



UNITED STATES SENATE  
**REPUBLICAN  
POLICY COMMITTEE**

Larry E. Craig, Chairman  
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November 19, 2002

*An Amendment Both Wrong and Destructive (Though Good for Trial Lawyers)*

**Daschle-Lieberman Is a Bad Idea –  
Even Apart From the Fact that Its Passage  
Will Doom the Homeland Security Bill**

The Senate will vote today (perhaps twice) on the Daschle-Lieberman Amendment. If that amendment passes, the future of the Homeland Security Bill is very much in doubt.

The House of Representatives essentially has gone home for the year, and it has little intention of returning to take up a homeland security bill for a third time, whereas the Senate has failed to pass it once.

The underlying Thompson-Gramm-Miller amendment is identical to the House-passed language, and Senate Republicans are trying to pass that amendment so that the bill can be cleared for the President's signature. Democrats want to send the bill back to the House – or to limbo, and they believe the Daschle-Lieberman amendment is their best opportunity to do so. If they succeed, they succeed in killing the Homeland Security Bill for this year.

Next year – and perhaps as early as this week after the Missouri election is certified – the Republicans will be in the majority in the Senate. There seem to be a substantial number of Democratic Senators who prefer to wait until Republicans are in charge. Ironically, perhaps, Republican Senators and the President are working hard to get a Homeland Security Bill passed this year: They don't believe defending the Homeland can wait.

The top Democrats are fighting to stop the House-passed language from reaching the President's desk. This morning, the Senate will take the key votes that will determine whether we will have a Department of Homeland Security this year, or some other year.

The Senate will vote on the Daschle-Lieberman Amendment (no. 4953 to no. 4911) which proposes to nullify 15 sections of the underlying text. Those 15 sections can be divided into five categories:

## I. Civil Litigation Reform To Improve Homeland Security

[Paragraphs (a)(3), (a)(5), and (a)(7) of the amendment]

1. Paragraph (a)(7) of the Daschle-Lieberman Amendment will nullify sections 1714, 1715, 1716, and 1717 of the underlying text. The underlying sections are short amendments to the **Public Health Service Act**, but they deal with legal liability for producing life-saving vaccines. Without such protections, there is a legitimate risk that the sources of essential vaccines will dry up. On the floor of the Senate last Friday afternoon, Senator Frist explained in some detail why the underlying provisions are essential for the few manufacturers of vaccines that remain in business in the United States – and for the health of the American people.

Senator Frist said, “[W]e are a Nation at risk. We are at risk from nuclear weapons and from chemical weapons, but when it really comes to what could potentially happen to our homeland, I would argue that the greatest risk is from microorganisms such as anthrax or smallpox, which we know are weapons of mass destruction if introduced into a population that is unprepared, that has not been vaccinated. Vaccine is the front line for people at risk from anthrax. It is the front line for people at risk from smallpox.” 148 Cong. Rec. S11175, col. 3 (daily ed. Sept. 15, 2002) (edited). Senator Frist declared that the Daschle-Lieberman Amendment “will put the people of our Nation at *greater* risk.” *Id.* col. 2.

Yesterday, the *Wall Street Journal* said in an editorial entitled “Politicizing Vaccines,” “The state of the U.S. vaccine industry has been a national scandal for years, with needless shortages not just to immunize against bioterror threats but even against such routine childhood diseases as tetanus and whooping cough. The latest threat comes from a proliferation of lawsuits that enrich the tort bar but make vaccine production a masochistic exercise.”

The underlying Thompson-Gramm-Miller language helps protect vaccine producers from the deadly disease carried by ravenous tort lawyers, and it helps ensure that vaccines will be available when needed. Keep that in mind when you hear allies of the trial lawyers (most of whom have taken the lawyers’ largesse) argue that these provisions are “special interest legislation.”

2. Paragraph (a)(3) of the Dashle-Lieberman Amendment will nullify sections 861-865 of the underlying text. Those underlying provisions are known as the “**the SAFETY Act**,” and they allow the Secretary to designate “qualified anti-terrorism technologies” so that the sellers of such technologies can then qualify for certain legal protections if they are sued. These provisions will encourage the development and use of hardware, software, processes, and technologies to aid in the fight against terrorism. Without some protection from the plaintiffs’ bar, new and promising technologies may never come into existence or be employed, and countless lives may be lost.

If a technology qualifies under the criteria set out in the bill and the seller is sued, the SAFETY Act provides the following: (1) claims would be consolidated in federal court; (2) plaintiffs must prove that their injuries were proximately caused by the sellers; (3) non-economic damages would be fairly apportioned in proportion to a defendant's fault; (4) punitive damages would be barred; (5) duplicate recovery for the same injury would be prohibited; (6) a government-contractor defense would be allowed; and (7) the sellers would be required to obtain the maximum amount of insurance possible, from which any payments for victims would be paid.

At the same time, the SAFETY Act does *not* provide any immunity from lawsuits nor does it cap attorney's fees. Of course, any person or organization that engages in criminal acts (including corporate crimes such as consumer fraud and government contract fraud) or terrorist acts is *denied* the protections of the SAFETY Act.

The SAFETY Act has precedents in the Aviation Security Act and the Air Transportation Safety and System Stabilization Act, both of which passed Congress overwhelmingly.

An expert on the staff of the House of Representatives has made the following persuasive point:

“Existing homeland security technologies could be used in a variety of civilian settings, such as shopping malls, sports arenas, hospitals, schools, mail service operations, movie theaters, transportation facilities, office buildings, residential buildings, and other potential terrorist targets [were it not for fears of legal liability]. While the Pentagon . . . can buy these anti-terrorism technology products to keep its employees and visitors safe, the Pentagon City Mall, just down the street, *cannot*. Consequently, citizens are more likely to be harmed because effective anti-terrorism technologies are not being deployed. Uncontrolled liability risks are preventing a rollout of technology that would reduce global risks of harm caused by terrorists. . . .”

3. Paragraph (a)(5) of the Daschle-Lieberman Amendment will nullify section 890 of the underlying text which amends the **Air Transportation Safety and System Stabilization Act**, Pub. L. 107-42, Sept. 22, 2001 [ATSSS].

Section 408 of ATSSS, 49 U.S.C.A. §40101 note (2002 pocket part), limits the liability of air carriers, aircraft manufacturers, airport sponsors, and persons with a property interest in the World Trade Center for the aircraft crashes of September 11, 2001. Liability is limited to the liability insurance coverage. The City of New York also is granted liability protection. However, persons “engaged in the business of providing air transportation security” were *not* given liability protection. The underlying Thompson-Gramm-Miller language deletes that exclusion, and it redefines the term “air carrier” in section 402 of ATSSS. The rationale for the change presumably is that a consistent policy ought to extend to all relevant actors, and that the focus of our anger and blame and seeking for remuneration ought to be the terrorists themselves (and their sponsors) and not others.

## II. Waiving FACA To Improve Homeland Security

[paragraphs (a)(2), (a)(4), and subsection (b) of the amendment]

**The Federal Advisory Committee Act (FACA)**, 5 U.S.C. App. §1 *et seq.* (2000 ed.), generally requires that meetings of governmental advisory committees be open to the public. There are, however, numerous exceptions. Everyone agrees that meetings should be open unless there is some compelling rationale for closure.

FACA itself exempts advisory committee meetings of the CIA and Federal Reserve, *id.* at §4(b), and it states expressly that Congress may provide other exemptions, *id.* at §4(a). Even under FACA as now written, the President or the head of an agency may close a meeting or a portion of a meeting. *Id.* at §10(d). Meetings may be closed when the agenda includes discussions of national security secrets, internal personnel rules, trade secrets, accusations of the commission of a crime, law enforcement records, regulation of financial institutions, legal action by the agency, personal information that would constitute an invasion of privacy, and other issues. See, 5 U.S.C. §552b(c) (2000 ed.), a standard which is incorporated into FACA.

The Thompson-Gramm-Miller text addresses FACA in three distinct ways in three separate sections, and the Daschle-Lieberman Amendment proposes to strike them all:

1. Subsection (b) of the Daschle-Lieberman Amendment will nullify section 232(b)(2) of the underlying text which allows the Office of Science and Technology to establish advisory committees to “assess the law enforcement technology needs of Federal, State, and local law enforcement agencies.” The underlying text makes those committees *exempt* from FACA.

2. Paragraph (a)(4) of the Daschle-Lieberman Amendment will nullify section 871 of the underlying text which allows the Secretary of Homeland Security to establish such advisory committees as he sees fit, and *allows* him to exempt them from FACA.

3. Paragraph (a)(2) of the Daschle-Lieberman Amendment will nullify section 311(i) of the underlying text which allows the Homeland Security Science and Technology Advisory Committee to remain in existence for more than two years. Subsection (i) of the underlying text provides that section 14 of FACA shall not apply to this particular advisory committee, and section 14 requires advisory committees to terminate after 2 years unless they are renewed by the President or other officer. 5 U.S.C. App. §14 (2000 ed.). This provision does *not* deal with openness but with tenure.

It can be argued that the underlying text should not contain the provisions on FACA that it does, but it cannot be argued responsibly that such provisions are unprecedented or extraordinary. The House of Representatives overwhelmingly adopted these provisions (which Congress can always

amend later), and the Senate must now decide if such ordinary policy choices should defeat the bill. Only the Thompson-Gramm-Miller Amendment contains the policy choices the House already has agreed to.

### **III. Amending “the Wellstone Amendment” To Improve Homeland Security**

[subsection (c) of the amendment]

The Daschle-Lieberman Amendment nullifies two-thirds of subsection 835(d) of the underlying Thompson-Gramm-Miller Amendment. The underlying text specifies the circumstances when the Secretary of Homeland Security can waive the requirements **prohibiting “corporate expatriates”** from contracting with the Department of Homeland Security.

Under section 835 of the underlying text (which is based on Senator Wellstone’s floor amendment that was adopted in the Senate), the Secretary cannot contract with an “inverted domestic corporation” (defined at some length in section 835 but, in short, a U.S. corporation that has moved overseas). However, subsection (d) of section 835 requires the Secretary to waive the restriction if necessary (1) to protect national security, (2) to protect American jobs, (3) or to prevent the Government from incurring increased costs.

The Daschle-Lieberman Amendment strikes the latter two reasons for waiving the restriction, and limits the waiver to reasons of national security. On the other hand, the Thompson-Gramm-Miller Amendment protects American jobs and taxpayers’ purses, as well as national security.

### **IV. Providing Oversight for Transportation Security Emergency Regulations**

#### **To Improve Homeland Security**

[paragraph (a)(6) of the amendment]

The Daschle-Lieberman Amendment nullifies section 1707 of the underlying Thompson-Gramm-Miller Amendment. The underlying text amends the Transportation Security Act, 49 U.S.C.A. §114(l)(2)(B) (2002 pocket part), to provide effective review of emergency regulations.

The Transportation Security Act, Pub. L. 107-71, gave the Under Secretary for Security (of DoT) extraordinary powers: To “protect transportation security,” he can issue emergency regulations or security directives “without providing notice or an opportunity for comment and without prior approval of the Secretary [of Transportation].” *Id.* at §114(l)(2)(A). Current law provides that the emergency regulations “shall remain effective” unless disapproved by the Transportation Security Oversight Board (or rescinded by the Under Secretary).

The underlying language changes the law so that no emergency regulation will remain in effect for no more than 90 days unless the Board ratifies them. The Transportation Security Oversight Board is composed of the Secretaries of Transportation, Defense, and Treasury; the Attorney General; the Director of Central Intelligence; and one person appointed by the President to represent the National Security Council and another to represent the Office of Homeland Security. The Thompson-Gramm-Miller Amendment helps check the vast and unique powers of the Under Secretary for Security.

## **V. Establishing a University Center To Improve Homeland Security**

[paragraph (a)(1) of the amendment]

The Daschle-Lieberman Amendment nullifies most of section 308(b)(2)(B) of the underlying Thompson-Gramm-Miller Amendment. The underlying text sets out 15 criteria that the Secretary is to use in selecting one or more university-based centers for enhancing homeland security. Daschle-Lieberman proposes to strike 14 of the 15 criteria.

Oponents of the underlying language say the provision steers the Secretary toward Texas A&M University. We don't know about that (since no university or State is mentioned), but the underlying provision does require the Secretary to make his selections based on 15 concrete criteria of merit and fitness. If the criteria are removed from the bill, the Secretary will be bound by one vague criterion. In fact, the Daschle-Lieberman Amendment opens the door for decision-making that is based more on politics than on science. If Senators Daschle and Lieberman are successful, the Secretary is more likely to choose institutions represented by powerful committee chairmen.

The Thompson-Gramm-Miller Amendment helps protect the integrity of the selection process.

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The Daschle-Lieberman Amendment will kill the Homeland Security Bill, and on point after point the provisions of the Daschle-Lieberman Amendment are inferior to those contained in the House-passed text. We are confident that the American people do not want the Homeland Security Bill weakened and then killed.

The Thompson-Gramm-Miller language is identical to the House-passed bill. The Senate must pass the Thompson-Gramm-Miller language – without amendment – if there is going to be a Department of Homeland Security this year.

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