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WASHINGTON, D.C. 20503

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(Senate)

STATEMENT OF ADMINISTRATION POLICY

S. 4 – Improving America’s Security Act of 2007

(Sen. Reid (D) Nevada and 16 cosponsors)

While the Administration supports the underlying intent of S.4 and believes the bill generally is an improvement over H.R. 1 (Implementing the 9/11 Commission Recommendations Act of 2007), the Administration has very serious concerns with several of the bill’s provisions and cannot support Senate passage of the bill in its current form. The Administration looks forward to working with Congress to address these objectionable provisions, several of which are discussed below.

The President and Congress have restructured and reformed the Federal government to focus resources on counterterrorism and to secure the Nation in an unprecedented fashion. The Administration welcomes the opportunity to continue to work with Congress to address the recommendations of the 9/11 Commission, as well as to take other necessary steps to improve the Nation’s homeland security. The Administration has adopted and made significant progress in implementing 37 of the 39 recommendations of the 9/11 Commission that relate to the Executive Branch.

In addition, the Administration has consistently urged Congress to adopt the two outstanding recommendations that apply to the Legislative Branch (which the 9/11 Commission stated may be among the most important of all its recommendations) and is disappointed that Congress has failed thus far to do so.

The 9/11 Commission recommended that Congress create a single, principal point of oversight for homeland security. Additionally, the Commission called on Congress to address the dysfunctional oversight of intelligence and counterterrorism. The Administration believes that Congressional leaders are best equipped to determine which committees should have jurisdiction over these issues but feels strongly that Congress has the obligation to address these recommendations.

TSA Personnel Management

The Administration strongly opposes the elimination of the personnel management authorities of the Transportation Security Administration (TSA). In the Aviation and Transportation Security Act, which established TSA, Congress recognized that special flexibility for personnel performing key homeland security roles is critical. Passage of the Homeland Security Act of 2002, which established the Department of Homeland Security (DHS), was delayed over debate over this same fundamental question. S. 4 includes provisions that would eliminate the flexibility given to TSA to perform its critical transportation security missions. The

Administration vigorously disagrees with these provisions of the bill, which were not recommended by the 9/11 Commission. These provisions, if enacted, would compromise transportation security and substantially diminish the Secretary's flexibility to effectively manage the Department.

Existing authorities permit TSA to flexibly manage and deploy its workforce, including its Transportation Security Officer (TSO) workforce, in carrying out important security work directly affecting national security. In exercising these authorities, TSA is committed to ensuring that employees are treated fairly, consistent with merit system principles. During Hurricane Katrina and after the United Kingdom (UK) air bombing plot was foiled, TSA changed the nature of employees' work—and even the location of their work—to quickly and effectively respond to these emergencies. For example, after the UK air bombing plot was discovered, TSOs employed new standard operating procedures within hours to deal with the new threat. This flexibility is key to how DHS, through TSA, protects Americans while they travel, both at home and abroad. These provisions, by eliminating these authorities, would significantly diminish the Department's ability to respond quickly to security threats and would ultimately reduce transportation security.

For these reasons, if the bill presented to the President includes these provisions related to TSA personnel management, the President's senior advisors would recommend that he veto the bill.

Congressional Oversight of Intelligence

S. 4 would require senior members of the Intelligence Community to provide intelligence information requested by any committee of the Congress asserting jurisdiction within 15 days of receiving a request unless the President certifies that such information is privileged pursuant to the Constitution. This provision would abandon the process of comity and accommodation that has existed between the two branches of government. Furthermore, the provision pays no regard to the present statutory framework in place to keep the Congress fully informed while protecting intelligence sources and methods and classified information. As a result, this provision invites routine information requests to escalate to the level of serious legal conflicts.

The Administration strongly opposes the provision barring coordination between departments and agencies of testimony, legislative recommendations, or comments before such communications are made to Congress. These prohibitions would preclude any element within the Executive Branch from requiring any element of the Intelligence Community to receive approval to testify or to submit testimony for review before testifying. Such coordination reflects a longstanding practice within the Executive Branch and is vital to ensuring that Congress receives the most complete and accurate information and testimony. More fundamentally, the anti-coordination provision would place unconstitutional restrictions on the President's authority to oversee the Executive Branch.

S. 4 would authorize Federal employees working in the Intelligence Community to disclose certain information, including classified information, to Congress and to Congressional staff without first reporting such information to the appropriate Inspector General or legally mandated Ombudsman. This provision would circumvent the provisions in existing law, which seek to ensure that classified and sensitive information that employees and contractors in the Intelligence Community wish to disclose to Congress is protected from unauthorized disclosure and

transmitted in a timely fashion. Intelligence Community employees already have multiple avenues within and outside departments and agencies to report allegations of wrongdoing, including possible false statements to Congress. Inspectors General, General Counsels, Ombudsmen, Ethics Officers, and other officials designated by Congress are adequately performing this function. Additionally, reporting directly to Congress without first reporting such information to the appropriate Inspector General may contribute to confusion and wasted time if employees provide inaccurate, outdated, or incomplete information to Congress without the opportunity for Inspectors General to examine facts and exercise the judgment with which Congress entrusted them.

These provisions may also expose highly sensitive material to handling and storage outside of approved arrangements that have been developed with the congressional intelligence committees, placing secrets and vulnerable sources of new information at risk. Furthermore, these provisions may inhibit foreign security partners from sharing certain information with the United States Government since we cannot commit to limited access to the information.

In addition, the Administration believes that the proposed revisions to the authorities of the Public Interest Declassification Board are unnecessary and inappropriate. The Constitution charges the President with ensuring that release of government information does not harm the Nation's security interests, including by directing the actions of Executive Branch officials with expertise in classification and declassification determinations.

Various additional provisions, as suggested above, would require Intelligence Community persons and agencies to disclose to Congress classified national security information as well as constitutionally privileged information, including internal "legal opinion[s]," subject only to the President's express invocation of a constitutional privilege. These provisions impermissibly restrict the availability of applicable privileges or the Executive Branch's ability to discharge its responsibilities respecting the control of sensitive national security and otherwise privileged information.

For these reasons, the Administration strongly opposes these provisions of the bill and looks forward to working with Congress to find an acceptable resolution to the Administration's concerns.

Making Portions of the Intelligence Budget Public

The Administration strongly opposes the requirement in the bill to publicly disclose sensitive information about the intelligence budget. Disclosure, including disclosure to the Nation's enemies and adversaries in a time of war, of the amounts requested by the President and provided by the Congress for the conduct of the Nation's intelligence activities would provide no meaningful information to the general American public, but would provide significant intelligence to America's adversaries and could cause damage to the national security interests of the United States.

Homeland Security Grant Programs

The Administration appreciates the Senate's desire to enhance the effectiveness of homeland security grants. However, the Administration opposes a number of problematic grant-related

provisions in S. 4 that would dilute grant funds by lessening dependence on risk and expanding eligibility criteria, which undermines the 9/11 Commission Report recommendation for such grants to be “based strictly on an assessment of risks and vulnerabilities.” For example, the Administration has serious concerns with provisions in the bill that would: (1) expand the number of Eligible Metropolitan Areas under the Urban Area Security Initiative (UASI); (2) expand allowable operational cost uses of UASI and State grants; (3) require future appropriations to be proportionate to authorized program funding levels; (4) allow cities and tribes to apply for grants directly without coordination through State Administrative Agencies; (5) create a permanent interoperable communications grant program; (6) potentially limit the ability of the Secretary of Homeland Security to exercise appropriate oversight over all grant programs; and (7) create additional homeland security grant programs for public transportation agencies and for research. In particular, the provision expanding eligible areas under UASI would create a considerable impulse to dilute the risk-based process for reviewing homeland security grant applications, as well as complicate, delay, and render far more opaque the process for grant selection. The Administration looks forward to working with Congress to improve these provisions to ensure that homeland security grants are effectively targeted to address risk and improve preparedness.

The Administration agrees with the goal of ensuring appropriate grant spending; however, detailed auditing of all State and local entities receiving grants, in addition to several new and existing reporting requirements, is overly burdensome and costly. In addition, the proposed release of such information to the public will unacceptably expose State and local vulnerabilities and undermine effective grant administration and may chill applicant willingness to share needed information.

State and Local Government and Private Sector Responsibilities

The Administration opposes the Federal standardization of performance criteria for State and local governments and the expansion of the role of the Federal government to supplant State and local government responsibilities to plan for and exercise such performance standards. Likewise, the Administration opposes the Federal establishment of minimum qualifications and other credentialing requirements for State and local emergency personnel determining who is fit and who is unfit to assist in an emergency.

S. 4 would establish an elaborate system for creating voluntary national preparedness standards, which may have significant unintended impacts. While these standards are meant to be voluntary, language in the proposed legislation directs the Secretary of Homeland Security to “consider the needs of the insurance industry, the credit-ratings industry, and other industries that may consider preparedness of private sector entities.” Thus, compliance with these voluntary standards could be used to assess creditworthiness and insurability, which would thereby dilute the voluntary nature of these standards and lead to the imposition of these standards as a limitation on the receipt of insurance coverage or access to credit. These standards may increase the regulatory burden and affect the Nation’s global competitiveness. Additionally, applying standards across all sectors and across all institutions within a sector is inappropriate as entities differ greatly in their need to maintain a state of preparedness depending on their criticality and the risk to their operations.

Privacy and Civil Liberties Oversight Board and DHS Privacy Officer

The Administration believes that deep respect for privacy and civil liberties is vital to the American system of government and therefore supports the work and structure of the existing Privacy and Civil Liberties Oversight Board. Since the Board was appointed in March 2006, it has integrated itself into the Administration's policy formulation and implementation processes and has moved to integrate its operations with those of the many other privacy and civil liberties offices that exist within the Executive Branch. The Board's present structure is in full accord with not only the spirit but also the letter of the 9/11 Commission's recommendation. However, this bill effectively would require a reconstitution of the present Board, as all members eventually would have to be confirmed by the Senate, and thus would thrust unwarranted disruption onto a structure that is operating effectively to fulfill its statutory mission.

The Administration also strongly opposes the provision in the bill enabling the Board, in contravention of the President's constitutionally-vested authority, to require the designation of additional privacy and civil liberty officers at certain agencies and the grant of subpoena power to the Board and the DHS privacy officer. The Administration has established Senior Agency Officials for Privacy within each department and agency. To establish another set of officers within the agencies would not only create the potential for conflict, and at the very least confusion, but also impede the progress the agencies have made to date in ensuring full compliance with information privacy laws, regulations, and policies. S. 4 is deficient in another respect in that, unlike current law, it provides no mechanism for withholding from the Board, in exceptional circumstances, information the disclosure of which could harm the national security. The Administration is adamant that these objectionable provisions must be changed and looks forward to working with Congress to accomplish this end.

Intelligence and Information Sharing

The Administration opposes, and recommends deletion of, the bill's State, local, and regional Fusion Center provisions. These provisions do not recognize or capitalize on the substantial progress that the Administration has made in creating the government-wide Information Sharing Environment established by the Intelligence Reform and Terrorism Prevention Act of 2004. These provisions would upset the coordinated government-wide approach to information sharing mandated by Congress and currently being implemented by the Executive Branch at the President's direction. By eschewing government-wide responsibility for information-sharing, the proposed provisions would undermine the fundamental premise of information-sharing reform—coordination among all Federal entities with counterterrorism responsibilities. In addition, many Federal agencies and departments interact regularly and routinely with State, local, and tribal officials and the private sector. The bill pays no regard to those existing relationships, and, by focusing exclusively on DHS's interactions with those non-Federal actors without adequately acknowledging and addressing the role of other Federal departments and agencies, risks undermining those valuable and necessary relations and harming the Federal government's ongoing efforts to communicate in a coordinated fashion with its non-Federal information-sharing partners. Further, the Administration has concerns with the S. 4 approach to expanding the Information Sharing Environment to include weapons of mass destruction information.

National Biosurveillance Integration Center

The Administration applauds the Senate's support for a fully functional National Biosurveillance Integration Center (NBIC). However, the Administration has serious concerns that S. 4 would alter established mechanisms for communicating public or animal health alerts. S. 4 prescribes that NBIC directly alert Federal agencies and State, local, and tribal public health entities when potential incidents are detected. The current language does not necessitate coordination with the department or agency with jurisdiction over, and expertise in, the relevant domain(s) and with the established communication channels on which State, local, and tribal public and animal health authorities rely for warnings affecting their jurisdictions. Unless messages are coordinated beforehand, local, and State health agencies may receive conflicting information, which can result in unnecessary or inappropriate action and may erode public confidence. The Administration strongly recommends that this language be amended to direct NBIC to issue actionable alerts in coordination with and, as appropriate, through the relevant Federal agencies. Such a modification would not preclude the NBIC from issuing routine situation reports or from issuing alerts to all sectors after the information and recommendations have been coordinated.

Data Mining

The Administration opposes language in the bill requiring Federal agencies to report to Congress on their use of data mining techniques. First, the definition of "data mining" contained in this bill is quite broad and might be read to include a wide range of normal, everyday investigative techniques. This definition would lead to massive new and administratively complex reporting requirements for Executive Branch agencies. Second, the bill, even with its provision for a classified annex, does not provide sufficient protection for patents, proprietary business processes, trade secrets, law enforcement practices (including those used in ongoing investigations), and other sensitive but unclassified information.

In addition, the reporting requirements are in part duplicative of an existing requirement contained in the USA PATRIOT Improvement and Reauthorization Act that the Department of Justice report on its data mining programs. Furthermore, the definition of "data mining" in this bill differs from the definition in the USA PATRIOT Improvement and Reauthorization Act, which could very well lead to confusion, increase the effort necessary to comply with the two requirements, and diminish the value of the reports required by the different laws.

Western Hemisphere Travel Initiative (WHTI)

The Administration is concerned that the provision relating to a Memorandum of Understanding (MOU) to initiate a pilot program with a State regarding an enhanced driver's license as an alternative WHTI document could place the timeline for implementation of the WHTI in peril. Currently, DHS expects a REAL ID-consistent pilot card with WHTI features (machine readable and citizenship certified) to be ready in the State of Washington (the only State with which an MOU is currently being negotiated) by January 2008. This provision could be read to require Washington State to pass legislation allowing for the MOU prior to the implementation of WHTI, which could delay the planned implementation date. The Administration recommends amending this language to clarify that this requirement is not a condition precedent to WHTI implementation.

Proposed DHS Deputy Secretary for Management

The Administration opposes the proposal to elevate the DHS Under Secretary for Management to a new Deputy Secretary for Management. Creating a separate Deputy Secretary for Management would result in an unprecedented and unworkable organizational structure that would dilute existing lines of accountability. This change is unnecessary, as the Under Secretary currently has all the authority that is needed to effectively manage the Department effectively. The Administration particularly objects to establishing a five-year statutory term for the new Deputy Secretary for Management, which would limit the ability of the President and the Secretary to oversee the Department effectively. These provisions also purport to impose substantial restrictions upon the President's authority to remove that constitutional officer. The Administration strongly objects to these constitutionally impermissible removal restrictions.

Proposed Office for the Prevention of Terrorism

The Administration opposes the establishment of the Office for the Prevention of Terrorism in DHS. Such an office adds an unnecessary bureaucratic layer that is duplicative of, and would conflict with, current authorities and programs. The 9/11 Commission stressed that terrorism prevention requires a coordinated and collaborative approach across all agencies and departments at the Federal level. The responsibility to prevent terrorism is, in short, one shared by many Federal agencies and departments. To create a new office within one department and then charge that office with the responsibility of "coordinating policy and operations" would inject extraordinary confusion into the existing approach and establish a less coordinated overall approach to fighting terror.

Constitutional Concerns

The Administration has constitutional concerns with several provisions of S. 4, as reported, particularly those in sections 501-503 of title V, section 1102, section 1103, and section 1301. The Administration looks forward to working with Congress to address these concerns.

PROVISIONS OF OTHER BILLS

The Administration understands that other homeland security-related legislation may be considered in the course of Senate floor consideration of S. 4. The Administration's views on certain provisions of those bills are described below.

S. 184 - Surface Transportation and Rail Security Act of 2007

The President and Congress have made great strides in improving transportation security with their State, local, international, and industry partners. The Administration welcomes the opportunity to enhance our transportation security system and supports the objectives of S. 184 that further a risk-based approach to security. To that end, the Administration fully supports the bill's provisions creating administrative civil enforcement authority for non-aviation modes of transportation in the bill. The Administration would like to work with Congress to address certain provisions of S. 184, taking into account the most appropriate use of available resources and promoting the security and economic welfare of the American traveling public.

In general, the Administration is concerned that many of the authorization levels presented in the bill are not in line with the President's budget priorities for fiscal year 2008 and may divert critical resources in future budget years that are needed for higher priority requirements.

Systemwide Amtrak Security Upgrades

The Administration opposes the establishment of a new grant program for systemwide Amtrak security upgrades. Such a program, administered by the Department of Transportation (DOT) in consultation with DHS, would be duplicative of existing Federal programs. As part of the annual DHS grant process, intercity passenger rail security grants are already afforded exclusively to Amtrak. Any grant legislation should be consistent with the existing Infrastructure Protection Program, and any additional funds awarded to Amtrak should be granted within the existing grant structure based on risk. In addition, DHS should have sole authority to both award and administer all preparedness-related grant funds in a manner that is consistent with the National Preparedness Goal based on risk. Further, the provision is overly prescriptive with respect to grant uses. The Secretary should have the discretion or provide flexibility in a dynamic threat environment.

Freight and Passenger Rail Security Upgrades

The Administration also opposes the establishment of a new, duplicative grant program for freight and passenger rail security upgrades. DHS already provides funds to State and local transit authorities for enhanced rail security. Further, the Administration opposes the expanded role for the Federal government to assume the responsibility to reimburse all of the costs incurred by private sector entities to fulfill their own responsibility for securing their passengers and assets. The Administration is deeply concerned about the precedent this provision would set for other industries to request similar Federal assistance.

Preventing Stakeholder Confusion

The Administration is concerned that the assignment of various tasks pertaining to security to DHS and DOT is not clear in several provisions of the bill, raising potential questions about which department has lead authority and responsibility for transportation security. In addition, some of the authorities granted by the bill may lead to stakeholder confusion as to the lead agency implementing Federal transportation security policy. Under statute, Executive Order, Presidential Directive, and memoranda of agreement between DHS and DOT, the Secretary of Homeland Security is the principal Federal official charged with responsibility for transportation security, including surface transportation security. While DOT retains its position as the lead Federal entity for transportation safety matters, the department and its subordinate agencies perform a supporting role in the area of transportation security. In order to prevent stakeholder confusion in this area, future directions of authority for transportation security should be made directly to DHS. Uniform language should be used to clearly delineate which agency will have the lead in implementing a requirement. To address this concern in S. 184, the Administration requests that section 112(c) of the bill be clarified. The Administration looks forward to working with the Congress to provide appropriate language.

S. 509 - Aviation Security Improvement Act

Security of Cargo on Passenger Aircraft

The Administration supports the Senate's intention to strengthen air cargo security and appreciates the flexibility afforded in S.509. The Administration looks forward to working with the committee to identify an appropriate implementation timeframe that minimizes the associated costs of this provision and adequately addresses the impact on the legitimate flow of commerce.

The Administration also objects to the significant costs that would be imposed on TSA to procure and operate a program to provide air carriers with blast-resistant containers. These specialized containers must be tested, certified, and tracked through the process as well as stored and maintained. The results of the current pilot program required by the Intelligence Reform and Terrorism Prevention Act of 2004 would significantly influence the development of such a system. A substantial portion of the current commercial aircraft fleet is not configured to support the use of Unit Load Devices (ULD) systems and therefore could not accommodate the current blast-resistant containers. Carriers with narrow body aircraft would need to make major modifications to their aircraft to accommodate any type of hardened container that would have to be developed for narrow-body aircraft. Incorporation of these devices may not prove cost-effective and could lead carriers to decide to discontinue transporting cargo. To the extent that such containers can be integrated with TSA's development of a comprehensive air cargo security system, as required by section 3 of the bill, the costs of the containers and the operation of the program should be borne by the industry.

Funding for Checked Baggage Screening Systems

The Administration recognizes the need to provide a reliable source of funding for long-term optimal checked baggage screening systems consistent with the Explosives Detection System Strategic Plan, which is budgeted for in the President's Budget. The Administration has significant concerns with reauthorizing the Aviation Security Capital Fund and with other structural, funding, and cost-sharing components in this provision. Accordingly, the Administration strongly opposes the formulation of this section of the bill.

New Sterile Area Access System

The Administration opposes the requirement that TSA study and implement a new sterile area access system to identify authorized airline flight deck and cabin crew members and grant expedited access through screening checkpoints. This unfunded requirement will compel DHS to shift resources that should be focused on priority port security efforts. DHS is working aggressively to comply with requirements of the Maritime Transportation Security Act, P.L. 107-295, and the SAFE Port Act, P.L. 109-347, to issue Transportation Worker Identification Credentials (TWIC) for port workers on an ambitious schedule. TSA's current procedures for access to Security Identification Display Areas and sterile areas at the nation's airports already provide a very strong security foundation. In addition, the bill's directive for full implementation of a system prejudices the outcome of the required report examining the feasibility of establishing such a system. Disparities among the disqualifying offenses specified by various statutory credentialing provisions add significant complexity to any efforts to

harmonize credential processes. Finally, the Administration recommends that this requirement be linked to Federal Aviation Administration's efforts to improve pilot licensing under the Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458.

Checkpoint Technology Deployment

The Administration strongly opposes the mandate to deploy checkpoint explosive detection equipment nationwide at more than 700 checkpoints comprising approximately 1,750 screening lanes in just one year. This compressed timeframe could compromise security by forcing the deployment of technology, the effectiveness of which has not been proven. It would impose unbudgeted costs in the hundreds of millions of dollars. DHS is aggressively developing and field-testing new technology as it becomes available and will deploy such technology when it will enhance security.

Aircraft Repair Stations

The Administration is concerned that the bill's prohibition of Federal Aviation Administration (FAA) certification of new foreign repair stations if regulations are not issued in 90 days may interfere with the flow of commerce and have a detrimental impact on the safety of domestic aircraft at some international locations. Because U.S. air carriers and foreign air carriers holding FAA certificates can only use repair stations that FAA has approved or "certified," prohibiting FAA certification of foreign repair stations could have a negative impact on carriers operating overseas and in need of repairs or required maintenance. The legislation could also put the United States in default of obligations under bilateral agreements having to do with foreign repair stations.

TSA is diligently working on the issuance of regulations to establish baseline security standards for foreign and domestic repair stations as required by Vision 100 (P.L. 108-176) and to require repair station facilities to implement a security program that would serve as the basis for a security audit. TSA has hired security inspectors and is training them to conduct audits. As soon as regulations are promulgated, TSA will initiate audits of the foreign repair stations. Reducing the time to conduct security reviews of foreign aircraft repair stations to six months would not enhance security at these facilities. There are close to 700 foreign aircraft repair stations certificated by the FAA. To perform a thorough security audit, TSA will need to obtain and analyze each facility's security posture and then perform the audit to evaluate whether the security measures meet TSA's baseline security standards.

S. 385 - Interoperable Emergency Communications Act

The Administration opposes the proposed amendment that would further modify the implementation of a new grant program established by the Deficit Reduction Act of 2005 and amended by the Call Home Act of 2006. Together with the time limitations imposed by Congress to allocate \$1 billion in grant funds for communications interoperability by September 30, 2007, these modifications undermine the Administration's ability to implement the most effective program. The Administration recommends instead that the Departments of Commerce and Homeland Security be provided the flexibility that is needed to allocate funds based on technical merit and benefit in promoting effective public safety communications interoperability. The Administration also opposes the duplication within the Department of

Commerce of existing DHS communications interoperability initiatives.

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