

**THE NUCLEAR TERRORISM READINESS AND ALERT
CENTER: TRANSFORMING THE ASPIRATIONAL NATURE OF
INTERNATIONAL LAW INTO OPERATIONAL CAPABILITIES**
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I. INTRODUCTION

Senior government officials, particularly those in the Intelligence Community, need to find a novel and creative solution for combating the deadly threat of nuclear terrorism. For decades, the United States has been heavily involved in preventing the proliferation of nuclear weapons through traditional international law.¹ It is noteworthy, however, that the Nuclear Non-Proliferation Treaty,² the crown jewel of all arms-control treaties, does not contain a feasible method of countering the threat of nuclear terrorism.³ Taken as a whole, treaty law does not lend itself to conflicts against non-state actors such as al-Qaeda.⁴ Specifically, terrorists

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¹ See MICHAEL LEVI, ON NUCLEAR TERRORISM 16–17 (2007); MARK M. LOWENTHAL, INTELLIGENCE: FROM SECRETS TO POLICY 260 (4th ed. 2009).

² Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

³ David S. Jonas, *Variations on Non-Nuclear: May the “Final Four” Join the Nuclear Nonproliferation Treaty as Non-Nuclear Weapon States While Retaining Their Nuclear Weapons?*, 2005 MICH. ST. L. REV. 417, 422, 424 (2005).

⁴ *Id.* at 424. See also Thomas Burch, *Non-State Actors in the Nuclear Black Market: Proposing an International Legal Framework for Preventing Nuclear Expertise Proliferation & Nuclear Smuggling By Non-State Actors*, 2 SANTA CLARA J. INT’L L. 84, (continued)

do not sign nonproliferation treaties nor do they adhere to the aspirational terms contained therein.⁵

Detractors of government efforts to combat nuclear terrorism have had great success pointing out the inherent shortcomings of the current methods of defense.⁶ Very few scholars, however, have offered achievable strategies for protecting our country from imminent attack.⁷ This article begins with an examination of the inadequacies of international law as a standalone means of preventing nuclear terrorism. Analysis then shifts to recent intelligence failures, particularly those that led to the attacks of September 11, 2001, and the war in Iraq. Additionally, the discussion highlights relevant congressional missteps and deficiencies in the legislative process. Finally, this article advocates for an innovative domestic solution. Specifically, it recommends the establishment of an information fusion center⁸ dedicated solely to the specter of nuclear terrorism.

The proposed fusion center discussed in this article will be referred to as the Nuclear Terrorism Readiness and Alert Center (NTRAC or Center). Its unique mission statement, organizational structure, and funding mechanism should be established by statute and leverage best practices from across the government spectrum. In essence, the NTRAC model provides the means to turn the aspirational nature of international law into operational capabilities. Thus, this article is not simply a critique of the shortcomings of current U.S. efforts aimed at nuclear terrorism. It also serves as a blueprint for the way ahead.

95–98 (2003); LORD MCNAIR, *THE LAW OF TREATIES* 162 (1961) (“[N]o State can be bound by any treaty provision unless it has given its assent . . .”).

⁵ See, e.g., David S. Jonas, *supra* note 3, 424–26; Norman G. Printer, Jr., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 *UCLA J. INT’L L. & FOREIGN AFF.* 331, 346 (2003).

⁶ See, e.g., LEVI, *supra* note 1, at ix.

⁷ *But see*, e.g., LEVI, *supra* note 1, at 18.

⁸ A fusion center is “a collaborative effort of two or more Federal, State, local, or tribal government agencies that combines resources, expertise, or information with the goal of maximizing the ability of such agencies to detect, prevent, investigate, apprehend, and respond to criminal or terrorist activity.” *Implementing Recommendations of the 9/11 Commission Act of 2007* § 210A, 6 U.S.C. § 124h(j)(1) (2010). This article proposes a fusion center model similar in concept to the state, local, and regional initiative discussed in this legislation. Nonetheless, NTRAC will be a robust collaborative venture that relies on federal government entities with significant counterterrorism authorities.

II. BACKGROUND

In his recent book titled *Obama's Wars*, Bob Woodward portrays a president deeply concerned with the national security landscape facing the United States.⁹ Throughout Woodward's narrative, the President and administration officials vigorously debate strategies for defeating international terrorist organizations abroad while also balancing delicate domestic issues such as the impending economic crisis.¹⁰ Despite the many challenges facing President Obama upon taking office, Woodward describes a man who consistently tackles issues head-on with thoughtful determination.¹¹ He portrays a leader that feels almost any roadblock can be surmounted with informed strategy and persistence.¹²

Despite the President's optimism, there is one issue which admittedly gives him pause.¹³ That issue is the threat of nuclear terrorism.¹⁴ In reference to nuclear terrorism, President Obama uncharacteristically loses his confidence and for the first time readers catch a glimpse of the absolute concern he has for this particular national security threat.¹⁵ He openly refers to nuclear terrorism as a "game changer" and worries about the catastrophic nature of such an attack on a major U.S. city.¹⁶ He also candidly admits, "When I go down the list of things I have to worry about all the time, that is at the top, because that's one area where you can't afford any mistakes."¹⁷

President Obama is not alone in his assessment. In fact, similar concerns have been raised by past presidents and other prominent politicians.¹⁸ For example, during the first presidential debate of 2004, President George W. Bush and Senator John Kerry were asked, "What is the single most serious threat to American national security?"¹⁹ Both men replied unequivocally that nuclear terrorism was their paramount

⁹ See generally BOB WOODWARD, *OBAMA'S WARS* (2010).

¹⁰ *Id.* at 80.

¹¹ *Id.* at 38.

¹² *Id.* at 38–39.

¹³ *Id.* at 363.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Graham Allison, *Preface to Confronting the Specter of Nuclear Terrorism*, 607 ANNALS AM. ACAD. POL. & SOC. SCI. 6, 6 (2006).

¹⁹ *Id.*

concern.²⁰ Vice President Richard B. Cheney also reiterated this sentiment during the last weeks of the campaign when he stated that nuclear terrorism is “the ultimate threat. For us to have a strategy that’s capable of defeating that threat, you’ve got to get your mind around that concept.”²¹ The emphasis placed upon this bipartisan issue by the highest levels of American leadership is noteworthy.²² Despite their best efforts, however, government officials have yet to find a viable solution to effectively combat this danger.²³ Thus, although ten years have passed since the events of September 11, 2001, the United States is still highly vulnerable to catastrophic attack.²⁴

The central thesis of this article is that senior government officials, particularly officials in the Intelligence Community, must find a novel and creative means of preventing this deadly threat. Nuclear terrorism does not lend itself to the traditional international agreement or treaty making process.²⁵ Moreover, history has proven that it would be extremely difficult to unify all nuclear nonproliferation and counterproliferation efforts under one figurehead or “czar for nuclear terrorism[.]”²⁶ Therefore, the U.S. government is faced with a significant challenge—how to successfully collect and analyze information related to nuclear terrorism and simultaneously adapt the complex government bureaucracy already in place to quickly and effectively safeguard against this risk.

The proposed NTRAC model rises to this challenge. To be effective, it is imperative that NTRAC be capable of combining a varied and disjointed system of defense into a cohesive and unified whole. The mission statement, leadership structure, organizational makeup, and funding mechanism for the Center should be established by statute and leverage best practices from across the government spectrum.

In effect, NTRAC would combine collocated personnel from all existing government entities tasked with safeguarding the United States from nuclear terrorism. Individual detailees with subject matter expertise would serve in rotational billets at the Center and act as liaisons to their parent organizations to facilitate effective communication during

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 7.

²³ *See generally* LEVI, *supra* note 1.

²⁴ *See, e.g., id.* at 1–3.

²⁵ *See* Jonas, *supra* note 3, at 424–26; Printer, Jr., *supra* note 5.

²⁶ LEVI, *supra* note 1, at 146.

operations. Thus, NTRAC would function as the focal point for all information related to nuclear terrorism and simultaneously provide the means to turn intelligence into action.

III. INTERNATIONAL LAW—AN IMPERFECT METHOD OF ADDRESSING NUCLEAR TERRORISM

For decades the United States has been heavily involved in preventing the proliferation of nuclear weapons through traditional international law.²⁷ Following the attacks of September 11, 2001, however, the discourse surrounding viable nonproliferation strategies became more exigent.²⁸ As evidenced by U.S. practice, the conventional tools of treaty and customary international law significantly factor into nonproliferation strategies.²⁹ It is noteworthy, however, that the Nuclear Non-Proliferation Treaty does not contain a feasible method of countering the threat of nuclear terrorism.³⁰ Rather, its terms seem too aspirational and ambiguous to combat such an immediate peril.³¹ Taken as a whole, treaty law does not easily lend itself to conflicts against non-state actors such as al-Qaeda.³² Only sovereign states are able to consent to the imposition of treaty terms. In addition, even if the United States were able to bring al-Qaeda to the bargaining table, how would diplomats negotiate with a loosely affiliated group of terrorists bent on catastrophic attack and infliction of maximum casualties? The answer is obvious—they would not.

To discuss the effects of international law on the threat of nuclear terrorism, it is imperative to first address two separate but interrelated theories related to intelligence collection. For nuclear materials to end up in the hands of a terrorist organization, the material required to create a nuclear weapon must logically flow from a state which already possesses the necessary components.³³ This fact is intuitive as there are currently no terrorist organizations capable of enriching uranium or completing the

²⁷ LOWENTHAL, *supra* note 1.

²⁸ *Id.*

²⁹ See Jonas, *supra* note 3, at 418.

³⁰ *Id.* at 420.

³¹ See NPT, *supra* note 2.

³² Jonas, *supra* note 3, at 424.

³³ *Id.*; LOWENTHAL, *supra* note 1.

highly complex set of steps necessary to create a working nuclear weapon.³⁴

Thus, intelligence collection may approach this situation from two distinct perspectives.³⁵ The first approach gives precedence to the nuclear activities of nation states, “both for their own sake as factors in regional stability and as possible sources of material to terrorists.”³⁶ Therefore, treaties limiting the acceptable transfer of nuclear weapons may enhance these collection activities by limiting the possible spectrum of state activities that intelligence practitioners would be forced to collect against.³⁷

The second approach, however, involves focusing intelligence collection on the actual terrorist group itself as well as examining the group’s declared actions and intentions.³⁸ During this type of collection activity, efforts are not enhanced by limitations on state actors. Rather, intelligence collection focuses purely on a loosely affiliated group of terrorist suspects whose actions are not constrained by terms in a treaty or international agreement.³⁹

In addition, there are other significant shortfalls in the use of treaties as a means of addressing nuclear terrorism. Notably, treaties cannot bind nation states which do not consent to their terms.⁴⁰ Thus, non-signatories to the Nuclear Non-Proliferation Treaty which have since developed nuclear weapons are not restricted by international law from transferring these weapons to a terrorist organization or to other non-signatory states.⁴¹ Treaties also do not take into account the prospect of misplaced or stolen nuclear materials that accompanies the collapse of a Nuclear-Weapon State.⁴² Most importantly, international treaties do little to curb the behavior of a terrorist organization that is already in possession of nuclear material, and which is capable of smuggling this material into the United States.⁴³ Accordingly, all of these factors work to the detriment of

³⁴ See Jonas, *supra* note 3, at 424 (“[I]t is states that exclusively control the nuclear technologies and production of fissile materials for nuclear weapons.”).

³⁵ LOWENTHAL, *supra* note 1.

³⁶ *Id.*

³⁷ *See id.*

³⁸ *Id.*

³⁹ *See id.* at 259.

⁴⁰ MCNAIR, *supra* note 4.

⁴¹ *See id.*; NPT, *supra* note 2.

⁴² Jonas, *supra* note 3, at 424.

⁴³ *See generally* Burch, *supra* note 4.

international law as a stand-alone means of prohibiting nuclear proliferation.

Despite the recent success of the U.S. military mission targeting Osama Bin Laden, the United States still faces significant danger from al-Qaeda and other various non-state actors.⁴⁴ Although these terrorist organizations do not enjoy the status of an independent-state sovereign, a nuclear attack by such a group targeted at a major U.S. city would undoubtedly be as catastrophic as a state initiated attack on that same city.⁴⁵ Nuclear weapons are indiscriminate by nature, and “[n]o other device can compare to the power of a nuclear weapon to inflict unfathomable destruction.”⁴⁶ Although all weapons of mass destruction have the potential to cause significant casualties, “only nuclear weapons [can] also destroy buildings and physical infrastructure, and do so on a vast scale.”⁴⁷ Regardless of whether terrorists are able to successfully detonate an intact nuclear weapon or a crudely improvised nuclear device, the impact on the United States, and indeed the world, would be irreversible.⁴⁸ Multiple scholars have discussed in great detail the devastation a nuclear weapon would inflict. For example:

If al-Qaeda was to rent a van to carry [a] ten-kiloton Russian weapon into the heart of Times Square and detonate it adjacent to the Morgan Stanley headquarters at 1585 Broadway, Times Square would vanish in the twinkling of an eye. The blast would generate temperatures reaching into the tens of millions of degrees Fahrenheit. The resulting fireball and blast wave would destroy instantaneously the theater district, the New York Times building, Grand Central Terminal, and every other structure within a third of a mile of the point of detonation. The ensuing firestorm would engulf Rockefeller Center, Carnegie Hall, the Empire State Building, and Madison

⁴⁴ See, e.g., Lesa Jansen, *9/11 Threat from Al Qaeda Operative Intercepted*, *Official Says*, CNN.COM (Sept. 9, 2011), http://articles.cnn.com/2011-09-09/us/terrorism.threat_1_al-qaeda-cells-raid-on-osama-bin-plot?_s=PM:US.

⁴⁵ David S. Jonas, *The New U.S. Approach to the Fissile Material Cutoff Treaty: Will Deletion of a Verification Regime Provide a Way Out of the Wilderness?*, 18 FLA. J. INT'L L. 597, 599 (2006).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See *id.*

Square Garden leaving a landscape resembling the World Trade Center site.⁴⁹

This powerful image emphasizes the need for a viable defensive strategy to protect the United States from terrorist attack. In a moment, the majority of New York City would cease to exist. In light of this alarming scenario and as a result of the existing inadequacies in government institutions which will be discussed throughout the remainder of this article, government officials should use every asset at their disposal to disrupt such a plot before it occurs. Although the aspirational terms of treaties aimed at nuclear nonproliferation are a necessary and indispensable means of limiting state action, the effect these treaties have on the specter of nuclear terrorism is uncertain.⁵⁰ Thus, to fill this gap in nuclear defense, we need a novel and creative domestic solution. In essence, our country and its defenders require the means to turn the mere “aspirational” into “operational” capabilities. This can be accomplished through the creation of an information fusion center dedicated solely to nuclear terrorism prevention.

IV. A RECIPE FOR DISASTER—RECENT U.S. INTELLIGENCE FAILURES

To develop a successful domestic defense against nuclear terrorism, it is important to first analyze some of the significant shortcomings in U.S. intelligence efforts identified in the wake of September 11, 2001. When read in tandem, two particular congressional reports highlight the ineffectiveness of modern intelligence capabilities to address the specter of nuclear terrorism.⁵¹ The National Commission on Terrorist Attacks upon the United States (the 9/11 Commission) was given a broad mandate to investigate the facts and circumstances that led to the successful terrorist attacks.⁵² Specifically, the 9/11 Commission examined points of failure “relating to intelligence agencies, law enforcement agencies, diplomacy,

⁴⁹ GRAHAM ALLISON, NUCLEAR TERRORISM: THE ULTIMATE PREVENTABLE CATASTROPHE 3–4 (2004).

⁵⁰ Jonas, *supra* note 3, at 423–24.

⁵¹ See STAFF OF NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., 108TH CONG., THE 9/11 COMM'N REP. (2004) [hereinafter 9/11 COMM'N REP.]; THE COMM'N ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WMD, 109TH CONG., REP. TO THE PRESIDENT OF THE U.S., (2005) [hereinafter WMD COMM'N REP.] (discussing the ineffectiveness of intelligence capabilities).

⁵² 9/11 COMM'N REP., *supra* note 51, at xv.

immigration issues and border control, the flow of assets to terrorist organizations, [and] commercial aviation”⁵³

In contrast, the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (the WMD Commission) was given a more specific mandate.⁵⁴ It was “charged with assessing whether the Intelligence Community [was] sufficiently authorized, organized, equipped, trained, and resourced to identify and warn in a timely manner of . . . the development and transfer of knowledge, expertise, technologies, materials, and resources associated with the proliferation of Weapons of Mass Destruction”⁵⁵ In particular, the WMD Commission analyzed these factors as they related to pre-war U.S. intelligence estimates of Iraq’s weapon capabilities and applied relevant lessons learned to other potential state and non-state threats that could arise in the future.⁵⁶

Both Commissions’ findings contained important insights into current U.S. intelligence efforts directed at nuclear terrorism. The 9/11 Commission determined that, despite a host of failures related to intelligence and information sharing, there were still numerous operational opportunities where government agencies could have been successful in disrupting the terrorist plot.⁵⁷ These opportunities, however, were largely missed due to inefficiencies in government collaboration.⁵⁸ Thus, the 9/11 Commission concluded that there were “pervasive problems of managing and sharing information across a large and unwieldy government that had been built in a different era to confront different dangers.”⁵⁹

The 9/11 Commission also found that “America’s homeland defenders faced outward” and little, if any, thought was given to the domestic arena.⁶⁰ The Intelligence Community demonstrated shortcomings in the collection and analysis of intelligence related to foreign terrorist groups, and

⁵³ *Id.*

⁵⁴ Exec. Order No. 13,328, 3 C.F.R. 139–40 (2004).

⁵⁵ *Id.* at 139.

⁵⁶ Letter from Laurence H. Silberman and Charles S. Robb, Co-Chairmen, Comm’n on the Intelligence Capabilities of the U.S. Regarding WMD, to President George W. Bush (Mar. 31, 2005), in WMD COMM’N REP., *supra* note 51 [hereinafter WMD Transmittal].

⁵⁷ STAFF OF NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., 108TH CONG., THE 9/11 COMM’N REP.: EXEC. SUMMARY 8 (2004) [hereinafter EXEC. SUMMARY].

⁵⁸ *Id.*

⁵⁹ 9/11 COMM’N REP., *supra* note 51, at xvi.

⁶⁰ EXEC. SUMMARY, *supra* note 57, at 10.

domestic collection was largely non-existent.⁶¹ For example, the Federal Bureau of Investigation (FBI) “did not have the capability to link the collective knowledge of agents in the field to national priorities.”⁶² More importantly, intelligence and law enforcement personnel had missed multiple opportunities to interdict the future hijackers as a result of repeated immigration violations.⁶³ Among potential excludable factors, the report found that the September 11th hijackers:

- included known al-Qaeda operatives who could have been watchlisted;
- presented passports manipulated in a fraudulent manner;
- presented passports with suspicious indicators of extremism;
- made detectable false statements on visa applications;
- made false statements to border officials to gain entry into the United States; and
- violated immigration laws while in the United States.⁶⁴

There can be little doubt that exploitation of any one of these terrorist “travel vulnerabilities” could have resulted in the prevention or detection of the September 11th terrorist attacks before the perpetrators brought their plans to fruition.⁶⁵ Although failure to detect the plot resulted in massive human suffering, it is important to note that a terrorist attack upon the United States using nuclear weapons would be exponentially more deadly and destructive.⁶⁶

While the findings of the 9/11 Commission are alarming, these factors become even more significant when augmented by the findings of the WMD Commission.⁶⁷ These two commission reports, when considered in tandem, bolster the case for a fusion center focused solely on nuclear terrorism information. On March 31, 2005, the WMD Commission issued its final report to the President.⁶⁸ The conclusions drawn by this Commission after a lengthy investigative process were blunt.⁶⁹ With unanimous consent, the WMD Commission found “that the Intelligence

⁶¹ 9/11 COMM’N REP., *supra* note 51, at xvi.

⁶² EXEC. SUMMARY, *supra* note 57, at 10.

⁶³ *Id.* at 13–14.

⁶⁴ *Id.* at 13.

⁶⁵ *Id.*

⁶⁶ ALLISON, *supra* note 49, at 129.

⁶⁷ WMD COMM’N REP., *supra* note 51, at 4.

⁶⁸ *See id.*

⁶⁹ WMD Transmittal, *supra* note 56.

Community was dead wrong in almost all of its pre-war judgments about Iraq's weapons of mass destruction."⁷⁰ Specifically, Commission members stressed that this intelligence failure was caused by "the Intelligence Community's inability to collect good information about Iraq's [weapons of mass destruction] programs, serious errors in analyzing what information it could gather, and a failure to make clear just how much of [the resulting analysis] was based on assumptions, rather than good evidence."⁷¹

The WMD Commission declared that intelligence estimates leading to the war in Iraq were "the most public—and most damaging—intelligence failures in recent American history."⁷² Commission members found unequivocally that the performance of U.S. intelligence elements was not only deficient, but it was also an embarrassment.⁷³ To emphasize this point, the WMD Commission wrote:

On the brink of war, and in front of the whole world, the United States government asserted that Saddam Hussein had reconstituted his nuclear weapons program All of this was based on the assessments of the U.S. Intelligence Community. And not one bit of it could be confirmed when the war was over.⁷⁴

With such damning language coming from the WMD Commission, one wonders how U.S. intelligence efforts could have gone so far astray. The answer to this question, however, seems evident from the text of the WMD Commission Report. In this report, Commission members portray the Intelligence Community as being disjointed and stuck in the past.⁷⁵ They refer to elements of the Intelligence Community as "fragmented, loosely managed, and poorly coordinated"⁷⁶ In contrast, potential nuclear threats from non-state actors are described as constantly evolving.⁷⁷ The WMD Commission notes that although "the focus of the U.S. Intelligence Community has historically been on the capabilities of

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² WMD COMM'N REP., *supra* note 51, at 3.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 5.

⁷⁶ *Id.*

⁷⁷ *Id.* at 35.

large nation states[,] [w]hen applied to the problem of terrorist organizations and smaller states, many of our intelligence capabilities are inadequate.”⁷⁸

Thus, the findings of the 9/11 Commission and WMD Commission Reports, when taken in their entirety, point to a scenario with catastrophic consequences.⁷⁹ Informed readers are left with an important question. How can our country combat nuclear terrorism if we are ill-equipped to collect and analyze intelligence related to both terrorism and nuclear proliferation as stand-alone intelligence disciplines? More importantly, how can we effectively procure intelligence on non-state actors when our government has repeatedly demonstrated that it is incapable of consistently collecting accurate information on large, homogenous nation states? Unfortunately, there are no easy answers to these questions.

V. THE NATIONAL COUNTERPROLIFERATION CENTER AND ANOTHER MISSED OPPORTUNITY

Although the 9/11 Commission recognized the potential for a domestic nuclear terrorist attack,⁸⁰ its analysis also lent credibility to the hypothetical scenario described earlier in this article. Not only was al-Qaeda interested in obtaining a nuclear weapon, they had already dedicated substantial effort toward actually procuring the material necessary to perpetrate an attack on a major U.S. city.⁸¹ In public testimony in February 2004, then Director of the Central Intelligence Agency George Tenet noted that Osama Bin Laden and al-Qaeda considered the acquisition of a nuclear weapon to be not only a strategic goal but also a “religious obligation.”⁸² The 9/11 Commission found that al-Qaeda had been actively pursuing nuclear capabilities for the previous ten years and that intelligence chatter indicated “that Bin Laden’s associates thought their leader was intent on carrying out a ‘Hiroshima.’”⁸³

In addition, the 9/11 Commission highlighted that the amount of nuclear material needed to make a viable weapon is minimal.⁸⁴ Commission members explained:

⁷⁸ *Id.* at 35–36.

⁷⁹ *Id.* at 517; EXEC. SUMMARY, *supra* note 57, at 8–10.

⁸⁰ 9/11 COMM’N REP., *supra* note 51, at 380.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

A trained nuclear engineer with an amount of highly enriched uranium or plutonium about the size of a grapefruit or an orange, together with commercially available material, could fashion a nuclear device that would fit in a van like the one Ramzi Yousef parked in the garage of the World Trade Center in 1993. Such a bomb would level Lower Manhattan.⁸⁵

As a result, the report called for a variety of unified strategies to combat this substantial risk.⁸⁶ Most notably, the 9/11 Commission recommended “the U.S. government should . . . [d]evote a maximum effort to the . . . task of countering the proliferation of weapons of mass destruction.”⁸⁷

The 9/11 Commission had one broad overarching goal—“to build unity of effort across the U.S. government.”⁸⁸ Commission members remarked that to effectively implement change, “it will require a government better organized than the one that exists today”⁸⁹ One means of initiating this change was to approach intelligence collection in a whole new manner.⁹⁰ The 9/11 Commission recommended “unifying strategic intelligence and operational planning against Islamist terrorists across the foreign-domestic divide with a National Counterterrorism Center”⁹¹ By creating this information fusion center dedicated to the broad focus of counterterrorism, members hoped to break down barriers to information sharing and unify all participants “in a network-based information sharing system that transcends traditional government boundaries”⁹²

The idea of the National Counterterrorism Center (NCTC) was quickly embraced by government leaders who saw the utility of this collaborative structure.⁹³ The NCTC was the first creative and workable solution designed to bring together all government agencies involved in the fight

⁸⁵ *Id.*

⁸⁶ EXEC. SUMMARY, *supra* note 57, at 18–19.

⁸⁷ *Id.* at 18.

⁸⁸ *Id.* at 20.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 21.

⁹³ See AMY ZEGART, SPYING BLIND: THE CIA, THE FBI, AND THE ORIGINS OF 9/11 186 (2007).

against terrorism.⁹⁴ It was widely understood that the NCTC's strength lay in its ability to combine "joint intelligence function[s] alongside . . . operations work."⁹⁵ In subsequent legislation, Congress expressed its willingness to apply the successful fusion center framework to other national security threats facing our country.⁹⁶ Notably, lawmakers aspired to create a National Counterproliferation Center (NCPC) to compliment the role of the NCTC and to utilize "all appropriate government tools to prevent and halt the proliferation of weapons of mass destruction, their delivery systems, and related materials and technologies."⁹⁷

The Intelligence Reform and Terrorism Prevention Act of 2004⁹⁸ (IRTPA), passed in December 2004, outlined a robust mandate for the NCPC.⁹⁹ Congress intended the NCPC to address several major functions.¹⁰⁰ As part of its complex mission, the NCPC was charged with combating the flow of not only nuclear weapons but also all other weapons of mass destruction.¹⁰¹ It was tasked with facilitating information sharing amongst all government partners, as well as serving as the central repository for all information related to the proliferation of these weapons.¹⁰² Most importantly, the NCPC was created to serve a broader strategic purpose.¹⁰³ It was intended to conduct operational planning for the federal government as a whole while simultaneously keeping the President informed of all issues related to the proliferation of weapons of mass destruction.¹⁰⁴

When examining relevant sections of the IRTPA, it is obvious that Congress intended this joint venture to be on a scale comparable to that of

⁹⁴ EXEC. SUMMARY, *supra* note 57, at 21.

⁹⁵ *Id.*

⁹⁶ *E.g.*, The Intelligence Reform and Terrorism Prevention Act of 2004 § 7202, 8 U.S.C. § 1777 (2004) [hereinafter IRTPA].

⁹⁷ IRTPA § 1022, 50 U.S.C. § 404o-1 (2004) (establishing the National Counter Proliferation Center).

⁹⁸ Pub. L. No. 108-458, 118 Stat. 3638 (2004) (codified as amended in scattered sections of the United States Code).

⁹⁹ IRTPA § 1022.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

the NCTC. The NCPC was responsible for coordinating information on all weapons of mass destruction, including chemical and biological weapons.¹⁰⁵ This type of collection was a heavy burden for the Intelligence Community as a whole in the period leading up to the September 11th attacks.¹⁰⁶ Thus, the NCPC would have required a substantial influx of personnel and resources to achieve its congressionally mandated mission.¹⁰⁷

The NCPC, as originally envisioned under the IRTPA, had substantial authority and expansive participation by representatives of all government stakeholders involved in nonproliferation and counterproliferation issues.¹⁰⁸ Only four months later, however, the recommendations of the WMD Commission Report hamstrung the NCPC before it had a chance to demonstrate its worth.¹⁰⁹ For political reasons, Congress had become “skeptical . . . about the increasingly popular idea of creating a network of ‘centers’ organized around priority national intelligence problems.”¹¹⁰ Therefore, the vision of the NCPC contained in the WMD Commission Report was vastly different than the mandate contained in the IRTPA.¹¹¹

Congress was now calling for a fusion center with limited staffing and resource allocation.¹¹² WMD Commission members specifically directed that the NCPC should be “a relatively small organization with approximately [one hundred] staff” to fulfill its mission.¹¹³ In addition, the WMD Commission Report further restricted the mission of the NCPC by forbidding its personnel from taking part in activities that had previously been required by the IRTPA.¹¹⁴ Notably, the NCPC no longer served as the “focal point for government-wide strategic operational planning” related to weapons of mass destruction.¹¹⁵ In fact, the NCPC was not even authorized to perform “analysis” in the traditional sense.¹¹⁶ Rather, its

¹⁰⁵ *Id.*

¹⁰⁶ EXEC. SUMMARY, *supra* note 57, at 20–21.

¹⁰⁷ *See id.* at 21–22.

¹⁰⁸ IRTPA § 1022.

¹⁰⁹ WMD COMM’N REP., *supra* note 51, at 328.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 328–29, 567.

¹¹³ *Id.* at 567.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 312.

¹¹⁶ *Id.* at 328.

limited staff was now responsible for the undefined task of “*coordinat[ing]* analysis and collection on nuclear, biological, and chemical weapons across the Intelligence Community.”¹¹⁷

Thus, following the attacks of September 11, 2001, the Intelligence Community was not the only government institution that lacked unity of effort when it came to combating terrorism. Congress also communicated mixed messages in its effort to protect national security.¹¹⁸ Accordingly, one of the central themes of this article is that in limiting the statutory authority of the NCPC, Congress and more specifically, members of the WMD Commission, made a momentous mistake. Going forward, it is imperative that government officials find a means of taking corrective action to remedy this situation before a domestic nuclear terrorist strike makes this the deadliest “missed opportunity” in American history.

VI. NTRAC—A CREATIVE DOMESTIC SOLUTION TO A DEADLY GLOBAL THREAT

The idea of unifying all nuclear nonproliferation and counterproliferation efforts under one centrally managed umbrella has been proposed in the past.¹¹⁹ The concept of creating an information fusion center focused solely on the threat of nuclear terrorism, however, has not been advanced.¹²⁰ The primary mistake made by the legislative branch of government is that it consistently tries to achieve maximum effect while expending minimum resources. Rather than strictly addressing nuclear terrorism, the primary threat to national security, Congress tried to create an entity that focused globally on all weapons of mass destruction.¹²¹ For instance, the NCPC was initially given the large, unwieldy mission of “analyzing and integrating all intelligence possessed or acquired by the

¹¹⁷ *Id.* at 328 (emphasis added).

¹¹⁸ *Id.* at 328 (endorsing the idea of creating the NCPC while expressing skepticism with the idea of creating a network of centers organized around priority national intelligence problems).

¹¹⁹ LEVI, *supra* note 1, at 146.

¹²⁰ The NCTC was established “to bring together *all* available information on terrorism, analyze the information, and provide warning of potential attacks on the U.S.” and was therefore not focused solely on nuclear terrorism. RICHARD A. BEST, JR., THE NATIONAL COUNTERTERRORISM CENTER (NCTC)—RESPONSIBILITIES AND POTENTIAL CONGRESSIONAL CONCERNS 1 (2011).

¹²¹ *See id.*; IRTPA § 1022, 50 U.S.C. § 404o-1 (2004).

United States pertaining to proliferation.”¹²² The important point to emphasize here is that the mission does not say “analyzing and integrating all intelligence pertaining to nuclear terrorism.” It instead encompasses the entire universe of weapon proliferation issues, including chemical and biological weapons.¹²³

The critique of the NCPC is therefore twofold. The U.S. government needs to stop focusing on “proliferation” as a catch all collection area. An information fusion center such as the proposed NTRAC should only be tasked with gathering information on nuclear weapons, not other weapons of mass destruction. To mandate otherwise would only confuse the overall mission. As a result, NTRAC should have a much more narrowly-defined mission than the NCPC. NTRAC should focus exclusively on the threat of nuclear terrorism and specific indicators that suggest terrorist preparation is underway or that an attack is imminent. State-to-state exchanges of weapons of mass destruction are a genuine concern for national security. However, the major issue should be immediately combating the flow of nuclear weapons from state actors to nuclear terrorists. Thus, a more modern and operational model that relies heavily on counterproliferation and interdiction efforts should supplement approaches involving only the international agreement process.

The U.S. government as a whole, like Congress, has also demonstrated a desire to take shortcuts when it comes to unifying efforts against nuclear terrorism.¹²⁴ Following the WMD Commission Report, government officials explored several means of combining efforts aimed at nuclear terrorism.¹²⁵ Rather than bringing together the broad expanse of departments and agencies involved in nuclear terrorism prevention under the umbrella of an information fusion center, however, policymakers tried to unify efforts under one government official, or “Czar for Nuclear Terrorism.”¹²⁶ Although this effort properly limited the central mission to

¹²² IRTPA § 1022.

¹²³ IRTPA §§ 1022, 6802.

¹²⁴ See WMD COMM’N REP., *supra* note 51, at 328.

¹²⁵ LEVI, *supra* note 1, at 146.

¹²⁶ *Id.* (“[T]here was an effort within the federal government to designate a high-level coordinator for defending against nuclear terrorism using the full spectrum of possible tools.”).

only nuclear terrorism, the Czar model proved unworkable for other reasons.¹²⁷

In his book *On Nuclear Terrorism*, Michael Levi explains why the Czar model inevitably failed.¹²⁸ He hypothesizes that “with effective defense demanding contributions at the local, state, federal, and international levels, no single manager is . . . theoretically possible at the highest levels.”¹²⁹ Thus, “appointing a so-called czar for nuclear terrorism would be bureaucratically all but impossible.”¹³⁰ Rather than unifying government efforts under one central umbrella, Levi instead recommends that federal policymakers focus on three important goals:

- Developing “a plan that defines the responsibilities of each part of the federal, state, and local government in preventing nuclear terrorism[;]”¹³¹
- Breaking “down classification barriers that perversely prevent many potentially critical players in the defense from receiving information they need to do their jobs most effectively[;]”¹³² and
- Promoting “international efforts to coordinate defenses and share information.”¹³³

While Levi’s goals are certainly enlightening, his theory is also flawed in one major respect. He is too quick to dismiss the idea of unifying all defenses against nuclear terrorism under one central umbrella. Notably, the idea of a Czar for Nuclear Terrorism proved to be unworkable, yet Levi failed to consider an information fusion center model as an alternate means to address this issue. Under the NTRAC model, all three of Levi’s goals are achievable. In essence, NTRAC would be an effective hybrid of both the NCPC and the Czar models. It would take the most useful elements of each and combine them in a multi-tiered defense. It would utilize a modern operational framework to execute a narrowly-defined mission. Most importantly, it would combine a robust workforce of subject-matter

¹²⁷ *Id.* (“Intense resistance from agencies that would have fallen under the new office [to be led by the Czar for Nuclear Terrorism] led to major limits on both its scope and its power.”).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

experts to achieve one invaluable goal related to nuclear terrorism—“to build unity of effort across the U.S. government.”¹³⁴

VII. TERRORIST TRAVEL AND A NARROWLY TAILORED MISSION STATEMENT

To build an effective collaborative framework, it is important to first ensure that the statute establishing NTRAC is adequately defined and narrowly tailored to a small number of specific objectives.¹³⁵ The original seven-part mission of the NCPC, as defined in the IRTPA, is overly cumbersome.¹³⁶ In addition, the IRTPA improperly focused on the issue of proliferation writ large, rather than only nuclear terrorism.¹³⁷ To address these concerns, this article advocates for a mission statement that is slightly modified from that of the NCPC. While the 9/11 Commission highlighted the need for new and creative measures to address nuclear terrorism,¹³⁸ it also made one particular recommendation that is especially important to this discussion. Interestingly, it called for a parallel effort to “[t]arget terrorist travel, an intelligence and security strategy that the 9/11 story showed could be at least as powerful as the effort devoted to terrorist finance.”¹³⁹

The link between terrorist travel and nuclear terrorism has been mentioned by multiple scholars.¹⁴⁰ It has not, however, been exploited to

¹³⁴ EXEC. SUMMARY, *supra* note 57, at 20.

¹³⁵ See John D. Negroponte & Edward M. Wittenstein, *Urgency, Opportunity, and Frustration: Implementing the Intelligence Reform and Terrorism Prevention Act of 2004*, 28 YALE L. & POL’Y REV. 379, 388 (2009) (discussing problems that occurred when attempting to implement IRTPA’s sweeping changes across the Intelligence Community).

¹³⁶ IRTPA § 1022, 50 U.S.C. § 404o-1 (2004).

¹³⁷ *Id.*

¹³⁸ EXEC. SUMMARY, *supra* note 57, at 20–21 (discussing five different measures to unify the government against terrorism), 22 (stating that a new National Intelligence Director should be established and one of the director’s main jobs would be “to oversee national intelligence centers . . . against common targets—like . . . nuclear proliferation . . .”).

¹³⁹ *Id.* at 19.

¹⁴⁰ See *id.* at 19 (discussing how to protect against terrorist attacks by targeting terrorist travel through a comprehensive screening system that includes improving check-point screening by improving “no-fly” lists and by focusing on neglected transportation security systems); LEVI, *supra* note 1, at 27 (discussing how acquiring nuclear materials is only one step, and how another step is transporting bomb materials and the actual terrorists

(continued)

the maximum degree possible. Notably, nuclear materials are not the only necessary ingredient for a successful attack.¹⁴¹ Rather, a lone terrorist suspect, or more likely a group of suspects, is required to actually assemble the device and initiate its detonation.¹⁴² Thus, by targeting terrorist travel, U.S. law enforcement could effectively remove one-half of this deadly equation. The result would be a nuclear device without an effective triggering mechanism. The attacks of September 11, 2001, provide a striking analogy. If the perpetrators of the attacks had been apprehended while trying to enter the United States, the result would have been four commercial airliners without terrorist hijackers onboard to execute their deadly mission.

A staff report issued by the 9/11 Commission, titled *9/11 and Terrorist Travel*,¹⁴³ provides additional insight into the travel vulnerabilities of terrorist organizations and, particularly, the terrorists that took part in the September 11th attacks.¹⁴⁴ In it, staff members “endeavor to dispel the myth that [the terrorists’] entry into the United States was ‘clean and legal.’ It was not.”¹⁴⁵ There were multiple opportunities to interrupt their plot.¹⁴⁶ In all, the perpetrators of the attacks “had [twenty-five] contacts with consular affairs and [forty-three] contacts with immigration and customs authorities.”¹⁴⁷ These facts, however, are especially notable given the following:

involved); Christopher C. Joyner & Alexander Ian Parkhouse, *Nuclear Terrorism in a Globalizing World: Assessing the Threat and the Emerging Management Regime*, 45 STAN. J. INT’L L. 203, 240 (2009) (discussing how globalization and revolutions in international transportation have made it easier for terrorists to buy and transport nuclear weapons across national borders to reach their targets).

¹⁴¹ Friedrich Steinhausler, *What It Takes to Become a Nuclear Terrorist*, 46 AM. BEHAV. SCIENTIST 782, 791 (2003).

¹⁴² *Id.* (“Even if the terrorists should have gained possession of sufficient amounts of weapons-grade nuclear fissile material, it is still a major technical challenge to actually build such a device.”).

¹⁴³ THOMAS R. ELDRIDGE ET AL., NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, 9/11 AND TERRORIST TRAVEL (2004), available at http://govinfo.library.unt.edu/911/staff_statements/911_TerrTrav_Monograph.pdf.

¹⁴⁴ *Id.* at 132.

¹⁴⁵ *Id.* at Preface.

¹⁴⁶ *Id.* at Preface, 132.

¹⁴⁷ *Id.* at Preface.

Three hijackers carried passports with indicators of Islamic extremism linked to al Qaeda; [and] two others carried passports manipulated in a fraudulent manner. It is likely that several more hijackers carried passports with similar fraudulent manipulation. Two hijackers lied on their visa applications. Once in the United States, two hijackers violated the terms of their visas. One overstayed his visa. And all but one obtained some form of state identification. We know that six of the hijackers used these state issued identifications to check in for their flights on September 11. Three of them were fraudulently obtained.¹⁴⁸

Thus, each time a prospective hijacker entered the United States prior to September 11, 2001, it represented a missed opportunity to not only disrupt the terrorist conspiracies, but also to avoid the resulting human suffering. To ensure that similar failings do not occur when it comes to terrorist plots utilizing nuclear materials, it is imperative that the proposed NTRAC analyze terrorist travel vulnerabilities in conjunction with intelligence related to nonproliferation and counterproliferation efforts.

This article proposes a unique mission statement for NTRAC that will enable the Center to leverage the vulnerabilities that exist between terrorist travel and nuclear terrorism. The proposed NTRAC model would utilize existing legislation from an established information fusion center tasked with tracking terrorist travel and adapt it to the unique goal of combating nuclear terrorism.¹⁴⁹ Although the Human Smuggling and Trafficking Center has achieved limited success due to budgetary and staffing constraints, its focus on curtailing terrorist travel into the United States provides an invaluable starting point for the statutorily defined mission of NTRAC.¹⁵⁰ It is imperative that NTRAC accomplish four central tasks to effectively address the threat of nuclear terrorism. Specifically, the Center must:

- Serve as the focal point for interagency efforts to address nuclear terrorism;
- Serve as a clearinghouse with respect to all relevant information from all Federal Government agencies in support of the United States strategy to prevent nuclear terrorism and clandestine terrorist travel linked to nuclear proliferation;

¹⁴⁸ *Id.*

¹⁴⁹ *See generally* IRTPA, Pub. L. No. 108-458, 118 Stat. 3638 (2004).

¹⁵⁰ *Id.*

- Ensure cooperation among all relevant policy, law enforcement, diplomatic, and intelligence agencies of the federal government to convert all information related to nuclear terrorism into tactical, operational, and strategic intelligence; and
- Prepare and submit to Congress and the President, on an annual basis, a strategic assessment regarding vulnerabilities in the United States and abroad that could be exploited by nuclear terrorists.

Consequently, the mission of NTRAC is notable in that it combines a number of important concepts. The Center would serve as an information clearinghouse for all intelligence related to nuclear terrorism. It would effectively incorporate detailees from the Intelligence Community, law enforcement entities, and subject-matter experts on nuclear technology under one central umbrella. The mission of the Center would also incorporate information gleaned from both foreign and domestic sources. In addition, this information could then be combined with known terrorist travel information to successfully exploit any travel vulnerabilities.

Most importantly, the analytical and strategic capabilities of NTRAC would reflect the original intent of the NCPC as envisioned in the 9/11 Commission Report and resulting legislation passed in response to the September 11th attacks.¹⁵¹ In effect, NTRAC would be capable of conducting advanced analysis of all-source intelligence and would also be responsible for annual strategic assessments of U.S. vulnerabilities to nuclear terrorism.¹⁵² Thus, NTRAC and its cadre of experienced subject-matter experts from across the government would be the first institution in a position to “interweave expertise on nuclear weapons with expertise on terrorism, something that has not always occurred in [the] past”¹⁵³

VIII. CREATING A VIABLE LEADERSHIP STRUCTURE

To achieve its central mission, NTRAC must have an effective leadership structure firmly in place prior to standing up its operational capabilities. This leadership structure must leverage existing departments and agencies while simultaneously aligning the Center with the core operational goal of turning intelligence into action. As attempts to create a Czar for Nuclear Terrorism demonstrated, no single individual is capable of unifying the various government agencies involved in protecting the

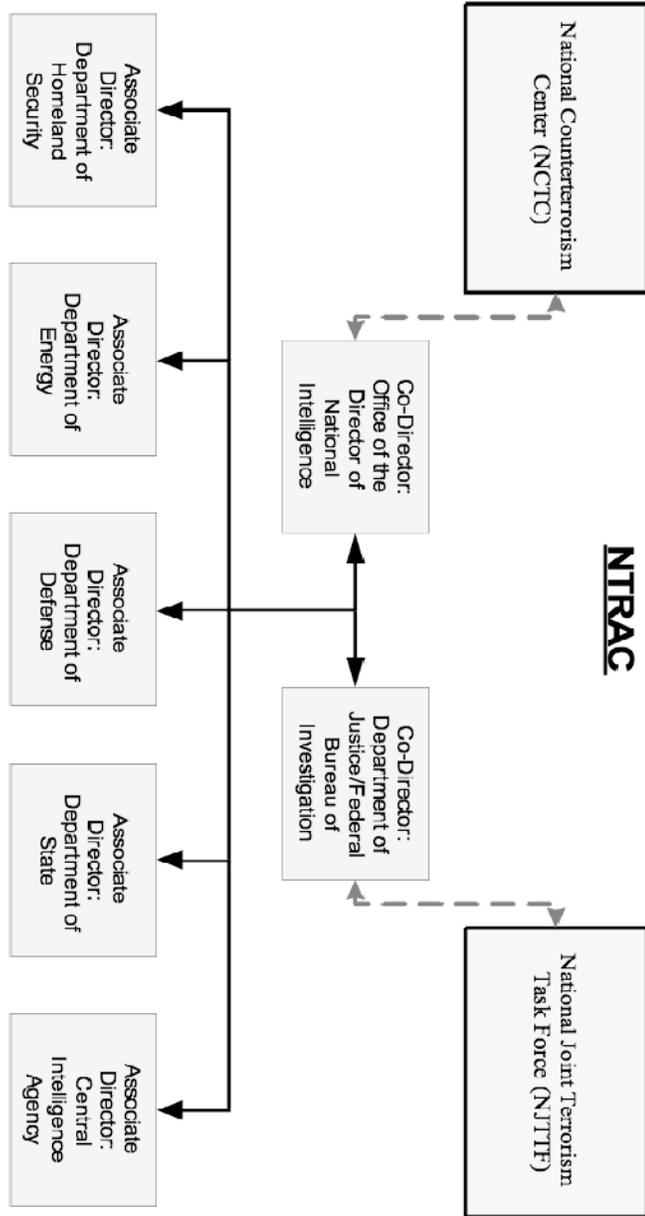
¹⁵¹ EXEC. SUMMARY, *supra* note 57 at 20; IRTPA § 1022.

¹⁵² “[A] carefully constructed strategic intelligence assessment would contribute immensely to improving our defenses.” LEVI, *supra* note 1, at 144.

¹⁵³ *Id.*

U.S. from nuclear attack.¹⁵⁴ Thus, leadership authority must be distributed across a broad range of government actors and exploit all available subject-matter expertise of the departments and agencies involved. To guarantee that NTRAC brings all relevant interests and expertise to bear on the issue of nuclear terrorism, this article proposes the leadership structure that follows, with government officials and managers detailed to the Center from designated executive branch entities.

¹⁵⁴ *Id.* at 146.



It is imperative that intelligence and law enforcement entities forge a collaborative partnership to ensure NTRAC's long-term viability. Accordingly, overall command authority for the Center would be bifurcated between representatives detailed from the Office of the Director of National Intelligence (ODNI) and the Department of Justice (DOJ), which includes the FBI. These two individuals would serve as co-directors of the Center and would share equally the command authority for NTRAC. Notably, during times of crisis the co-directors would report directly to the President of the United States, who would serve as the final arbiter of decisions related to the threat of nuclear terrorism. In addition, the co-directors would be directly supported by five collocated detailees who would serve as associate directors to the Center. These individuals would represent the Department of Homeland Security (DHS), the Department of Energy (DOE), the Department of Defense (DOD), the Department of State (DOS), and the Central Intelligence Agency (CIA), respectively.

Each detailed associate director would act as an adviser to the co-directors and would have direct communication with their parent organization and, more importantly, its respective principal. In addition, these individuals would be responsible for establishing memorandums of agreement and understanding between NTRAC and their parent organization as well as facilitating the transfer of additional detailees to the Center. Thus, NTRAC would ultimately be staffed with a cadre of trained detailees, including personnel from individual agencies within the federal government tasked with supporting current nonproliferation and counterproliferation efforts.

Under the proposed model, the staff at NTRAC would serve on a two-year rotational basis and each parent organization would be reimbursed from the Center's budget for detailed personnel. This practice would encourage increased participation by government stakeholders. The number of detailees should be well in excess of the one hundred staff recommended in the WMD Commission Report, and would ideally mirror staffing levels at the NCTC.¹⁵⁵ Moreover, detailee participation in NTRAC should not be limited to the departments and agencies listed in the leadership diagram for the Center. Rather, additional personnel should also be drawn from departments with a less direct connection to preventing nuclear terrorism, such as the Departments of Treasury, Commerce, and Health and Human Services as well as the Nuclear Regulatory Commission and the White House's National Security Council.

¹⁵⁵ WMD COMM'N REPORT, *supra* note 51, at 567.

The bifurcated leadership structure of NTRAC would enable the Director of National Intelligence and the U.S. Attorney General to collaborate on the strategic direction of the Center and would also help to diffuse interagency rivalries that may grow out of a sense of ownership over a particular collaborative venture. Critics of this type of an organizational structure will likely assert that it is unworkable. They will argue that combining law enforcement and intelligence entities in such a manner violates legal principles related to information sharing and will lead to intelligence abuses. Despite this likely criticism, intelligence and law enforcement entities are capable of working in close concert as long as proper safeguards have been put in place to protect the rights of U.S. persons.¹⁵⁶ In addition, history has demonstrated that the practice of separating law enforcement and intelligence activities was not promulgated purely out of legal concerns. Rather, it was due in part to a phenomenon referred to as “legal myth.”¹⁵⁷

During the course of the WMD Commission’s work, the members observed numerous “legal issues” that arose in a variety of contexts within the Intelligence Community.¹⁵⁸ They noted that “although there are, of course, very real (and necessary) legal restrictions on the Intelligence Community, quite often the cited legal impediments ended up being either myths that overcautious lawyers had never debunked or policy choices swathed in pseudo-legal justifications.”¹⁵⁹ Further, the WMD Commission added that this “confusion about what the law actually requires can seriously hinder the Intelligence Community’s ability to be proactive and innovative.”¹⁶⁰ Information sharing was unquestionably one of the major arenas in which legal myths had a detrimental effect.¹⁶¹ To correct any misperceptions, the WMD Commission sought a recalibration of the term “sharing.”¹⁶² Commission members explained:

¹⁵⁶ The term “U.S. person” is a term of art in the intelligence community. It denotes a group of individuals or entities who are subject to heightened protections under the law. The term is defined in multiple intelligence statutes. For the purpose of this discussion, analysis will focus on the definition contained in Executive Order 12333.

¹⁵⁷ WMD COMM’N REPORT, *supra* note 51, at 335.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 430.

¹⁶² *Id.*

The term information “sharing” suggests that the federal government entity that collects the information “owns” it and can decide whether to “share” it with others. This concept is deeply embedded in the Intelligence Community’s culture. We reject it. Information collected by the Intelligence Community—or for that matter, any government agency—belongs to the U.S. government. Officials are fiduciaries who hold the information in trust for the nation. They do not have authority to withhold or distribute it except as such authority is delegated by the President or provided by law.¹⁶³

One government institution in particular, DOJ, saw its operations benefit greatly from this change during the period immediately following the attacks of September 11, 2001.¹⁶⁴ After passage of the Foreign Intelligence Surveillance Act of 1978,¹⁶⁵ which regulated all domestic surveillance for foreign intelligence purposes, “all three branches of the federal government assumed or decided, as a matter of law or policy, that the statute could not or should not be used primarily to support law enforcement methods of protecting national security.”¹⁶⁶ As a result, the “conceptual dichotomy between law enforcement methods and all other lawful methods of protecting national security gave rise to a ‘wall’ between intelligence and law enforcement elements[.]”¹⁶⁷ In effect, this wall stood as a barrier to information sharing until November of 2002.¹⁶⁸

Following the September 11th attacks, and in light of emerging legal myths related to information sharing, the Foreign Intelligence Surveillance Court of Review (FISCR) “removed the wall’s legal foundations, rejecting as ‘false’ the conceptual dichotomy between law enforcement and other lawful methods of protecting national security.”¹⁶⁹ This action was

¹⁶³ *Id.*

¹⁶⁴ Craig S. Lerner, *The USA Patriot Act: Promoting the Cooperation of Foreign Intelligence Gathering and Law Enforcement*, 11 *GEO. MASON L. REV.* 493, 504–06 (2003) (discussing the enactment of the Patriot Act and its effect on the operations of the FBI and the Department of Justice).

¹⁶⁵ Pub. L. No. 95-511, 92 Stat. 1783 (1978).

¹⁶⁶ David S. Kris, *The Rise and Fall of the FISA Wall*, 17 *STAN. L. & POL’Y REV.* 487, 487 (2006) (emphasis omitted).

¹⁶⁷ *Id.* at 488.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

significant in that it recognized the new national security landscape facing the United States.¹⁷⁰ More importantly, the FISCRC established that effectively defending against the terrorist threat would likely “determine the very future and viability of the U.S. as a nation and as a constitutional democracy.”¹⁷¹ As a result of this decision, the FBI was able to conduct investigations free of the prior restrictions that had “in some cases . . . require[d] parallel law enforcement and intelligence investigations of the same targets, run by separate squads of FBI agents who could not freely consult with one another.”¹⁷² Thus, the FISCRC corrected this legal myth and enabled the FBI to more freely connect the dots when it came to national security investigations.¹⁷³

This article does not assert that the NTRAC model will be free of all legal constraints. Indeed, there are multiple legal concerns that arise in regard to safeguarding information on U.S. persons, especially with respect to a collaborative venture that combines departments and agencies with such a wide array of both foreign and domestic authorities.¹⁷⁴ Nonetheless, the proposed model is not only theoretically possible, but its establishment is also feasible in the near future. Existing legal restrictions on the collection, retention, and dissemination of information on U.S. persons may be overcome by well-developed internal procedures and a robust intelligence oversight program.¹⁷⁵ In addition, the proposed NTRAC could utilize multiple tools “to protect fully the legal rights of all United States persons, including freedoms, civil liberties, and privacy rights guaranteed by [f]ederal law.”¹⁷⁶

Accordingly, the effective organizational framework outlined in this article would allow NTRAC to succeed at its core mission. By creating a leadership structure where command authority is shared equally between representatives from ODNI and DOJ, NTRAC effectively knocks down the

¹⁷⁰ David S. Jonas, *The Foreign Intelligence Surveillance Act Through the Lens of the 9/11 Commission Report: The Wisdom of the Patriot Act Amendments and the Decision of the Foreign Intelligence Surveillance Court of Review*, 27 N.C. CENT. L.J. 95, 98 (2005).

¹⁷¹ *Id.*

¹⁷² Kris, *supra* note 166, at 488.

¹⁷³ *Id.*

¹⁷⁴ See generally Exec. Order No. 12,333, 3 C.F.R. 200 (1982), reprinted in 50 U.S.C. § 401 note (Supp. V 1981), amended by Exec. Order No. 13,470, 73 Fed. Reg. 45,325 (Aug. 4, 2008).

¹⁷⁵ See *id.* §§ 1.6(c), 3.1.

¹⁷⁶ *Id.* § 1.1(b).

wall between intelligence and law enforcement efforts aimed at nuclear terrorism.

IX. LEVERAGING EXISTING AUTHORITIES AND CREATING A VIABLE STAFFING MODEL

By serving as the focal point for all interagency efforts to address nuclear terrorism, NTRAC would provide valuable insight to strategic intelligence initiatives and tactical operations. It would also unify government efforts from the veritable alphabet soup of government actors involved in preventing nuclear terrorism. To that end, it is important that NTRAC personnel have adequate communication with their parent organization to obtain information relevant to the threat of nuclear terrorism and to provide useful direction, as necessary, during enforcement operations. For this model to succeed, each collocated detailee at the Center must act as a conduit to funnel information to and from their parent organization. More importantly, NTRAC would need to have the necessary synergy with existing counterterrorism initiatives, namely the aforementioned NCTC, the FBI's National Joint Terrorism Task Force (NJTTF), and the individual components or offices belonging to each departmental stakeholder.

ODNI's NCTC serves as "the primary organization in the U.S. government for analyzing and integrating all intelligence . . . pertaining to terrorism and counterterrorism."¹⁷⁷ The FBI's NJTTF, however, was established as the epicenter of domestic counterterrorism operations, and its current efforts involve over forty law enforcement partners of the FBI.¹⁷⁸ The NJTTF oversees regional joint terrorism task forces (JTTFs) which are "small cells of highly trained, locally based, passionately committed investigators, analysts, linguists, SWAT experts, and other specialists from dozens of U.S. law enforcement and intelligence agencies."¹⁷⁹ Thus, by creating a bifurcated leadership structure with co-directors from both ODNI and DOJ, NTRAC establishes instant synergy with the Intelligence Community and law enforcement entities from across the nation. Further, the Center would be able to leverage both the authority of the Director of National Intelligence and the U.S. Attorney General in its fight against nuclear terrorism.

¹⁷⁷ IRTPA § 1022, 50 U.S.C. § 404o (2006).

¹⁷⁸ *Joint Terrorism Task Force*, U.S. DEP'T JUST., <http://www.justice.gov/jttf/> (last visited Apr. 23, 2012).

¹⁷⁹ *Id.*

As a result of the IRTPA, which amended the National Security Act of 1947,¹⁸⁰ the Director of National Intelligence has been afforded unparalleled authority over the Intelligence Community as a whole.¹⁸¹ This authority was also subsequently expressed in amendments to Executive Order 12333,¹⁸² which is a presidential directive that regulates the activities of intelligence elements.¹⁸³ Under its terms, the Director of National Intelligence “shall serve as the principal adviser to the President, to the [National Security Council], and to the Homeland Security Council for intelligence matters related to national security, and shall oversee and direct the implementation of the National Intelligence Program and execution of the Intelligence Program budget.”¹⁸⁴ Thus, by designating a representative of ODNI as co-director of NTRAC, the Center would not only have synergy with the NCTC, but it would also have a direct relationship with the Intelligence Community and all its disparate members. This is significant because many of the detailees assigned to NTRAC will likely come from entities such as the CIA, the National Security Agency (NSA), the National Reconnaissance Office (NRO), or any of the multiple intelligence entities located within individual departments of the federal government.

Conversely, the FBI, which is part of DOJ, is an organization with traditional law enforcement authorities as well as domestic intelligence collection capabilities.¹⁸⁵ Thus, the co-director of NTRAC that is selected from DOJ would provide invaluable access to America’s premier federal law enforcement agency and to information that is collected during ongoing counterterrorism investigations. Although the FBI possesses considerable domestic law enforcement authorities under Title 18,¹⁸⁶ its intelligence elements are also authorized to “[c]ollect (including through clandestine means), analyze, produce, and disseminate foreign intelligence and counterintelligence to support national and departmental

¹⁸⁰ Pub. L. No. 80-235, 61 Stat. 495 (1947).

¹⁸¹ See generally IRTPA.

¹⁸² See generally Exec. Order No. 12,333, 3 C.F.R. 200 (1982), reprinted in 50 U.S.C. § 401 note (Supp. V 1981), amended by Exec. Order No. 13,470, 73 Fed. Reg. 45,325 (Aug. 4, 2008).

¹⁸³ *Id.*

¹⁸⁴ *Id.* § 1.3.

¹⁸⁵ *Frequently Asked Questions*, FBI, <http://www.fbi.gov/about-us/faqs> (last visited Apr. 23, 2012).

¹⁸⁶ *Id.*

missions[.]”¹⁸⁷ Thus, NTRAC’s relationship with the FBI would also be highly beneficial as this organization has “the unique ability to address national security and criminal threats that are increasingly intertwined and to shift between the use of intelligence tools such as surveillance or recruiting sources and law enforcement tools of arrest and prosecution.”¹⁸⁸

Inclusion of an associate director and multiple detailees from DHS is also critical to NTRAC’s success. The DHS Office of Intelligence and Analysis (I&A) could contribute a great deal of advanced analysis on issues such as terrorist watchlisting.¹⁸⁹ The Transportation Security Administration (TSA) could also lend its expertise to issues involving the “No Fly List” and aviation security generally.¹⁹⁰ Moreover, inclusion of three other DHS components would be especially beneficial to the Center’s mission of countering nuclear terrorism by tracking terrorist travel. These components are Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and the U.S. Coast Guard. CBP is the primary organization tasked with protecting U.S. borders.¹⁹¹ Its “top priority is to keep terrorists and their weapons from entering the United States.”¹⁹² ICE, a law enforcement agency, provides investigative capabilities related to immigration.¹⁹³ In addition, this organization works directly with the FBI in regional JTTFs.¹⁹⁴ Lastly, the Coast Guard is a

¹⁸⁷ Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401 note (Supp. V 1981), *amended by* Exec. Order No. 13,470, 73 Fed. Reg. 45,325 (Aug. 4, 2008) at § 1.7(g).

¹⁸⁸ *Frequently Asked Questions*, *supra* note 185.

¹⁸⁹ Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981), *amended by* Exec. Order No. 13,470, 73 Fed. Reg. 45,325 (Aug. 4, 2008) § 1.7(h)–(i). *See, e.g.*, MARCIA HODGES ET AL., DHS’ ROLE IN NOMINATING INDIVIDUALS FOR INCLUSION ON THE GOVERNMENT WATCHLIST AND ITS EFFORTS TO SUPPORT WATCHLIST MAINTENANCE (2011), *available at* http://www.oig.dhs.gov/assets/Mgmt/OIG_11-107_Sep11.pdf.

¹⁹⁰ *See, e.g.*, MARCIA HODGES ET AL., ROLE OF THE NO FLY AND SELECTEE LISTS IN SECURING COMMERCIAL AVIATION (2009), *available at* http://www.oig.dhs.gov/assets/Mgmt/OIGr_09-64_Jul09.pdf.

¹⁹¹ *About Border Security*, U.S. CUSTOMS AND BORDER PROTECTION, http://www.cbp.gov/xp/cgov/border_security/bs (last visited Apr. 23, 2012).

¹⁹² *Id.*

¹⁹³ *ICE Overview*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/> (last visited Apr. 23, 2012).

¹⁹⁴ *Joint Terrorism Task Force*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/jttf/> (last visited Apr. 23, 2012); *Joint Terrorism Task Force*, *supra* note 178.

multi-mission service with both law enforcement and intelligence authorities.¹⁹⁵ While its primary mission is to protect the nation's maritime interests, it also has substantial intelligence collection authority under Executive Order 12333.¹⁹⁶

Although DHS involvement is essential to NTRAC's success, DOE may be the most important stakeholder in NTRAC. Should a nuclear terrorist successfully penetrate the U.S. border, the expertise of DOE personnel would be invaluable in countering and diffusing the threat.¹⁹⁷ The DOE Office of Intelligence and Counterintelligence collects and analyzes information on "nuclear terrorism, counterintelligence, cyber threats, nuclear proliferation, strategic surprise, and energy and environmental security."¹⁹⁸ This would assist with analysis efforts at NTRAC. In addition, DOE has access to subject-matter experts at its national laboratories and plants, who possess knowledge of nuclear technology and nuclear weapons.¹⁹⁹

DOE also contains a separately organized entity known as the National Nuclear Security Administration (NNSA), established pursuant to the National Defense Authorization Act for Fiscal Year 2000.²⁰⁰ The NNSA is a multi-mission agency with significant statutory authority in the areas of nuclear terrorism prevention and national security.²⁰¹ Notably, the "NNSA is responsible for the management and security of the nation's nuclear

¹⁹⁵ *Missions*, UNITED STATES COAST GUARD (last modified Aug. 15, 2011), <http://www.uscg.mil/top/missions>.

¹⁹⁶ Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401 note (Supp. V 1981), *amended by* Exec. Order No. 13,470, 73 Fed. Reg. 45,325 (Aug. 4, 2008), § 1.7(h).

¹⁹⁷ *A Safe, Secure Nuclear Future*, DEP'T ENERGY (Jun. 8, 2011, 12:00 PM), <http://energy.gov/articles/safe-secure-nuclear-future>; *Emergency Response*, NAT'L NUCLEAR SECURITY ADMIN., <http://nnsa.energy.gov/ourmission/emergencyresponse> (last visited Apr. 23, 2012).

¹⁹⁸ *Department of Energy Implementation Activities in the Case of a Lapse of Appropriations*, DEP'T ENERGY, (April 8, 2011, 12:00 PM) <http://energy.gov/articles/department-energy-implementation-activities-case-lapse-appropriations>.

¹⁹⁹ U.S. DEP'T OF ENERGY, STRATEGIC PLAN 31 (May 2011), *available at* http://energy.gov/sites/prod/files/2011_DOE_Strategic_Plan_.pdf.

²⁰⁰ National Nuclear Security Administration, Pub. L. No 106-65, § 3203, 113 Stat. 512, (1999); *NNSA Timeline*, NAT'L NUCLEAR SECURITY ADMIN., <http://nnsa.energy.gov/aboutus/ourhistory/timeline> (last visited Apr. 23, 2012).

²⁰¹ IRTPA § 3201, 50 U.S.C. § 2401 (2006).

weapons, nuclear nonproliferation, and naval reactor programs.”²⁰² In sum, this organization is “the nation’s premier responder to any nuclear or radiological incident within the United States or abroad and provides operational planning and training to counter both domestic and international nuclear terrorism.”²⁰³

Similarly, DOD would be an invaluable asset to NTRAC because of its robust intelligence capabilities and involvement in domestic response and homeland defense. The Defense Intelligence Agency (DIA) and the intelligence services of the U.S. Army, Navy, Air Force, and Marine Corps have all been given substantial foreign collection authorities under Executive Order 12333.²⁰⁴ In addition, over the last decade the military has become increasingly involved in domestic responses to emergencies, disasters, civil disturbances, and national security events.²⁰⁵ Therefore, the ability of the military to respond to a nuclear event greatly compliments the capabilities of the NNSA. The creation of United States Northern Command (USNORTHCOM) in 2002 also enables the military to quickly defuse terrorist events taking place within the United States.²⁰⁶ Thus, should a nuclear terrorist attack become imminent, having direct communication with USNORTHCOM would be essential.

The associate director selected from DOS would bring unequaled perspective on foreign affairs and diplomacy to NTRAC. The Center could also gain insight from ongoing nonproliferation treaty efforts as well as provide input to government officials tasked with negotiating these agreements. The DOS Bureau of Intelligence and Research (INR) is given substantial authority to “harness intelligence to serve U.S. diplomacy.”²⁰⁷

²⁰² *Our History*, NAT’L NUCLEAR SECURITY ADMIN., <http://nnsa.energy.gov/aboutus/ourhistory> (last visited Apr. 23, 2012).

²⁰³ *Emergency Response*, *supra* note 197.

²⁰⁴ Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401 note (Supp. V 1981), *amended by* Exec. Order No. 13,470, 73 Fed. Reg. 45,325 (Aug. 4, 2008), at § 1.7(b),(f).

²⁰⁵ *See, e.g.*, Christopher B. Walters, *Responding to National Disasters and Emergencies: A Contract and Fiscal Law Primer*, 2007 ARMY LAW. 35 (2007).

²⁰⁶ *About USNORTHCOM*, U.S. N. COMMAND, http://www.northcom.mil/About/history_education/history.html (last visited Apr. 23, 2012).

²⁰⁷ *Bureau of Intelligence and Research*, U.S. DEP’T STATE, <http://www.state.gov/s/inr/> (last visited Apr. 23, 2012); Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401 note (Supp. V 1981), *amended by* Exec. Order No. 13,470, 73 Fed. Reg. 45,325 (Aug. 4, 2008) at § 1.7(i).

In addition, there are multiple organizations within DOS tasked with missions related to nonproliferation and counterproliferation, including the Bureau of International Security and Non-proliferation (ISN).²⁰⁸ ISN is charged with “enhanc[ing] international security against the threat of [weapon of mass destruction] terrorism by strengthening [the] political and operational capability of international partners to deter, detect, defeat, and respond to terrorists and their facilitators.”²⁰⁹ ISN also “establish[es], maintain[s], and continue[s] to improve upon” existing government efforts aimed at nuclear terrorism.²¹⁰

Finally, it is crucial that the CIA be included in NTRAC and provide a large number of detailees. Despite the establishment of ODNI in the IRTPA, the Director of Central Intelligence still has substantial responsibility for “all-source analysis, [human intelligence], intelligence operations, and foreign liaison.”²¹¹ Human intelligence is particularly helpful in the fight against nuclear terrorism because this collection discipline “has the major advantage of affording access to what is being said, planned, and thought” by terrorist organizations.²¹²

In addition to the major role the CIA plays in collection activities,²¹³ collocating personnel from this organization also has a distinct advantage. It would allow NTRAC to leverage the CIA’s Weapons, Intelligence, Nonproliferation, and Arms Control Center (WINPAC). WINPAC, an information fusion center, provides “intelligence support aimed at doing all

²⁰⁸ *Bureau of International Security and Nonproliferation*, U.S. DEP’T STATE, <http://www.state.gov/t/isn> (last visited Apr. 23, 2012). The Bureau of Arms Control, Verification and Compliance and the Under Secretary for Arms Control and International Security Affairs are also tasked with missions related to nonproliferation and counterproliferation. *Department Organization*, U.S. DEP’T STATE, <http://www.state.gov/r/pa/ei/rls/dos/436.htm> (last visited Apr. 23, 2012).

²⁰⁹ *Combating Weapons of Mass Destruction Terrorism*, DEP’T STATE, <http://www.state.gov/t/isn/c16403.htm> (last visited Apr. 23, 2012).

²¹⁰ *Id.*

²¹¹ LOWENTHAL, *supra* note 1, at 41.

²¹² *Id.* at 100.

²¹³ *Today’s CIA*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/about-cia/todays-cia/index.html> (last visited Apr. 23, 2012). *See also Clandestine Service*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/offices-of-cia/ clandestine-service/index.html> (last visited Apr. 23, 2012); *Our Mission*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/offices-of-cia/ clandestine-service/our-mission.html> (last visited Apr. 23, 2012).

it can to protect America from the strategic threat of foreign weapons.”²¹⁴ While WINPAC focuses purely on the “end-to-end analysis of [foreign] weapons systems,”²¹⁵ the expertise of its personnel would be beneficial to NTRAC’s daily operations.

Given the multitude of stakeholders in NTRAC, the strength of the Center will lie in its ability to refocus existing resources on the core issue of nuclear terrorism. Although officials at NTRAC will not be solely responsible for the direction and execution of domestic interdiction and counterproliferation operations, the Center is intended to provide insight and direction to stakeholders should a nuclear threat emerge. NTRAC’s leadership would also provide invaluable advice directly to the President, who serves as the final authority for all decisions related to nuclear threat situations. Thus, NTRAC would not have sole command and control responsibility for entities such as the FBI or other domestic law enforcement agencies because placing this type of authority in the hands of an information fusion center would countermand a number of existing laws.²¹⁶ Rather, NTRAC would provide direct input into domestic operations should a threat become imminent.

X. THE MOST DIFFICULT TASK—FUNDING NTRAC

Although the proposed organizational structure of NTRAC would make it uniquely positioned for success, there is one final issue which must be addressed and will likely be dispositive of the Center’s long term viability. NTRAC must have a dedicated, statutory funding mechanism. Without this type of funding, it seems likely that the Center will fail.²¹⁷

²¹⁴ *The CIA Weapons, Intelligence, Nonproliferation, and Arms Control Center*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/offices-of-cia/intelligence-analysis/organization-1/winpac.html> (last visited Apr. 23, 2012).

²¹⁵ *Id.*

²¹⁶ The Attorney General, as head of the Department of Justice, is tasked with “supervis[ing] and direct[ing] the administration and operation of [DOJ], including the Federal Bureau of Investigation, Drug Enforcement Administration, Bureau of Alcohol, Tobacco, Firearms and Explosives, Bureau of Prisons, Office of Justice Programs, and the U.S. Attorneys and U.S. Marshals Service, which are all within the Department of Justice.” *Attorney General—U.S. Department of Justice*, U.S. DEP’T JUSTICE, <http://www.justice.gov/jmd/mps/manual/ag.htm> (last visited Apr. 23, 2012).

²¹⁷ See *The 9/11 Reform Act: Examining The Implementation of the Human Smuggling and Trafficking Center: Hearing Before the Subcomm. on Mgmt., Integration, and* (continued)

The funding necessary to establish NTRAC will not be overly burdensome on the U.S. budget. In fact, it will be far less than the amount the U.S. government has expended to create DHS and ODNI. Furthermore, like these two new government institutions, the establishment of NTRAC is integral to effectively safeguard national security.

The number of dedicated staff necessary to fulfill NTRAC's mission will be rather limited due to the utilization of detailees. Accordingly, Congress should be responsible for closely examining the NTRAC model and should provide adequate funding to staff the Center with personnel from all departments and agencies that have missions related to nuclear terrorism prevention. Lawmakers should also be mindful that the threat of nuclear terrorism is constantly changing and adapting.²¹⁸ Thus, annual reviews of appropriations should take place to ensure that NTRAC is capable of growing in sync with the ever-expanding threat of nuclear terrorism.

Funding for NTRAC may be further complicated by the appropriations process itself.²¹⁹ Just as the Center will attempt to blend intelligence and law enforcement entities with nuclear subject-matter experts, Congress will be forced to combine traditional funding mechanisms with those used to finance Intelligence Community activities. This will likely be a difficult and deliberative process. It is simply not feasible for the entire budget of NTRAC to be furnished by one independent stakeholder. Nor is it reasonable for participants to contribute financing in a piecemeal fashion for their involvement in this joint venture. Rather, it is paramount that Congress provides the Center with independent, line-item funding for all operational costs. This funding mechanism would help to avoid an undue burden on any one stakeholder. In addition, it would reduce interagency rivalries and avoid the complications that result when a particular institution develops a feeling of "ownership" for an interagency venture.

To create a successful funding model, Congress must intermingle traditional appropriations with National Intelligence Program (NIP) funds in a line-item appropriation. This is largely due to the variety of organizations involved in this collaborative venture. For instance, the NIP

Oversight of the Comm. on Homeland Sec., 109th Cong. 18 (2006) (quoting testimony that without individual funding for fusion centers, staffing levels will remain inadequate).

²¹⁸ WMD COMM'N REP., *supra* note 51, at 458.

²¹⁹ See SANDY STREETER, THE CONGRESSIONAL APPROPRIATIONS PROCESS: AN INTRODUCTION (2007), available at <http://www.senate.gov/reference/resources/pdf/97-684.pdf>.

“funds intelligence activities in several Federal departments and the . . . [CIA].”²²⁰ The benefit of this funding mechanism is that the “NIP’s budget is classified, so the President’s budget does not publicly disclose funding requests for intelligence activities.”²²¹ Therefore, the Director of National Intelligence is given specific authority to “oversee and direct the implementation of the National Intelligence Program and execution of the National Intelligence Program Budget.”²²²

Notably, difficulties arise when organizations such as the FBI are tasked with multiple concurrent missions, for example, collecting and analyzing intelligence while simultaneously conducting law enforcement operations.²²³ As a result, the Director of National Intelligence could hypothetically exert a great deal of control over the FBI’s day-to-day operations. This situation would be greatly amplified in the NTRAC model, where funding would be used for a variety of activities, not all of which would qualify as purely intelligence activities. As if to emphasize this point, funding mechanisms have had a considerable adverse effect on existing fusion centers despite repeated requests for direct, line-item funding from Congress.²²⁴

Thus, there seem to be only two solutions. Congress could attempt to directly apportion NIP funds along with traditional appropriations, in contravention of the authority and control given to the Director of National Intelligence. Conversely, the Director of National Intelligence could delegate authority over a subset of NIP funds to the co-directors of NTRAC to specifically fund its day-to-day operations. Although either option will face a great deal of political and bureaucratic resistance, this article proposes that the second funding alternative is more likely to lead to the Center’s success. Delegating authority to the co-directors will likely be unpopular among members of Congress. In fact, when confronted with the idea of a line-item appropriation, many legislators would likely opine that

²²⁰ OFFICE OF MGMT. AND BUDGET, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2012 65 (2011), available at http://www.whitehouse.gov/files/documents/budget_2012.pdf.

²²¹ *Id.*

²²² Exec. Order No. 12,333, 3 C.F.R. 200 (1982), reprinted in 50 U.S.C. § 401 note (Supp. V 1981), amended by Exec. Order No. 13,470, 73 Fed. Reg. 45,325 (Aug. 4, 2008) at § 1.3.

²²³ WMD COMM’N REP., *supra* note 51, at 458–59.

²²⁴ *The 9/11 Reform Act: Examining The Implementation of the Human Smuggling and Trafficking Center: Hearing Before the Subcomm. on Mgmt., Integration, and Oversight of the Comm. on Homeland Sec.*, 109th Cong. 19–20 (2006).

NTRAC is “impossible” due in part to its unorthodox funding mechanism. This article counters, however, that although the road ahead will likely be a difficult one, establishing this funding mechanism is both possible and responsible. Moreover, it is necessary to protect the United States from what is an inevitable and impending crisis of deadly proportions.²²⁵

Members of Congress may hesitate to draft legislation authorizing such a joint venture due to intrinsic political risk aversion and the fear that such an idea will not gain public support. In this instance, however, there is one additional alternative. In creating the NCPC, Congress granted unprecedented authority to the President to control its operations.²²⁶ The President was not only directed to establish the NCPC as he saw fit, but he was also granted the power to take “into account all appropriate government tools to prevent and halt the proliferation of weapons of mass destruction, their delivery systems, and related materials and technologies.”²²⁷ Thus, the final conclusion of this article is that the President possesses unilateral authority under existing legislation to effectively transform the NCPC into the NTRAC model. In effect, by taking such action, the President could avoid all the political pitfalls that often accompany the legislative process.

XI. CONCLUSION

Anyone familiar with current events will have undoubtedly heard the term “too big to fail.” This slogan has entered the American lexicon in response to the economic crisis of 2008 and has been repeated again and again by members of Congress and the American media.²²⁸ It is often used in the context of discussing corporations and banks.²²⁹ In recent times, it has come to signify something much more profound. This term is often used to describe a modern day domino theory of economic collapse.²³⁰

²²⁵ LEVI, *supra* note 1, at 1–3.

²²⁶ IRTPA § 1022, 50 U.S.C. § 404o-1 (2004).

²²⁷ *Id.*

²²⁸ See Jonathan R. Macey & James P. Holdcroft, Jr., *Failure Is an Option: An Ersatz-Antitrust Approach to Financial Regulation*, 120 YALE L.J. 1368, 1376 (2011).

²²⁹ See, e.g., Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 98 (2009).

²³⁰ See, e.g., John C. Coffee, Jr., *Systemic Risk After Dodd-Frank: Contingent Capital and the Need for Regulatory Strategies Beyond Oversight*, 111 COLUM. L. REV. 795, 799–800 (2011).

Although this article offers a blueprint for preventing nuclear terrorism, there is one central theme that readers should embrace—this country is in dire need of yet another “bailout.” Politicians and government leaders need to infuse the government with the financial means necessary to establish a collaborative venture such as NTRAC.

The 9/11 Commission endeavored to identify lessons for the future.²³¹ It outlined a government reorganization of unprecedented proportions, and Commission members recognized that “the institutions charged with protecting our borders, civil aviation, and national security did not understand how grave [the terrorist] threat could be.”²³² Congress hoped that “the terrible losses chronicled in [their] report [could] create something positive—an America that is safer, stronger, and wiser.”²³³ Unfortunately, America’s current defenses against nuclear terrorism demonstrate that our country has forgotten the lessons of the past.²³⁴ We have failed to establish the unity of purpose integral to overcoming this deadly threat. Thus, without an effective means to combat nuclear terrorism, government officials and indeed all Americans could find themselves at the mercy of a determined and indiscriminate enemy.

As noted by the 9/11 Commission, “[t]he massive departments and agencies that prevailed in the great struggles of the twentieth century must work together in new ways, so that all instruments of national power can be combined.”²³⁵ The NTRAC model presents a viable structure to effectively leverage the expertise of all government stakeholders tasked with protecting against nuclear terrorism. Although America’s legislators have failed to establish the unity of purpose necessary to overcome the deadly threat of nuclear terrorism,²³⁶ government officials and the American public should view funding for NTRAC as a necessary expense. The financial crisis brought with it a multitude of changes for working

²³¹ 9/11 COMM’N REP., *supra* note 51, at xvi.

²³² *Id.*

²³³ *Id.*

²³⁴ See Christopher C. Joyner & Alexander Ian Parkhouse, *Nuclear Terrorism in a Globalizing World: Assessing the Threat and the Emerging Management Regime*, 45 STAN. J. INT’L L. 203, 204–05 (2009).

²³⁵ 9/11 COMM’N REP., *supra* note 51, at xvi.

²³⁶ See Sam Nunn, *The Race Between Cooperation and Catastrophe: Reducing the Global Nuclear Threat*, 607 ANNALS AM. ACAD. POL. & SOC. SCI. 43, 48, 50 (2006).

class families and necessitated a bailout of the American way of life.²³⁷ In this instance, however, nuclear terrorism has the potential to rob our country of something much more precious—the continued existence of human life itself. In conclusion, this concept is too big, and indeed the threat too deadly, for current defensive efforts to fail.

²³⁷ See Cyril V. Jones, *Rekindling the Flame: How the Coming Fundamental Changes in U.S. Financial Markets Due to the Global Financial Crisis Could Improve Foreign Direct Investment in the United States*, 32 HOUS. J. INT'L L. 245, 257 (2009); Bruce E. Aronson, *The Financial Crisis One Year Later: Proceedings of a Panel Discussion on Lessons of the Financial Crisis and Implications for Regulatory Reform*, 43 CREIGHTON L. REV. 275, 321 (2010).