full success and, in fact, were a disappointment because neither charity was publicly proved to support terrorism.” 9/11 COMMISSION MONOGRAPH at 111.

<sup>198</sup> 9/11 COMMISSION MONOGRAPH at 185.

<sup>199</sup> As Mariano-Florentino Cuellar has noted, “[e]xecutive officials ... may prefer to use their powers to create an impression of greater security, even in the absence of the capacity to impose substantial costs on the most troubling offenders, or to detect them” Mariano-Florentino Cuellar, *The Mismatch Between State Power and State Capacity in Transnational Law Enforcement*, Stan. L. School Pub. L. Working Paper No. 70 at 1 (November 2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=474662](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=474662).

<sup>200</sup> Peter L. Fitzgerald, *Managing “Smart Sanctions” Against Terrorism Wisely*, 36 NEW ENG. L. REV. 957, 961 (2002) (symposium issue).

<sup>201</sup> See Laura Donohue, *Anti-Terrorist Finance In The United Kingdom And United States* 27 MICH. J. INT’L L. 303, 426 (2006) (noting that a number of states have started designating individuals, along with the United Nations, and warning that “[t]he United States’ refusal to allow any sort of independent arbitration to accompany the creation of lists substantially weakened the UN attempt to build a dossier of dangerous individuals. Simultaneously, the lack of such a structure opens the door to abuse from other states.”).

Ironically, these internationally focused benefits, meager though they are, are the aspects of terrorism-financing regulation most closely related to OFAC's original mission.

*B. FinCEN and the High Cost of Searching for Money Launderers*

The government has tried to prevent criminals from laundering their ill-gotten gains for decades, and this anti-money laundering regime has always been administered by banking regulators in the Department of the Treasury. In this article, we have argued that civil administrative agencies usually fight the war on terror badly. Can this possibly be true for a government agency that has been running comparable civil investigations against criminals for decades?<sup>202</sup>

In our view, it is. While the regulation of banks to prevent money laundering is not a new administrative task, the post-9/11 regime illustrates the perils of the hasty expansion of regulation – a case of overreaction that has particularly exacerbated the problems of fit and overdiscretion that, along with the problem of inexpertise, typically characterize the results of sending bureaucrats to war. After 9/11, banking regulators have rushed into a scheme that substantially affects a set of proxies for terrorists – financial institutions – without any indication that the terrorists themselves have been affected.

1. The Regulatory Scheme, And How It Changed After 9/11

There was little that was secret about the Bank Secrecy Act of 1970, which was passed to prevent tax evaders and criminals from hiding or laundering their taxable or ill-gotten assets in federally regulated banks.<sup>203</sup> In the years that followed, banks and other federally regulated financial institutions were required to report to the Department of the Treasury on large or otherwise suspicious transactions.<sup>204</sup>

After 9/11, the BSA was amended by the Patriot Act to expand the reach of the criminal sanctions against money laundering,<sup>205</sup> to permit the

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<sup>202</sup> As some observers have claimed, “economic sanctions are frequently the government's first and principal tool to deal with international terrorism.” Jonathan Grebinar, *Responding To Terrorism: How Must A Democracy Do It? A Comparison Of Israeli And American Law*, 31 *FORDHAM URB. L.J.* 261, 280 (2003).

<sup>203</sup> 31 U.S.C. § 5311 et. seq. See *Cal. Bankers Ass'n. v. Shultz*, 416 U.S. 21, 26-30 (1974) (discussing these and the other concerns Congress tried to address in the BSA).

<sup>204</sup> For a description of FinCEN in the pre-9/11 era, see Steven A. Bercu, *Toward Universal Surveillance in an Information Age Economy*, 34 *Jurimetrics J.* 383, 386-400 (1994).

<sup>205</sup> Among other things, it expanded the number of predicate penalties for a money laundering charge, section 1956, and it criminalized the transportation of bulk cash, section, 31 USC 53, and it made the operation of an unlicensed money transfer business a general, rather than a specific, intent crime. 18 U.S.C. § 1960. It added the provision of monetary support to the list of crimes under the antiterrorism act.

Treasury Department to pursue civil penalties against alleged launderers,<sup>206</sup> and - most notably - to increase the reporting requirements on, and broaden the definition of, financial institutions subject to the requirements of the act.<sup>207</sup> Congressional leaders and executive officials claimed that these new laws were designed to stem the flow of money to terrorists.<sup>208</sup>

The result has been a repurposing of the part of the Treasury Department that implements the money laundering regulations. The Financial Crimes Enforcement Network, or FinCEN, has been transformed from an office that tracked the financial transactions of criminals into one that looks, in principal part, for similar transactions by terrorists.<sup>209</sup>

FinCEN implements this new regulatory mandate by scrutinizing the reports and recordkeeping of banks and other financial institutions.<sup>210</sup> In theory, it looks for a financial trail that will lead investigators and prosecutors to terrorists.<sup>211</sup> But in practice, much of what the agency does involves the policing of the report-filing programs of the financial

<sup>206</sup> See *id.* § 1956(b). Under this the statute, any person who engages or attempts to engage in a transaction involving more than \$10,000 in criminally derived proceeds may be held civilly liable for the value of the proceeds or \$10,000, whichever is greater. The statute contains a long-arm jurisdiction provision, via which, A foreign "person" is now subject to jurisdiction for a forfeiture action, as long as personal service can be effected and one of the following conditions is met: (1) the money laundering offense involved a financial transaction that occurred in whole or part in the U.S.; (2) the foreign person (including a foreign bank) converts property in which the U.S. has an interest by virtue of a forfeiture order of a U.S. court; or (3) the foreign person is a financial institution that maintains a bank account at a financial institution in the U.S. 18 U.S.C. § 1956

<sup>207</sup> For an exhaustive discussion of these new requires, see Robert W. Helm & Kevin K. Babikian, *Creating, Managing And Distributing Offshore Investment Products: A Legal Perspective*, 1471 PLI/CORP 715, 964 (2005) ("The USA PATRIOT Act required the Treasury Department to extend CTR reporting requirements under the BSA to all trades and businesses -- not just financial institutions."). The statute also permits federal authorities to share information with financial institutions about the potential targets of investigation. See 67 Fe. Reg. 60, 579 (Sep. 26, 2002) (setting forth the implementing regulations for this process). FinCEN reports that it has processed 167 such requests for information by federal agencies between February 1, 203 and December 6, 2005. FinCEN, FinCEN's 3143(a) Fact Sheet 3, <http://www.fincen.gov/314factsheet.pdf> (Dec. 6, 2005).

<sup>208</sup> See *The Financial War on Terrorism and the Administration's Implementation of the Anti-Money Laundering Provisions of the USA Patriot Act*, Hearings Before Comm. on Banking, Hous. and Urban Affairs, 107th Cong., 2d Sess. (2002) (statement of Senator Paul Sarbanes) ("The U.S. must lead both by example and by promoting concerted international action. Our goal must be not only to apprehend particular individuals, but to cut off the pathways in the international financial system along with terrorist and other criminal money moves"), at [http://banking.senate.gov/02\\_01hr/012902/sarbanes.htm](http://banking.senate.gov/02_01hr/012902/sarbanes.htm); *id.* (statement of Representative John J. LaFalce) ("[T]he Treasury Secretary's new, more flexible anti-money laundering powers will enable law enforcement to tackle with much more effectiveness abuses of our financial system by terrorists and criminals"), at [http://banking.senate.gov/02\\_01hr/012902/lafalce.htm](http://banking.senate.gov/02_01hr/012902/lafalce.htm); *id.* (statement of Michael Chertoff, Assistant Attorney General, Criminal Division, Department of Justice) ("Title III of the PATRIOT Act has provided law enforcement with important new authority to investigate and prosecute the financing of crime, including terrorism."), at [http://banking.senate.gov/02\\_01hr/012902/chertoff.htm](http://banking.senate.gov/02_01hr/012902/chertoff.htm). For more background, and credit for the links, see U.S. v. Wray, 2002 WL 31628435, \*2 n.5 (D.Virgin Islands).

<sup>209</sup> Treasury Order No. 105-08. In May 1994, its mission was broadened to include regulatory responsibilities. For more views on money laundering, see Bruce Zaragis, *Selected Symposium Remarks "Financial Aspects of the War on Terror": March 18, 2002: The Merging of the Counter-Terrorism and Anti-Money Laundering Schemes*, 34 LAW & POL'Y INT'L BUS. 45 (2002); see also Michael P. Malloy, *Unfunding Terror - Perspectives on Unfunding Terror*, 17 TRANSNAT'L LAW. 97 (2004).

<sup>210</sup> In this regard, FinCEN's work is concentrated on combining information reported under the BSA with other government and public information. This information is then turned over to law enforcement officials, with the idea being that they can then build money laundering cases with what they get.

<sup>211</sup> FinCEN declares that its mission includes "Supporting law enforcement, intelligence, and regulatory agencies through sharing and analysis of financial intelligence." FinCEN, *Mission Statement*, [http://www.fincen.gov/af\\_mission.html](http://www.fincen.gov/af_mission.html) (emphasis in original).

institutions covered by the BSA and Patriot Act.

Because the new regulatory regime substantially expanded the number of institutions subject to the money laundering reporting requirements, tracking the reporting is a big job. The Patriot Act and its implementing regulations expanded the number of financial institutions subject to reporting requirements, for the first time covering credit unions, futures commission merchants, commodity trading advisors, commodity pool operators, and informal or unlicensed transmitters of money.<sup>212</sup> That last category means that BSA reporting requirements now apply to pawnbrokers, loan circles, hawallas, and, possibly, any other person who loans money to someone else.<sup>213</sup> Loan and finance companies are also expressly covered.<sup>214</sup> Moreover, the statute gave authority to the Treasury Department to further expand the types of institutions covered by the reporting requirements.

Those subject to the act's reach must file Suspicious Activity Reports with the Department of the Treasury.<sup>215</sup> Also, all financial institutions must establish anti-money laundering programs, including, as one Department of Justice attorney has explained, "at a minimum, the development of internal policies, procedures, and controls; the designation of a compliance officer; an ongoing employee training program; and an independent audit function to test programs."<sup>216</sup>

The Treasury Department has also issued specific minimum standard "know your customer" regulations, pursuant to the Patriot Act. These regulations require financial institutions to make "reasonable and practical" efforts to verify new customers; maintain records of the information used to verify them; and consult the lists of terrorists promulgated by OFAC.<sup>217</sup> Nor are these the only requirements that

<sup>212</sup> 31 U.S.C. § 5312(a)(2), (c) (2003).

<sup>213</sup> The Act explicitly applies to "underground banking systems," which it defines as "a business in the transmission of funds, including any person who engages as a business in an informal money transfer system or any network of people who engage in a business in facilitating the transfer of money ... outside the conventional financial institutions system." 31 U.S.C. § 5318

<sup>214</sup> 31 U.S.C. § 5312(a)(2), (c); Jeffrey P. Taft & Christina A. LaVera, *The Changing Landscape Of Federal Money Laundering Laws: An Overview Of The USA Patriot Act And Related Developments*, 57 CONSUMER FIN. L.Q. REP. 109, 111. (2003) (describing the implementation of this provision of the statute).

<sup>215</sup> The Treasury Department has the authority to define financial institutions pursuant to 31 U.S.C. § 5312, which includes its own broad definition of the term. The statute itself provides that "each financial institution shall establish anti-money laundering programs, including, at a minimum-

(A) the development of internal policies, procedures, and controls;

(B) the designation of a compliance officer,

(C) an ongoing employee training program; and

(D) an independent audit function to test programs.

31 U.S.C. § 5318(h).

<sup>216</sup> Lester Joseph, *Anti-Money Laundering Update*, 1378 PLI/Corp 627, 633 (2002).

<sup>217</sup> 31 U.S.C. § 5318(h). For more on the Customer Identification Program, see Jeffrey P. Taft & Christina A. LaVera, *The Changing Landscape Of Federal Money Laundering Laws: An Overview Of The USA Patriot Act And Related Developments*, 57 CONSUMER FIN. L.Q. REP. 109, 111. (2003).

FinCEN has imposed on banks since the promulgation of the Patriot Act.<sup>218</sup>

Complying with FinCEN's regulatory regime, as was the case with OFAC's, is an involved process – one involved enough to warrant the development of a cottage industry of compliance consultants, who offer software systems to track transactions, outside training sessions, and a range of experts who can advise covered financial institutions as to what they must do to meet the Treasury Department's standards.<sup>219</sup> U.S. banks spent about \$125 million in 2003, and the same again in 2004, to comply with FinCEN's regulatory scheme.<sup>220</sup>

## 2. Fit

But all of this civil regulation has done little to affect the fundamentally non-civil nature of terrorism. We have used the term “fit” to show how the characteristic form of civil rules – broadly applicably and dependent upon voluntary compliance – are ill-suited for counter-terrorism. FinCEN's counter-terrorism regime exemplifies the problems of fit, because it has not done much good. There is little evidence that the new administrative regime has affected much of the money laundered:<sup>221</sup> federal convictions for money laundering have not increased,<sup>222</sup> and investigations have a failure rate of 99.5%.<sup>223</sup>

As with OFAC's freezes, none of this is at all surprising. The 9/11 commission staff concluded that “al Qaeda probably did not use the formal financial system to store or transfer funds internally after Bin Ladin moved to Afghanistan.”<sup>224</sup> And Christina Jackson has observed that “enforcement systems designed to unearth the large scale transfers used by money launderers are not as adept at identifying the small routine transactions of

<sup>218</sup> For example, financial institutions are also now required to file Currency Trading Forms reporting transactions “relating to coins and currency received” as well. See William J. Sweet, Jr., Saul M. Pilchen, & Stacie E. McGinn, *Summary Of The USA Patriot Act Of 2001 Anti-Money Laundering Provisions*, 1289 PLI/CORP 55, 67 (2002). On November 3, 2005, pursuant to Section 356 of the USA PATRIOT Act, FinCEN issued regulations requiring insurance companies to establish and implement anti-money laundering compliance programs, and requiring insurance companies to file suspicious activity reports (SARs). [http://www.nasd.com/web/idcplg?IdcService=SS\\_GET\\_PAGE&nodeId=646](http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&nodeId=646); see also <http://www.fincen.gov/newsrelease10312005.pdf>. The Treasury Department can also add to these reporting requirements in the cases where it is particularly suspicious of a pattern of overseas money laundering. In such cases, it can order domestic financial institutions to take “special measures,” imposing additional tracking requirements to the paper generated by these suspicious accounts.

<sup>219</sup> For a description of this process, see *supra* notes \_\_\_ and accompanying text.

<sup>220</sup> Karen Epper Hoffman, *AML Security Emphasizes Detection and Prevention*, Jan. 13, 2005 Banking Strategies Blog, <http://www.bai.org/cs/blogs/bankingstrategiesnews/archive/2005/01/13/505.aspx>.

<sup>221</sup> Daniel J. Mitchell, *The Anti-Terrorist Financing Guidelines: The Impact on International Philanthropy: A Symposium Held at Pace University School of Law December 3, 2004: Fighting Terror and Defending Freedom: The Role of Cost-Benefit Analysis*, 25 PACE L. REV. 219, 222-23 (2005) (symposium issue).

<sup>222</sup> See *id.* at 223.

<sup>223</sup> See *id.*

<sup>224</sup> 9/11 COMMISSION MONOGRAPH at 25.





terrorist cells.”<sup>225</sup>

The likelihood that any particular reporting requirement will help to catch a terrorist is very low. As the 9/11 commission staff explained, “For terrorist financial transactions, the amount of money is often small or consistent with the customer’s profile (such as a charity raising money for humanitarian aid) and the transactions seemingly innocuous. As a consequence, banks generally are unable to separate suspicious from legitimate transactions.”<sup>226</sup>

### 3. Overdiscretion

The radical expansion of FinCEN’s administrative scheme has created new opportunities for the agency to impose penalties on financial institutions that have failed to meet every jot and tittle of the new requirements. It is here that the new discretion afforded an agency overseeing a much bigger regulatory scheme becomes most obvious.

FinCEN has, since 9/11, imposed a staggering number of fines on banks for failing to meet its reporting requirements. Moreover, those fines have been extraordinarily large.<sup>227</sup> ABN-AMRO, a large European bank, has been hit with a \$30 million fine (and more from state regulators).<sup>228</sup> Western Union has also been hit with a \$30 million fine for its record keeping failures.<sup>229</sup> And the Department of Justice has brought criminal prosecutions for anti-money laundering violations that resulted in a \$50 million civil monetary penalty against AmSouth, and a criminal fine and civil monetary penalty against Riggs Bank that, amounting to a total of \$43 million, put the bank out of business.<sup>230</sup>

<sup>225</sup> Christina Jackson, *Combating the New Generation of Money Laundering*, 4 J. HIGH TECH. L. 139, 143 (2004).

<sup>226</sup> 9/11 COMMISSION MONOGRAPH at 52. Observers agree: “[s]ome kinds of criminal financial activity - whether impelled by intrinsic objectives or a craving for profits - will remain extraordinarily difficult to deter, because of offenders’ motivations and their ability to substitute among different types of transactions.” Mariano-Florentino Cuellar, *The Mismatch Between State Power and State Capacity in Transnational Law Enforcement*, Stan. L. School Pub. L. Working Paper No. 70 at 1 (November 2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=474662](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=474662).

<sup>227</sup> For a list of these fines, not all of which, of course, were related to terrorism, but a great number of which were related to recordkeeping, see <http://www.aquilan.com/documents/Recent%20FinCEN%20Actions.pdf#search=%22fincen%20fines%22>. See generally, Aaron R. Hutman, Matthew J. Herrington, Edward J. Krauland, *Money Laundering Enforcement and Policy*, 39 Int’l Law. 649 (2005) (noting significant enforcement actions).

<sup>228</sup> <http://www.federalreserve.gov/boarddocs/press/enforcement/2005/20051219/121905attachment3.pdf>, <http://www.federalreserve.gov/boarddocs/press/enforcement/2005/20051219/121905attachment2.pdf>

<sup>229</sup> See [http://www.fincen.gov/western\\_union\\_assessment.pdf#search=%22fincen%20fines%20western%20union%22](http://www.fincen.gov/western_union_assessment.pdf#search=%22fincen%20fines%20western%20union%22).

<sup>230</sup> See generally, John Mooney, *The Hazards of Enforcing Guidance*, 31 ADMIN. L. & REG. NEWS 2, 2 (Winter, 2006). On AmSouth, FinCEN’s assessment of civil monetary penalty may be found at <http://sec.edgar-online.com/2004/10/12/0000891836-04-000358/Section9.asp> (finding, among other things, that “AmSouth failed to develop an anti-money laundering program tailored to the risks of its business and reasonably designed, as required by law, to prevent the Bank from being used to launder money and finance terrorist activities and to ensure compliance with the Bank Secrecy Act.”). The government’s 2005 Money Laundering Threat Assessment

The regulatory industry, as one might imagine, has found the increased level of fines to be troubling. It has accused FinCEN of assessing the fines randomly and unpredictably, and has sought more guidance from the agency on how it decides to assess fines and why it makes them so large.<sup>231</sup> As with OFAC, though, FinCEN has not been eager to limit its discretion to fine as it wishes.<sup>232</sup>

#### 4. Inexpertise

Although the Treasury Department has tried to prevent money laundering for some time, we see two ways in which the new anti-terrorism scheme has failed to make use of that expertise – even apart from the question as to whether trying to prevent terrorists from laundering money makes sense as a civil administrative scheme at all.

First, it is by no means clear that the government can handle all of this new data. The result of the recent intensification of the reporting regime has been a Treasury Department overwhelmed with paper. Some 12 million reports are filed on transactions over \$10,000 every year.<sup>233</sup> As of June 30, 2005, over 2.6 million Suspicious Activity Report forms had been filed with FinCEN.<sup>234</sup> The suspicious activity reports that are the focus of the post-Patriot Act regime have also exploded in number: filings in the first six months of 2005 increased 45% over filings during the same period of 2004 for depository institutions alone.<sup>235</sup> The volume of SAR filings in 2003 was 453% higher than those filed in 1996.<sup>236</sup> As the chair of the American Bankers Association testified to Congress, banks filed 43,000

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reported that Riggs was fined for “Riggs National Bank was fined over forty million dollars as a consequence of serious deficiencies in its AML program, including in its private banking practice” including loans to “politically exposed persons, accepting millions of dollars in deposits under various corporate and individual account names and paying little or no attention to suspicious activity in these accounts.” Money Laundering Working Group, 2005 Money Laundering Threat Assessment, 14 (2005) (available at [http://www.ustreas.gov/press/releases/reports/js3077\\_01112005\\_MLTA.pdf](http://www.ustreas.gov/press/releases/reports/js3077_01112005_MLTA.pdf)) See also Timothy O'Brien, "Regulators Fine Riggs \$25 Million," *New York Times*, May 14, 2004, available at <http://www.heraldtribune.com/apps/pbcs.dll/article?AID=/20040514/ZNYT01/405140301>. (“The fine stems from Riggs's failure over at least the last two years to actively monitor suspect financial transfers through Saudi Arabian and Equatorial Guinean accounts held by the bank. The accounts are still being scrutinized as possible conduits for terrorist funds or for the proceeds of graft.”).

<sup>231</sup> Byrne, *supra* note \_\_.

<sup>232</sup> See *supra* notes \_\_ and accompanying text.

<sup>233</sup> American Community Banking Association, Comment, Request for Burden Reduction Recommendations; Money Laundering, Safety and Soundness, and Securities Rules; Economic Growth and Regulatory Paperwork Reduction Act of 1996 Review, 70 Fed. Reg. 5571 (February 3, 2005), [http://www.americascommunitybankers.com/government/scripts/government\\_view\\_comment.asp?ID=1142](http://www.americascommunitybankers.com/government/scripts/government_view_comment.asp?ID=1142), (“financial institutions have filed over 12 million CTRs each year since 1995”)

<sup>234</sup> FinCEN, *Industry Forum: An Overview of Suspicious Activity Report (SAR) Training Elements in 2005*, 1 (Feb. 2006), available at [http://www.fincen.gov/sars/sars\\_by\\_numbr\\_issue5.pdf](http://www.fincen.gov/sars/sars_by_numbr_issue5.pdf).

<sup>235</sup> FinCEN, *Industry Forum: An Overview of Suspicious Activity Report (SAR) Training Elements in 2005*, 2 (Feb. 2006), available at [http://www.fincen.gov/sars/sars\\_by\\_numbr\\_issue5.pdf](http://www.fincen.gov/sars/sars_by_numbr_issue5.pdf).

<sup>236</sup> The SAR Activity Review: By the Numbers, Issue 2, at 1 (May 2004), available at <http://www.fincen.gov/bythenumbersissue2.pdf>.

such reports per month with OFAC in 2005 – and that was a 40% increase over the prior year.<sup>237</sup> There is no indication that FinCEN, even a FinCEN that has expanded precipitously since 9/11, knows how to manage all of these reports.<sup>238</sup> In fact, the former director of FinCEN complained in 2004 that too many of these SARs were being filed by banks.<sup>239</sup> The haphazard nature of the fines that FinCEN has imposed has led some observers to question whether the agency has a policy in place to sort through each of the reports.

Second, the broad scope of the new regulations suggests not an agency applying old skills to new areas, but an agency that may be engaged in regulatory empire-building. Some observers have concluded that the complexity, detail, and public-private nature of the regulatory scheme – FinCEN has not only imposed a broad new laundry list of reporting requirements on financial institutions after 9/11, but has also "encourage[d] further cooperation" among financial institutions in preventing terrorists from laundering funds – is expanding FinCEN's reach beyond its traditional regulatory purview.<sup>240</sup>

Finally, it is worth briefly noting that some observers question the enterprise of tasking financiers with anti-terrorism responsibilities – a job in which the regulateds are as inexperienced as the regulators. As Larry Cunningham has noted, there is "reason to doubt whether the tools auditors apply to old-fashioned financial statement audits work as well when applied in" non-traditional exercises such as "thwart[ing] terrorist financing."<sup>241</sup>

## 5. Impact On Proxies

The new administrative procedures designed to combat money laundering are extraordinarily overbroad – because they ask almost any

<sup>237</sup> Testimony of John Byrne, Chairman, American Bankers Ass'n, before the House Banking Ctte, May 4, 2005, <http://www.aba.com/NR/rdonlyres/CDA74BEE-3E41-42D4-B7E0-C32E94B32D07/39275/AMLTestimonyJBMay2005.pdf>

<sup>238</sup> As one banker has wondered: "We've got all of this data; how much actually led to something? That's a question all of us have. After all this effort and all these resources, what success have we had?" Annie Baxter, *Personal Information Becomes Post-9/11 Target*, Sept. 6, 2006 Marketplace, available at <http://marketplace.publicradio.org/shows/2006/09/08/PM200609086.html> (quoting Bill Patient BankCherokee of Minnesota's compliance officer).

<sup>239</sup> See Hutman, *supra* note ?? at 654.

<sup>240</sup> Mariano-Florentino Cuéllar, *Notice, Comment, And The Regulatory State: A Case Study From The Usa Patriot Act*, 28 ADMIN. & REG. L. NEWS 3, 3 (Summer, 2003) As Florentino-Cuellar observed elsewhere, "the rule is one that applies to virtually anyone in the country, ... and ... the statute gives the agency a lot of latitude with the rule." Mariano-Florentino Cuéllar, *The Mismatch Between State Power And State Capacity In Transnational Law Enforcement*, 22 BERKELEY J. INT'L L. 15, 32 (2004). In fact, the new regulations selected by the agency, are designed, in his view, to facilitate financial institutions disclosures to the Treasury Department the accounts of people suspected of being involved in money laundering and terrorist financing. See 67 Fed. Reg. 60,579 (Sept. 26, 2002).

<sup>241</sup> Lawrence A. Cunningham, *The Appeal And Limits Of Internal Controls To Fight Fra Ud, Terrorism, Other Ills* 29 J. CORP. L. 267, 271 (2004).

money-related business to implement a complex reporting scheme on almost all of the money it sees. In doing so, we see the problems of using civil administrative process – which is best suited for broad rules of general applicability – to root out terrorists uninterested in accepting the benefits of regulation and participating in an administrative scheme.

The reporting requirements take millions of hours of bank employee time to comply with the regulations – in addition to further hours on the part of government officials to go through the money laundering reports that are filed. The question, as always, remains whether the new regulations are really likely to deter terrorists, and so are worth the costs. A KMPG survey reveals that 94% of North American banks reported increased costs in complying with FinCEN's rules, with one-third of respondents indicating their costs have more than doubled over the last three years.<sup>242</sup>

More generally, banking industry representatives have complained that compliance with these programs is supervised idiosyncratically and differently among different banking regulators,<sup>243</sup> and that the multiple regulators involved in the process make for a complex regulatory regime.<sup>244</sup>

All of this is a substantial burden on financial institutions, affecting their information systems, employee training, and strategic planning for the future, and even possible mergers and acquisitions.

## 6. Conclusion

The question, then, is whether it makes sense to use a civil scheme that regulates financial institutions that volunteer to be under federal control to track possible customers of those institutions who have no interest in furthering the federal regulatory scheme. The search for the needle in the

<sup>242</sup> Karen Epper Hoffman, *AML Security Emphasizes Detection and Prevention*, Jan. 13, 2005 Banking Strategies Blog, <http://www.bai.org/cs/blogs/bankingstrategiesnews/archive/2005/01/13/505.aspx>.

<sup>243</sup> Testimony of John Byrne, Chairman, American Bankers Ass'n, before the House Banking Ctte, May 4, 2005, <http://www.aba.com/NR/rdonlyres/CDA74BEE-3E41-42D4-B7E0-C32E94B32D07/39275/AMLTestimonyJBMay2005.pdf> pp2-3. One banker has estimated that implementing the new know-your-customer rules consume 40% of his time. See Annie Baxter, *Personal Information Becomes Post-9/11 Target*, Sept. 6, 2006 Marketplace, available at <http://marketplace.publicradio.org/shows/2006/09/08/PM200609086.html> (quoting Bill Patient BankCherokee of Minnesota's compliance officer).

<sup>244</sup> It's not just FinCEN involved in this new regulatory process. The federal banking regulators (principally the Federal Reserve, OCC – itself technically a part of Treasury – and FDIC), have imposed reporting requirements on their regulated industries pursuant to the Patriot Act, as has the SEC, NYSE, and NASD. Per the stock exchanges, all broker/dealers must implement an anti-money laundering compliance program and must file suspicious activity reports (SARs), which identify and describe transactions that raise suspicions of illegal activity, and to establish certain procedures with regard to "correspondent accounts" maintained for foreign banks. See Joseph, *supra* note \_\_, at 661.

As for the banking regulators, nothing less than the abilities of financial institutions to merge is at stake. The Patriot Act requires federal banking regulators to consider "the effectiveness of the" bank or thrift "in combating money laundering activities, including in overseas branches" when the bank or thrift seeks to merge with another financial institution. bank holding company act; bank something act. "the effectiveness of any insured depository institution involved in the proposed merger transaction in combating money laundering activities, including in overseas branches" in connection with any bank or thrift merger.

haystack here is a very costly one, and we think that looking to civil officials to handle this massive effort to smoke out terrorists – who do not participate in high finance at any rate – illustrates the damage that can be inflicted on a regulated industry by expanding the scope of regulation to try to reach the sort of people who don't want to be regulate or two participate in a regulatory scheme.

#### IV. QUALIFICATIONS TO THE ANALYSIS

We now turn to a number of potential objections to our analysis: (A) that our blanket condemnation of civil administrative counter-terrorism would preclude some efficient and effective rules from being enacted – the locked cockpit door rule objection; (B) that the substantial costs imposed by terrorist incidents make it worth mobilizing the administrative state even if that state is usually ineffective at identifying terrorists – the 1% problem; (C) that our claims about fit do not accurately characterize everything the administrative state does – the organizational flexibility objection; and (D), that one twofold advantage of generally applicable rules is that they reduce the risk of racial profiling or other undesirable narrowcasting of counterterrorism efforts, while engaging the many in a large government enterprise – the victory garden objection.

##### A. The Locked Cockpit Door Objection

It is probably the case that among the vast variety of actions that the civil administrative state might take, some might principally deter terrorists, and possibly do so effectively.

Our claim is not that it never makes sense to use the civil bureaucracy to combat terror – just that it almost never makes sense. We acknowledge, for example, the Federal Aviation Administration's rule requiring airlines to lock their cockpit doors so that passengers could not get in during flight. The Aviation and Transportation Security Act, passed shortly after 9/11, authorized the FAA to require reinforced, locked cockpit doors during flight on both domestic and international flights.<sup>245</sup> The agency duly passed a rule requiring the locked doors, noting that it was being enacted "in the wake of the September 11, 2001, terrorist attacks against four U.S. commercial airplanes."<sup>246</sup>

The FAA rule was one of general applicability, civil in nature, and

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<sup>245</sup> See Pub. L. 107-71; 115 Stat. 597. Section 104 of that Act required the administrator of the agency to regulate access to cockpits – if it was not already apparent that the agency had such authority from its broad powers to regulate the airplane industry to ensure flight safety.

<sup>246</sup> Flightcrew Compartment Access and Door Designs 67 Fed. Reg. 2112, 2112 (Jan 15, 2002).



may be a good idea. Locked cabin doors might, many have surmised, have prevented 9/11 from happening.<sup>247</sup> to prove the rule we propose, for this is an example of agency action that can pass our three tests of fit, balance between discretion and oversight, and expertise.

Here, rather than targeting a proxy group, this rule directly targets terrorists, who must be among the few who would attempt to illicitly open a cockpit door during flight. Rather than requiring the FAA to do something outside its area of expertise and beyond its ordinary goals and mandate, this rule called on the FAA to act within its expertise in overseeing airline standards and plane safety. The question of oversight and discretion in this case is admittedly an open one, as the FAA may delegate inspection and confirmation duties to low level bureaucrats, and may or may not provide adequate oversight of these duties. We do concede that it may be possible to conceive of examples where civil administrative regulations can be designed to remedy the problems of fit, overdeference, and inexpertise, and where the burden on the public at large— here, a burden on airlines to install locks and ensure that they are used – might be worth the cost of deterrence.

When this is the case, we are all for it. However, we do not think that there will be many examples of this sort of judicious use of civil administrative agencies. Our claim is a descriptive one, and thus may be tested empirically. Comprehensively doing so is beyond the scope of this article, but we think that evaluations of every aspect of the civil bureaucracy's counter-terrorism initiatives would reveal that the vast majority of them don't work – and we have offered a theory about why that might be the case.

## B The 1% problem

The vice president has suggested that the calamitous, if remote, risk of a major terrorist attack justifies high investments in the war on terror.<sup>248</sup> Some call this the 1% doctrine,<sup>249</sup> and the idea for our purposes is that the one in 100 risk of attack justifies the mobilization of civil administrative agencies to combat terrorism, and the imposition of substantial burdens on non-terrorists, because it is possible that this mobilization will prevent

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<sup>247</sup> See, e.g., Brian R. Wahlquist, *Slamming The Door On Terrorists And The Drug Trade While Increasing Legal Immigration: Temporary Deployment Of The United States Military At The Borders* 19 GEO. IMMIGR. L.J. 551, 582 (2005) (“despite multiple hijackings of commercial airliners over the past few decades, little was done to reinforce cockpit doors until after September 11”).

<sup>248</sup> The vice president identified this problem in “November of 2001 when the vice president is confronted with harrowing intelligence about Pakistani nuclear scientists sitting with (Osama) bin Laden ... The vice president says that we need to think about these low-probability, high-impact events in a different way ... [that] If there is a one percent chance that WMDs essentially have been given to terrorists, we need to treat it as a certainty.” Bill Glauber, *Q&A: Suskind on how analysis and action split*, 7/16/06 Milwaukee Journal & Sentinel at 1 (quoting Ron Suskind).

<sup>249</sup> RON SUSKIND, *THE ONE PERCENT DOCTRINE* (2006) (documenting this policy of the administration).



calamity.

It is of course possible to imagine a terrorist strike so horrific that almost any cost is worth paying to prevent it – so long, of course, as paying that cost will actually prevent the attack. But it is not at all clear that using the civil bureaucracy to lead the fight against terrorists will prevent future attacks or even measurably reduce the risk of attack, based on what we've seen so far. The false positives have been high, the expenses great, and the inefficiencies many. (The balance of effectiveness and efficiencies in the non-civil law enforcement context may be different, and we do not pretend to assess those costs here.) But the 1% argument assumes that the government's bureaucratic counter-terrorism initiatives will in fact be effective in preventing, or at least reducing the risk of, terrorism. And that is exactly the point that we contest.

By the same token, a 1% assessment of the spectre of a terrorist attack in the United States seems far out of proportion to the frequency of the attacks that the country has actually experienced. Of course, this forecasting problem is one that may also be tested empirically, and we do not claim to do so in this paper. We would have hoped that our government, in making this argument in defense of its initiatives, would have felt compelled itself to provide some data in support of such sweeping claims. But in the absence of any evidence about the likelihood of future attacks, we think that while the specter of a terrorist attack may loom large, it is hardly an everyday occurrence. In such a setting, it is unlikely that the civil costs incurred by the repurposing of agencies towards terror-fight are worth it.

### C Agencies Can Do Anything

We have characterized civil administration as a form of governance best suited to rules of general applicability and the regulation of volunteers. In doing so, we admit that we are painting with a broad brush; we make no claim that there is a Platonic ideal of an agency, and that it necessarily involves rulemakings and adjudications of volunteers. It may be that at least some agencies can flexibly be reformed to handle atypical or idiosyncratic regulatory problems.<sup>250</sup> The problem is that they are not being so reformed, as exemplified by the examples we have given here. As with the cockpit door objection, our response to the organizational flexibility argument is twofold.

First, here too, we willingly qualify our claim: agencies almost

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<sup>250</sup> For one approach on how this might be done, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998)

never, rather than never ever, are good at fighting terrorism. We will not rule out the possibility that our civil bureaucratic agencies can be efficiently and successfully reformed to perform new terrorism-related tasks outside their areas of expertise – although we think that will only very rarely be the case.

But, as with the cockpit door objections, in the rare cases that agencies can be efficiently reformed to perform counter-terrorism related tasks in a way that will meet our three tests of fit, balance between discretion and oversight, and expertise, we are all for it. Here, we would suggest that perhaps the crucial test is that of expertise. Lawmakers might be able to find ways to enable a given civil agency to target terrorists rather than proxy groups and to strike an adequate balance between discretion and oversight. But for most counter-terrorist tasks, expertise will be more readily found in agencies and amongst officials that deal with criminal matters or law enforcement, such as intelligence analysts and criminal investigators, rather than amongst bureaucratic officials such as bank regulators and DMV employees, with their expertise in civil matters. Here, as with the other objections, if we take the importance of expertise, fit, and adequate supervision seriously, we suspect that only a very few proposed reforms, however well intentioned, will meet these tests.

#### D The Victory Garden Problem

The imposition of burdens on everyone in the war on terror is not wholly without appeal. Making all Americans suffer a bit more when they renew their drivers' licenses may help to unify the country behind an antiterrorism policy, and reassure a worried public that something tangible is being done to prevent terrorism.<sup>251</sup> It may activate a populace in the same way that victory gardens<sup>252</sup> and war bonds<sup>253</sup> have done in wars past – by convincing everyone that their subjection to administrative process at least means that they are doing their bit. Moreover, spreading the costs around reduces the likelihood of a particularly ugly cost of targeted counterterrorism: racial profiling.

We find the victory garden upside of sending the administrative state to war to be un compelling. The psychological advantage of appearing to having done something, however ineffective, is not at all clear. As anyone who has ever chatted with their neighbor in an airport security line

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<sup>251</sup> See *supra* notes ?? and accompanying text.

<sup>252</sup> For an overview see LEWIS A ERENBERG, THE WAR IN AMERICAN CULTURE: SOCIETY AND CONSCIOUSNESS DURING WORLD WAR II 17 (1996).

<sup>253</sup> See, e.g., ANTHONY CRESCENZI, THE STRATEGIC BOND INVESTOR 18 (2002) (“War bonds were crucial not only for the role they played in financing the war but also in the way they unified the nation. The sale of war bonds became a rallying cry.”).



can attest, the American public is not so stupid as to be unable to distinguish potentially useful from hopelessly ineffective security measures, and it gets little satisfaction from participation in the latter. Victory garden proponents will look hard, in our view, to find any evidence that levels of American patriotism have received a boost from longer DMV lines.

Moreover, the pretense of effective action that a civil administrative war on terror or a well-tended victory garden represents is surely open to abuse. Actions that do nothing to win a war may crowd out other actions that might work. And at any rate, the real costs imposed on proxies like financial institutions, charities, or people who would like to obtain asylum or drivers' licenses, in our view, exceed the intangible benefits of making people feel like something is being done.

The risks of profiling in a more targeted war against terror are real,<sup>254</sup> but again, as many have observed, efforts to avoid profiling can tend to the absurd. Reversing the efforts of grandmothers who hope to obtain drivers' licenses but lack adequate proof of residence or citizenship imposes real costs on a great number of people – far more people than even the most pessimistic estimates of the numbers of terrorists seeking drivers' licenses could possibly envision. In the end, we think the match of criminal-style law enforcement efforts to deal with the criminal-like law evading efforts of potential terrorists better uses the potential of government action (and promises the test of criminal process at the end of the government action) than does the imposition of broad costs on everyone in the name of getting unconventional terrorists fighters in the bureaucracy mobilized.

## CONCLUSION

Administrative agencies like the Treasury Department have been unfit, inexperienced, and unsupervised in their efforts to detect and deter terrorists under the PATRIOT Act, and the new measures introduced by the REAL ID Act are likely only to make matters worse by pushing more of our unrelated civil agencies into the fray. Indeed, the agencies we study in detail are hardly alone in developing expensive new antiterrorism policies. The FDA, for example, has joined them.<sup>255</sup> It is, according to a

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<sup>254</sup> See, e.g., Richard Banks, Essay, *Racial Profiling And Antiterrorism Efforts*, 89 CORNELL L. REV. 1201, 1201 (2003) (observing that “commentators continue to debate the fairness of the widespread detention, deportation, and prosecution of Arabs and Muslims for non-terrorism related offenses. That debate has focused partly on the issue of racial profiling”).

<sup>255</sup> Andrea Meyerhoff, Counter-terrorism at FDA, at <http://www.fda.gov/ohrms/dockets/ac/02/slides/3902s1-04-meyerhoff/> (Oct. 29, 2002). See

<http://www.fda.gov/oc/opacom/hottopics/bioterrorism.html> (last visited Feb. 21, 2006). See generally, Otesa Middleton, *FDA Grows to Counter Challenges of Terrorism*, WALL ST. J., Sept. 11, 2002, available at <http://www.ph.ucla.edu/epi/bioter/fdagrows.html> (“Since last year’s terror and anthrax attacks, the Food and Drug Administration’s staff has swelled to record levels ... [including] a staff of 10,389, a 10% increase”); James T. O’Reilly, *Bombing Bureaucratic Complacency: Effects of Counter-Terrorism Pressures Upon Medical Product*

commissioner, “applying ... more resources to counterterrorism in all areas of the agency,”<sup>256</sup> including the development of a new “Project BioShield”<sup>257</sup> and the fast-tracking of an antiterrorism vaccine approval process.<sup>258</sup>

OSHA advises employers on how best to defend against chemical,<sup>259</sup> biological,<sup>260</sup> and radiation<sup>261</sup> terrorism, and requires them to address terrorist emergencies through its emergency response program.<sup>262</sup> The Federal Energy Regulatory Commission (FERC), a rate regulator, has limited access to its documents,<sup>263</sup> and, pursuant to a new statute, set new rules for the distribution of gas<sup>264</sup> and oil – again all in the name of the war on terror.<sup>265</sup> Even HUD has gotten into the anti-terrorism game. Pursuant

*Approvals*, 60 N.Y.U. ANN. SURV. AM. L. 329, 331 (2004) (as to “the Food & Drug Administration, the National Institutes of Health (NIH), and the Centers for Disease Control and Prevention (CDCP)... each is a large and complex public health bureaucracy and each has served a distinct, though interrelated, role in the war on terrorism”).

<sup>256</sup> Michelle Meadows, *The FDA and the Fight Against Terrorism*, FDA CONSUMER MAGAZINE, Jan.-Feb. 2004, available at [http://www.fda.gov/fdac/features/2004/104\\_terror.html](http://www.fda.gov/fdac/features/2004/104_terror.html). The FDA’s increased efforts generally have focused on two defensive measures: preventing willful contamination of all regulated goods and increasing the availability of medical products to prevent or treat injuries caused by biological, chemical, or nuclear agents. *The Food and Drug Law Institute’s 45th Annual Educational Conference Keynote Addresses*, 57 FOOD DRUG L.J. 227, 231 (2002).

<sup>257</sup> Project BioShield Act of 2004, Pub. L. 108-276, 118 Stat. 835 (2004). Project BioShield has three main measures: providing the NIH with new authorities to speed research and development in areas of medical countermeasure development; authorizing the use of unapproved medical products during emergencies; and mandating the government to maintain a stockpile of vaccines and other medical products to provide for the health security of the United States in the event of a bioterrorist attack or other emergency. Project BioShield Act of 2004, §§ 2-4.

<sup>258</sup> As the FDA itself noted when it rapidly approved a child dose of an antidote for nerve gas exposure, the agency “has placed a high priority in making available safe and effective countermeasures against potential terrorist attacks.” O’Reilly, *supra* note \_\_, at 332; Michael Greenberg, *Information, Paternalism, and Rational Decision-Making: The Balance of FDA Drug Approval*, 13 ALB. L.J. SCI. & TECH. 663, 667-68 (2003) (“Concerns about terrorism are pressing a new set of regulatory reforms at the FDA, designed to speed the development pipeline for new products important to national security, and in recognition that such products may be formally untestable under the traditional FDA new product approval regime”).

<sup>259</sup> See [http://www.osha.gov/SLTC/emergencypreparedness/chemical\\_sub.html](http://www.osha.gov/SLTC/emergencypreparedness/chemical_sub.html) (last visited Feb. 21, 2006).

<sup>260</sup> See [http://www.osha.gov/SLTC/emergencypreparedness/biological\\_sub.html](http://www.osha.gov/SLTC/emergencypreparedness/biological_sub.html) (last visited Feb. 21, 2006).

<sup>261</sup> See [http://www.osha.gov/SLTC/emergencypreparedness/radiation\\_sub.html](http://www.osha.gov/SLTC/emergencypreparedness/radiation_sub.html) (last visited Feb. 21, 2006).

<sup>262</sup> Emergency Action Plans, 29 C.F.R. § 1910.38 (2006), available at [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=STANDARDS&p\\_id=9726](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=9726).

<sup>263</sup> Specifically, FERC removed from the public viewing certain documents, such as oversized maps, that detail the specifications of energy facilities licensed or certificated under Part I of the Federal Power Act, and Section 7(c) of the Natural Gas Act. See Comm-Opinion-Order, 97 FERC ¶ 61,030 (Oct. 11, 2001); see also Patricia McDermott, *Information Disclosures by Government: Data Quality and Security Concerns Symposium: Withhold and Control: Information in the Bush Administration*, 12 KAN. J.L. & PUB. POL’Y 671, 684-58 (2003) (discussing FERC limiting access to information post-9/11).

<sup>264</sup> FERC signed an Interagency Agreement with various agencies, including the Department of Homeland Security, to share information, analyses and jointly prepare Environmental Impact Statements (EIS) and safety reports for all LNG terminals. Interagency Agreement Among the Federal Energy Regulatory Commission, United States Coast Guard, and Research and Special Programs Administration for the Safety and Security Review of Waterfront Import/Export Liquefied natural gas Facilities, Feb. 11, 2004, available at <http://www.ferc.gov/industries/lng/safety/reports/2004-interagency.pdf>. See FERC, *A Guide to Liquefied Natural Gas: What All Citizens Should Know*, available at <http://www.ferc.gov/for-citizens/citizen-guides/citiz-guide-lng.pdf> (last visited Feb. 21 2006).

<sup>265</sup> Suedeen G. Kelly, Address to the Environmental Regulation, Energy, and Market Symposium, in 15 DUKE ENVTL. L. & POL’Y F. 251, 256 (Spring 2005) (FERC commissioner noting that the biggest issue that has come to light in the last year and a half since LNG activity has been progressing at FERC has been concern about terrorism on tankers and discussing how the Coast Guard actually has jurisdiction over the tankers); *Report of the*

to the Church Arson Prevention Act of 1996, HUD now guarantees loans made by financial institutions to assist 501(c)(3) nonprofits that have been damaged as a result of arson – or terrorism.<sup>266</sup>

And these new initiatives are only part of the story. Although the new Department of Homeland Security has three primary missions – “prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism, and minimize the damage from potential attacks and natural disasters,”<sup>267</sup> – DHS has extended its terror-fighting mandate to anti-counterfeiting measures,<sup>268</sup> a Safe School Initiative,<sup>269</sup> and the regulation of telemarketing.<sup>270</sup> State and local governments have also been pressed into service in the anti-terrorism cause, on both immigration<sup>271</sup> and other matters.<sup>272</sup>

Civil administrators should be encouraged to lay down their arms in the war on terror, pick up their collective bureaucratic pens, and turn back to the tasks for which they were intended. For as we have seen, when these agencies pursue terrorists instead of developing their areas of expertise, proxies – and ultimately all of us – pay the price of the errors that inevitably ensue.

Of course, this doesn't mean that we shouldn't fight terrorists. Counter-terrorism policies could be directed through traditional military, law enforcement, and intelligence mechanisms. They could also be directed through new, specialized anti-terrorist agencies that operate differently than

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*Natural Gas Regulation Committee*, 25 Energy L. J. 217, 223 (2004) (discussing FERC's plan to protect the energy infrastructure in the wake of 9/11); *Report of the Natural Gas Regulation Committee*, 26 Energy L. J. 259, 275-76 (2005) (discussing FERC activity regarding measures enacted to protect the critical energy infrastructure); Jim Rossi, *Realizing the Promise of Electricity Deregulation: Moving Public Law Out of the Deference Trap in Regulated Industries*, 40 WAKE FOREST L. REV. 617, 669 (2005) (suggesting that concerns over the relationship between terrorism and oil led to Congress's failed energy bill in 2003).

<sup>266</sup> <http://www.hud.gov/sec2.cfm>.

<sup>267</sup> U.S. Dep't of Homeland Security, FAQs, at <http://www.dhs.gov/dhspublic/faq.jsp> (last visited Feb. 21, 2006).

<sup>268</sup> As the Congressional Research Service has said, “Another matter extends to the capability of the Secret Service to maintain its traditional role in the enforcement of certain financial crimes, such as anti-counterfeiting. Such criminal conduct has also become more sophisticated and complex. And combating it may now have to compete with new higher priorities and expanded duties in other fields, most markedly in anti-terrorism.” Congressional Research Service, Homeland Security Department: FY2006 Appropriations (2005) available at <http://www.fas.org/sgp/crs/homsec/RL32863.pdf>

<sup>269</sup> U.S. Dep't of Homeland Security, Threats and Protections: Children and Schools, at <http://www.dhs.gov/dhspublic/display?theme=75> (last visited Feb. 21, 2006).

<sup>270</sup> U.S. Dep't of Homeland Security, U.S. Immigration and Customs Enforcement, Cornerstone – Financial Crimes: Safeguarding America Through Financial and Trade Investigations, at <http://www.ice.gov/graphics/cornerstone/financialcrimes.htm> (last modified Nov. 21, 2005).

<sup>271</sup> The 9/11 Commission Report, 81 (Nat'l Comm. on Terrorist Attacks Upon the U.S., July 22, 2004), available at <http://www.9-11commission.gov/report/911Report.pdf>. Some cities, including New York, have traditionally refused to share information with the INS on the immigration status of their citizenry. See The 9/11 Commission Report, *supra*, 475 n.46.

<sup>272</sup> The federal government's Terrorist Information and Prevention System suggests novel uses of the federal Militia clause power, including the new prospect of disciplining local counterparts who have refused to cooperate in the effort to quash terrorism. Gill Grantmore, *The Phages of American Law*, 36 U.C. DAVIS L. REV. 455, 472 (Jan. 2003).

traditional civil regulators, much as specialized agencies like the Department of Defense operate to pursue the administration of conventional wars. Concerns regarding the ultimate value of the war on terrorism writ large and the precise approach that these task specific and rationalized government actors should take in their anti-terrorism initiatives are, however, beyond the scope of this article.

Rather, we have focused on a different, narrower question: should anti-terrorist measures be channeled through our ordinary administrative agencies? We think that, generally, the answer is no. Involving administrative agencies in this war serves no goals but expressive and symbolic ones, and at a substantial financial and social cost.

But public opinion often favors agency action against terrorism, however ill advised or futile such action might in fact be. Our government has left us no doubt that it views the war on terror as proceeding on all fronts, domestic and international, through the military, through law enforcement, and through these ordinary agencies.<sup>273</sup>

Realistically, therefore, we feel compelled to answer the “what then” question – what if, in spite of the concerns we have raised here, anti-terrorist measures will nonetheless be directed through administrative agencies, for reasons of political expediency, public demand, or symbolic significance, if no others? In our view, if anti-terrorism measures must be directed through administrative agencies, the least that we can do is to try to minimize the collateral damage such measures cause to our agencies, to proxies, and to the American people.

The most effective way of doing so would be to ensure that those measures are good policy anyway – that is, that they would be good policy even without the national security purpose that is catalyzing their immediate implementation. To meet the “good policy anyway” test, at a minimum such measures should observe three principles: they should fit within the core competence of the agency, properly balance discretion with oversight, and perhaps most importantly, promote some end that furthers the agency’s regulatory responsibilities.

The driver’s license measures called for by the REAL ID Act provide a good example of how current anti-terrorist measures could be amended to be “good policy anyway.” Whether an initiative promotes the

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<sup>273</sup> Terrorism financing is “A Key Front in a Global War on Terror” as Treasury officials have testified to Congress, and warranted inclusion in the president’s state of the union address. Testimony of Stuart A. Levey, Treas. Under Secretary Terrorism and Financial Intelligence, House Banking Ctte., August 23, 2004, *available at* <http://www.ustreas.gov/press/releases/js1869.htm>. Congressman James Sensenbrenner has declared that “The Real ID [Act] is vital to preventing foreign terrorists from hiding in plain sight while conducting their operations and planning attacks.” Dinya Sarkar, REAL ID Zips Through Congress, <http://www.fcw.com/article88832-05-11-05-Web>, May 11, 2005.

agency's purpose should be considered according to two concerns: the substance of the provision and a cost-benefit analysis of the extent to which the provision promotes a core goal in light of the resources it directs away from other agency goals. Here, sharing databases of driver records and automobile registrations with other states enables DMVs to more accurately enforce driver and automobile safety across state lines and seems likely to do so efficiently, without redirecting too many resources from other agency initiatives, for it builds from and reinforces existing databases and ongoing synchronization efforts in the states.

In contrast, confirming social security numbers and immigration status are directly counterproductive measures that discourage some residents, particularly illegal immigrants, from participating in the licensing regime. Because other measures aimed at ensuring security of the cards themselves and at confirming identity and reducing identity fraud promote the core goal of automobile and driver safety only indirectly, the effect of these measures on the agency's resources and functions generally is crucial: very inexpensive measures may nonetheless be worthwhile for their indirect effects, but very costly measures like maintaining databases of identity documents will certainly direct too many resources away from the agency's core purposes.

It is perhaps not surprising that there seems to be a connection between the goals that are within the core purpose of the agency and the tasks that are within its expertise. Here, activities that undermine the DMV's purpose also tend to be outside its expertise, such as checking immigration documents and reviewing social security numbers, as well as checking and maintaining databases of identity documents. Once again, maintaining and sharing driver and automobile records forms a notable exception, being well within the agency's area of expertise.

Ultimately, although the "good policy anyway" test provides a way for the government to implement some counter-terrorism measures through our civil administrative systems, if it must, the civil bureaucracy is not the right place to center the war on terrorism. Our administrative agencies should be left to manage the occasionally boring but ultimately crucial matters that they handle best.