

SEE SOMETHING, SAY SOMETHING ACT OF 2011

SEPTEMBER 12, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary,  
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 963]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 963) to amend the Homeland Security Act of 2002 to provide immunity for reports of suspected terrorist activity or suspicious behavior and response, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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## Purpose and Summary

H.R. 963 creates a statutory qualified immunity protection for individuals who report suspicious terrorism-related activity and for law enforcement officers who respond in good faith to citizens' reports.

### Background and Need for the Legislation

The bill buttresses efforts, such as the Department of Homeland Security's "See Something, Say Something" campaign,<sup>1</sup> to encourage citizens to share information regarding suspicious activity that may be related to terrorism.

The "See Something, Say Something Act" amends the Homeland Security Act of 2002.<sup>2</sup> The Act protects vigilant citizens and law enforcement officers who use their common sense to help prevent the next terrorist attack.

The bill creates immunity from civil suit for any person who in good faith reports to authorities "any suspicious transaction, activity, or occurrence indicating that an individual may be engaging, or preparing to engage, in a violation of law relating to an act of terrorism." The bill also codifies qualified immunity protection for reasonable good faith actions taken in response to reports of suspicious activity by any Federal, State, or local law enforcement officer or Federal official with responsibility for protecting against terrorist activity. If the bill's immunities apply, then the party found to be immune "shall be entitled to recover from the plaintiff all reasonable costs and attorneys fees."

These protections are necessary to encourage citizens to share their reasonable suspicions with law enforcement officers without fear of liability. The protections for law enforcement officers will similarly empower law enforcement officers to reasonably pursue citizen tips without fear of being sued.

While good faith actions to prevent a terrorist attack may not necessarily give rise to liability under existing law following protracted and costly litigation, and existing law may provide qualified immunity for citizens or law enforcement officers in specific situations and jurisdictions, the bill's codification of a simple, easily understood, and generally applicable qualified immunity standard will increase citizens' and law enforcement officers' ability to act in good faith to investigate suspicions and prevent attacks.

#### A. ALERT CITIZENS HAVE THWARTED PAST PLOTS

Many times over the past decade, tips from alert citizens have helped to thwart potential terrorist attacks.

##### *1. Attempted Attack on Times Square*

On May 1, 2010, street vendor Lance Orton noticed suspicious smoke coming from a parked van, and acted with other vendors to inform a nearby New York City police officer. The suspicious smoke

<sup>1</sup>See, e.g., Department of Homeland Security, "If You See Something, Say Something" campaign website, available at <http://www.dhs.gov/files/reportincidents/see-something-say-something.shtm>.

<sup>2</sup>6 U.S.C. §§ 451 *et seq.*

was the result of bomb ignited by Faisal Shahzad, who had trained at a Pakistani terrorist training camp.<sup>3</sup>

Following the tip, officials were able to disarm the Times Square bomb before it could explode, and Faisal Shahzad was later arrested after boarding an international flight. The street vendors who noticed the suspicious smoke prevented this attempted bombing. Hours after the thwarted attack, vendor Lance Orton was asked what he had to say to fellow New Yorkers: "See something, say something," he said.<sup>4</sup>

## 2. Arrest of Lubbock, Texas man

In January, Lubbock, Texas resident Khalid Aldawsari placed suspicious purchases of the chemical Phenol, which can be used to make explosives.<sup>5</sup> The North Carolina chemical company, with whom the orders were placed, noticed the suspicious purchases and reported them to the FBI.

The FBI's investigation uncovered purchases of other chemicals, which, combined with Phenol, can make the explosive T-N-P. An FBI search of his computer uncovered emails describing potential targets including reservoirs and dams, nuclear power plants, night clubs, and the Dallas home of former President George W. Bush. The FBI promptly arrested Aldawsari.<sup>6</sup>

## 3. Christmas Day Bombing

On Christmas Day in 2009, Umar Farouk Abdulmutallab boarded an international flight with plastic explosives that he had concealed in his underwear.<sup>7</sup> As he attempted to detonate the explosives, airline passengers worked together to tackle the terrorist, and put out the fire that the explosives had caused.

While two of the passengers were injured in the attempted bombing, they were able to subdue and handcuff Abdulmutallab as the pilot safely landed the plane. As this attack demonstrates, ordinary citizens who remain alert and vigilant about their surroundings are America's first line of defense against terrorist attacks.

## 4. Fort Dix Six

In 2007, a teenage clerk at an electronics store was asked by two men to transfer a videotape to a DVD. When the teenager and another employee went into the back room and started the process of transferring the tape, they found themselves watching several jihadists shooting some very large weapons. The teen frantically

<sup>3</sup>Eileen Sullivan & Kimberly Dozier, Boston Herald, "Sources: Bomber trained at Pakistan terror camp," (May 4, 2010), available at [http://www.bostonherald.com/news/national/northeast/view/20100504sources\\_times\\_square\\_bomber\\_trained\\_at\\_pakistan\\_terror\\_camp/](http://www.bostonherald.com/news/national/northeast/view/20100504sources_times_square_bomber_trained_at_pakistan_terror_camp/).

<sup>4</sup>Michael Schmidt, New York Times, "T-Shirt Vendor Takes On New Persona: Reluctant Hero of Times Square," (May 2, 2010), available at <http://cityroom.blogs.nytimes.com/2010/05/02/t-shirt-vendor-takes-on-new-persona-reluctant-hero-of-times-square/>.

<sup>5</sup>James McKinley & Sarah Wheaton, New York Times, "Saudi Student to Be Arraigned in Bomb Plot," (Feb. 25, 2011), available at <http://www.nytimes.com/2011/02/26/us/26texas.html>.

<sup>6</sup>Jason Ryan, ABC World News, "Texas Student Khalid Aldawsari Arrested on Terror Charges; Targeted George W. Bush," (Feb. 24, 2011), available at <http://abcnews.go.com/Politics/texan-charged-plans-bomb-bush-home-dams-nuclear/story?id=12990927>.

<sup>7</sup>Mark Hosenball, Newsweek, "The Radicalization of Umar Farouk Abdulmutallab," (Jan. 2, 2010), available at <http://www.newsweek.com/2010/01/01/the-radicalization-of-umar-farouk-abdulmutallab.html>.

told his coworker what he had witnessed. And then he said, “I don’t know what to do. Should I call someone or is that being racist?”<sup>8</sup>

Here, the teenage clerk was brave enough to overcome his fear of political correctness. He called the FBI. As a result, a group of terrorists who became known as the “Fort Dix Six” were captured. The FBI believes the “Fort Dix Six” were in the final stages of preparing for an armed assault on Fort Dix, and perhaps other military installations, where they could have killed or injured men and women in our armed forces.

#### B. FAILURE TO SHARE SUSPICIONS CAN HAVE TRAGIC CONSEQUENCES

By tragic contrast to the thwarted attacks above, 13 men and women were murdered by Army psychologist Nidal Hasan at Fort Hood, Texas. This was the deadliest terror attack on American soil since September 11. This tragedy could perhaps have been avoided if suspicions about Hasan’s behavior had been raised and acted upon before the attack.

Multiple reports indicate that, before the attack, Hasan engaged in extreme rhetoric and other suspicious behavior. Indeed, Hasan’s publicly displayed sympathy for radical Islam throughout his residency at Walter Reed Army Medical Center and post-residency fellowship at the Uniformed Service University of Health Sciences (“USUHS”) led two colleagues to describe him as “a ticking time bomb.”<sup>9</sup>

During the last month of his residency Hasan, like all other psychiatric residents at Walter Reed, was required to deliver an academic presentation on psychiatric issues. Hasan chose to fulfill this requirement with a lecture on violent Islamic extremism.<sup>10</sup> Hasan’s draft of this presentation consisted almost entirely of citations to the Koran, with almost no mention of scientific or psychiatric material.<sup>11</sup> The draft presented extremist interpretations of Islam that supported the killing of non-Muslims, argued that the September 11 attacks might be defended as an act of revenge, and that having Muslim-Americans in the military created a risk of murder against their fellow soldiers.<sup>12</sup>

After his residency, Hasan was accepted to a fellowship at USUHS. He displayed his radicalism almost immediately and throughout this fellowship.<sup>13</sup> A presentation he delivered early in the fellowship was so inflammatory and supportive of violent extremism against the United States that the instructor halted the presentation after a few minutes.<sup>14</sup> In discussions with classmates, Hasan on more than one occasion justified the actions of suicide bombings and suggested that the actions of Osama bin Laden were justified.<sup>15</sup>

<sup>8</sup>Jana Winter, New York Post, “Clerk Rings Up N.J. Jihad Clerks,” (May 13, 2007), available at [http://www.nypost.com/p/news/regional/item\\_0oS2xKmNdVwCzcvzxPuCBL](http://www.nypost.com/p/news/regional/item_0oS2xKmNdVwCzcvzxPuCBL).

<sup>9</sup>U.S. Senate Homeland Security and Governmental Affairs Committee, Chairman Joseph I. Lieberman and Ranking Member Susan M. Collins, “A Ticking Time Bomb: Counterterrorism Lessons from the U.S. Government’s Failure to Prevent the Fort Hood Attack,” at p. 27 (February 2011) (hereafter “Lieberman/Collins Report”), available at [http://hsgac.senate.gov/public\\_files/Fort\\_Hood/FortHoodReport.pdf](http://hsgac.senate.gov/public_files/Fort_Hood/FortHoodReport.pdf).

<sup>10</sup>*Id.* at 28.

<sup>11</sup>*Id.*

<sup>12</sup>*Id.* at 28–29.

<sup>13</sup>*Id.* at 29–30.

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* at 30.

Hasan's suspicious activity continued up until the day of his attacks. He corresponded with radical jihadi cleric Anwar al-Awlaki<sup>16</sup> and, on the night before his attack told a fellow soldier that he should quit the military because he believed the Koran forbids alliances with Christians and Jews.<sup>17</sup> On the night before his murder spree, Hasan gave away all of his possessions and distributed copies of the Koran.<sup>18</sup>

None of this suspicious activity was reported to the proper authorities in a way that identified Hasan's activities as suspicious. Indeed, despite his poor performance as an Army psychiatrist, his superiors gave him strong evaluations.<sup>19</sup> The failure of his medical colleagues to report Hasan's suspicious and violent rhetoric is at least partly attributable to "a fear of litigation, a fear of being called bigots, or a fear of being wrong about the nuances of a theological ideology."<sup>20</sup> Out of political correctness and a fear of reprisal, Hasan's suspicious activities went unreported.

On the morning of November 5, 2009, Nidal Hasan walked in to a deployment center at Fort Hood near Killeen, Texas, and opened fire, killing 13 Department of Defense employees and wounding 32 others.<sup>21</sup> Better sharing of his suspicious activities could have prevented the attack.

### C. THE THREAT OF LITIGATION COULD CHILL CITIZEN REPORTS

Unfortunately, at least part of citizens' reluctance to share information about potential terrorist attacks could be related to the threat of litigation if the suspicions are mistaken.

When the passengers of a 2006 U.S. Airways flight noticed behavior by six men that they genuinely believed to be suspicious, they alerted the crew.<sup>22</sup> The crew shared the suspicions, and these men were removed from the plane. Authorities then detained and questioned the men.

The authorities ultimately determined that the six men did not pose a threat, and they were released. However, the men then sued the airport, the airline, the authorities, and the passengers who had voiced their sincere concerns.

For the airline passengers who had merely shared their suspicions out of a good faith desire to keep themselves and their fellow passengers safe, the prospect of prolonged and costly litigation to defend their actions was potentially ruinous. Without a clear statutory immunity for their good faith actions, the passengers would have been forced to retain counsel and defend themselves through litigation that could potentially last years and cost tens of

<sup>16</sup> See Elizabeth Bumiller and Scott Shane, *New York Times*, "Pentagon Report on Fort Hood Details Failures," (Jan. 15, 2010), available at <http://www.nytimes.com/2010/01/16/us/politics/16hasan.html>; Carrie Johnson, *Washington Post*, "FBI to Probe Panels that Reviewed E-Mails from Alleged Fort Hood Gunman," (Dec. 9, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/08/AR2009120801731.html>.

<sup>17</sup> Testimony of Lawrence J. Haas, House Judiciary Subcommittee on the Constitution Hearing on H.R. 963, "The See Something, Say Something Act of 2011" at 6 (June 24, 2011).

<sup>18</sup> *Id.*

<sup>19</sup> Lieberman/Collins Report at 33.

<sup>20</sup> Testimony of M. Zuhdi Jasser, M.D., House Judiciary Subcommittee on the Constitution Hearing on H.R. 963, "The See Something, Say Something Act of 2011" at 5 (June 24, 2011).

<sup>21</sup> Lieberman/Collins Report at 7.

<sup>22</sup> See Scott W. Johnson, *The Weekly Standard*, "The Flying Imams Win: And the rest of us lose" (Nov. 9, 2009), available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/017/148tyfxg.asp?page=1>; see also Libby Sander, *New York Times*, "6 Imams Removed from Flight for Behavior Deemed Suspicious," (Nov. 22, (2006), available at [http://www.nytimes.com/2006/11/22/us/22muslim.html?\\_r=1&ex=1164517200&en=24531ca1fa7314e1&ei=5087%0A](http://www.nytimes.com/2006/11/22/us/22muslim.html?_r=1&ex=1164517200&en=24531ca1fa7314e1&ei=5087%0A).

thousands of dollars or more. Even if, at the end of this process, their actions were vindicated, the passengers would have lost considerable time in defending the suit and incurred significant legal fees for which they were not insured. Absent a statutory fee shifting provision, the passengers had little prospect of recovering these fees from the plaintiffs.

Absent Congressional action, the message of the U.S. Airways flight and the subsequent litigation would have been that citizens should keep their suspicions to themselves, lest they subject themselves to a lawsuit for reporting suspicious activity. Nothing could undermine the government's interest in encouraging citizens to say something when they see something as surely as liability for citizens who report their good faith suspicions.

Fortunately, Congress did enact a statutory immunity with a fee shifting provision, P.L. 110-53, §1206,<sup>23</sup> on an overwhelming bipartisan basis in 2007. This provision buttressed the passengers' legal position by clarifying that their good faith report could not lead to liability against them, and that they would be entitled to recover legal fees from the plaintiffs in the lawsuit.

Recognizing that this statute made it far more difficult to sue the passengers and potentially made the plaintiffs responsible for the passengers' legal expenses, the plaintiffs in the U.S. Airways litigation dropped their claims against the passengers shortly after Congress adopted the 2007 law.

#### D. THE BILL EXPANDS CURRENT LAW THAT APPLIES ONLY TO TRANSPORTATION SYSTEMS

P.L. 110-53, §1206, which was adopted in 2007 with overwhelming bipartisan support in response to the U.S. Airways lawsuit, creates immunity from suit only for reports of "*any suspicious transaction, activity, or occurrence that involves, or is directed against, a passenger transportation system or vehicle or its passengers.*"<sup>24</sup> H.R. 963 expands these immunities so that they would apply to reporting "any suspicious transaction, activity, or occurrence," regardless of whether a passenger transportation system is involved.

Accordingly, the definition of the "Authorized Officials" entitled to immunity is expanded in the bill to include "any officer, employee, or agent of the Federal Government with responsibility for preventing, protecting against, disrupting, or responding" to suspicious terrorism-related activity. The 2007 law only offered immunity to employees of passenger transportation systems and Department of Homeland Security (DHS), Department of Transportation (DoT), or Department of Justice (DoJ) officials with responsibilities relating to the security of passenger transportation systems.<sup>25</sup>

The terrorist threat is not limited to transportation systems, and citizens should be encouraged to make good-faith reports of suspicious activity free from fear of reprisal whether or not transportation is involved.

If the government is going to encourage citizens to report suspicious activity, as it should, then we must also protect those citizens from being sued for making such reports. The "See Something,

<sup>23</sup> Codified at 6 U.S.C. § 1104.

<sup>24</sup> 6 U.S.C. § 1104(d)(2).

<sup>25</sup> 6 U.S.C. § 1104(d)(1)(b).

Say Something Act” ensures that Americans can exercise their common sense to protect against and prevent terrorist attacks.

### Hearings

The Committee’s Subcommittee on the Constitution held one day of hearings on H.R. 963, on June 24, 2011. Testimony was received from Lawrence J. Haas, Dr. M. Zuhdi Jasser, President of the American Islamic Forum for Democracy, and Chief Chris Burbank of the Salt Lake City Police Department, with additional material submitted by Congressman Peter King, Chairman of the House Homeland Security Committee, and the National Fraternal Order of Police.

### Committee Consideration

On July 21, 2011, the Committee met in open session and ordered the bill H.R. 963 favorably reported without amendment, by voice vote, a quorum being present.

### Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following roll call votes occurred during the Committee’s consideration of H.R. 963.

1. An amendment by Ms. Chu to prohibit extension of immunity to bias-based reports. Defeated 4 to 16.

#### ROLLCALL NO. 1

|  | Ayes | Nays | Present |
|--|------|------|---------|
| Mr. Smith, Chairman .....              |      | X    |         |
| Mr. Sensenbrenner, Jr. ....            |      |      |         |
| Mr. Coble .....                        |      | X    |         |
| Mr. Gallegly .....                     |      | X    |         |
| Mr. Goodlatte .....                    |      | X    |         |
| Mr. Lungren .....                      |      |      |         |
| Mr. Chabot .....                       |      |      |         |
| Mr. Issa .....                         |      |      |         |
| Mr. Pence .....                        |      |      |         |
| Mr. Forbes .....                       |      | X    |         |
| Mr. King .....                         |      | X    |         |
| Mr. Franks .....                       |      | X    |         |
| Mr. Gohmert .....                      |      | X    |         |
| Mr. Jordan .....                       |      |      |         |
| Mr. Poe .....                          |      | X    |         |
| Mr. Chaffetz .....                     |      | X    |         |
| Mr. Griffin .....                      |      | X    |         |
| Mr. Marino .....                       |      | X    |         |
| Mr. Gowdy .....                        |      | X    |         |
| Mr. Ross .....                         |      | X    |         |
| Ms. Adams .....                        |      | X    |         |
| Mr. Quayle .....                       |      | X    |         |
| Mr. Conyers, Jr., Ranking Member ..... |      |      |         |
| Mr. Berman .....                       |      |      |         |
| Mr. Nadler .....                       |      |      |         |
| Mr. Scott .....                        | X    |      |         |
| Mr. Watt .....                         |      |      |         |
| Ms. Lofgren .....                      |      |      |         |
| Ms. Jackson Lee .....                  | X    |      |         |
| Ms. Waters .....                       |      |      |         |
| Mr. Cohen .....                        |      |      |         |

## ROLLCALL NO. 1—Continued

|                             | Ayes | Nays | Present |
|-----------------------------|------|------|---------|
| Mr. Johnson .....           |      |      |         |
| Mr. Pierluisi .....         | X    |      |         |
| Mr. Quigley .....           |      |      |         |
| Ms. Chu .....               | X    |      |         |
| Mr. Deutch .....            |      |      |         |
| Ms. Sánchez .....           |      |      |         |
| Ms. Wasserman Schultz ..... |      |      |         |
| Total .....                 | 4    | 16   |         |

**Committee Oversight Findings**

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

**New Budget Authority and Tax Expenditures**

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

**Congressional Budget Office Cost Estimate**

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 963, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, September 9, 2011.*

Hon. LAMAR SMITH, CHAIRMAN,  
*Committee on the Judiciary,*  
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 963, the “See Something, Say Something Act of 2011.”

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Sarah Puro (for Federal costs), who can be reached at 226–2860, and Amy Petz (for the private-sector impact).

Sincerely,

DOUGLAS W. ELMENDORF,  
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.  
Ranking Member



*H.R. 963—See Something, Say Something Act of 2011.*

H.R. 963 would amend the Homeland Security Act of 2002 to grant immunity from civil liability to people who report suspicious activities that would violate the law relating to terrorism. Under current law, citizens are protected from liability in cases when they report suspicious activities on transportation systems. The bill would expand that protection to any citizen in any circumstance. Because the bill would address a private right of action and based on information from the Department of Homeland Security, CBO estimates that the bill would have no effect on the Federal budget. Enacting H.R. 963 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 963 would impose an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) by preempting State and local liability laws. CBO estimates that the preemption would not significantly affect the budgets of State, local, or tribal governments; while the mandate would limit the application of State and local laws, it would impose no duty that would result in additional spending.

By expanding protections against civil liability claims for individuals who report suspicious terrorist-related activities to an authorized official, the bill would eliminate an existing right to seek compensation for damage caused by certain acts; that expansion would impose a private-sector mandate. The direct cost of the mandate would be the forgone net value of awards and settlements in such claims. Because there is a lack of information about both the value of awards in such cases and the number of claims that would be filed in the absence of this legislation, CBO has no basis for predicting the level of potential damage awards, if any. Thus, CBO cannot estimate the cost of this mandate or whether that cost would exceed the annual threshold established in UMRA for private-sector mandates (\$142 million in 2011, adjusted annually for inflation).

The CBO staff contacts for this estimate are Sarah Puro (for Federal costs) and Amy Petz (for the private-sector impact). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

### **Performance Goals and Objectives**

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 963 is designed to encourage the sharing of information respecting potential terrorist attacks by reducing the threat of litigation against citizen informants and law enforcement responders.

### **Advisory on Earmarks**

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 963 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

## Section-by-Section Analysis

*Section 1:*

Short title.

*Section 2(a):*

Provides for new Sec. 890A to be added at the end of the Homeland Security Act of 2002. For ease of reference, the section-by-section analysis below will analyze the sections of this new Sec. 890A.

*Section 890A(a)(1):*

Creates immunity from civil liability under Federal, State, and local law for any person who, in good faith and based on objectively reasonable suspicion, reports “covered activity” to an “authorized official.”

Covered activity is defined by Section 890A(d)(2) to mean “any suspicious transaction, activity, or occurrence indicating that an individual may be engaging, or preparing to engage, in a violation of the law relating to an act of terrorism.”

Authorized official is defined by section 890A(d)(1) to mean either “any officer, employee, or agent of the Federal Government with responsibility for preventing, protecting against, disrupting, or responding to a ‘covered activity’” or “any Federal, State, or local law enforcement officer.”

*Section 890A(a)(2):*

Provides that immunity shall not apply to reports that the person knew to be false or made with reckless disregard for the truth.

*Section 890A(b)(1):*

Creates and clarifies immunity for any authorized official who observes or receives a report of covered activity, and takes reasonable action in good faith to respond to the activity. So long as the authorized official’s actions are reasonable and taken in good faith to respond to the reported activity, then the official is immune from suit even if the defense of qualified immunity would not otherwise be available.

*Section 890A(b)(2)(a):*

Provides that the availability of the defense under this section does not affect an authorized official’s ability to assert any other defense, such as qualified immunity, that may be available.

*Section 890A(b)(2)(b):*

Clarifies that the statute does not change or otherwise affect the contours of other defenses, privileges, or immunities that may be available. The statute creates a defense that is independent of and separate from existing defenses, privileges, and immunities.

*Section 890A(c):*

Provides that an authorized official or person who is found to be immune under the defense created by this statute shall be

entitled to recover all reasonable costs and attorneys fees from the plaintiff.

*Section 890A(d)(1)*

Defines “authorized official to mean either “any officer, employee, or agent of the Federal Government with responsibility for preventing, protecting against, disrupting, or responding to a ‘covered activity’” or “any Federal, State, or local law enforcement officer.”

*Section 890A(d)(2):*

Defines “covered activity” to mean “any suspicious transaction, activity, or occurrence indicating that an individual may be engaging, or preparing to engage, in a violation of the law relating to an act of terrorism (as that term is defined in section 3077 of title 18, United States Code).”

18 U.S.C. § 3077 defines an “act of terrorism” to include acts of either domestic or international terrorism, as those terms are defined in 18 U.S.C. § 2331.

18 U.S.C. § 2331 defines both “international terrorism” and “domestic terrorism” as “acts dangerous to human life” that violate criminal law or would violate criminal law if committed within the jurisdiction of the United States or of any State, and that appear to be intended to (1) intimidate or coerce a civilian population; (2) influence the policy of a government by intimidation or coercion; or (3) to affect the conduct of a government by mass destruction, assassination, or kidnapping. The term “domestic terrorism” covers activities that meet this definition and occur primarily within the territorial jurisdiction of the United States, while “international terrorism” covers activities that occur primarily outside the territorial jurisdiction of the United States or that transcend national boundaries. Activities related to either variety fall within the definition of “covered activities” in H.R. 963.

*Section 2(b):*

Amends the table of contents of the Homeland Security Act of 2002 to insert a reference to the new Section 890A created by the bill.

**Changes in Existing Law Made by the Bill, as Reported**

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

**HOMELAND SECURITY ACT OF 2002**

**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

(a) \* \* \*

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

\* \* \* \* \*

TITLE VIII—COORDINATION WITH NON-FEDERAL ENTITIES; INSPECTOR GENERAL; UNITED STATES SECRET SERVICE; COAST GUARD; GENERAL PROVISIONS

\* \* \* \* \*

Subtitle H—Miscellaneous Provisions

\* \* \* \* \*

Sec. 890A. Immunity for reports of suspected terrorist activity or suspicious behavior and response.

\* \* \* \* \*

**TITLE VIII—COORDINATION WITH NON-FEDERAL ENTITIES; INSPECTOR GENERAL; UNITED STATES SECRET SERVICE; COAST GUARD; GENERAL PROVISIONS**

\* \* \* \* \*

**Subtitle H—Miscellaneous Provisions**

\* \* \* \* \*

**SEC. 890A. IMMUNITY FOR REPORTS OF SUSPECTED TERRORIST ACTIVITY OR SUSPICIOUS BEHAVIOR AND RESPONSE.**

(a) IMMUNITY FOR REPORTS OF SUSPECTED TERRORIST ACTIVITY OR SUSPICIOUS BEHAVIOR AND RESPONSE.—

(1) IN GENERAL.—Any person who, in good faith and based on objectively reasonable suspicion, makes, or causes to be made, a voluntary report of covered activity to an authorized official shall be immune from civil liability under Federal, State, and local law for such report.

(2) FALSE REPORTS.—Paragraph (1) shall not apply to any report that the person knew to be false or was made with reckless disregard for the truth at the time that the person made that report.

(b) IMMUNITY FOR RESPONSE.—

(1) IN GENERAL.—Any authorized official who observes, or receives a report of, covered activity and takes reasonable action in good faith to respond to such activity shall have qualified immunity from civil liability for such action, consistent with applicable law in the relevant jurisdiction. An authorized official as defined by section (d)(1)(A) not entitled to assert the defense of qualified immunity shall nonetheless be immune from civil liability under Federal, State, and local law if such authorized official takes reasonable action, in good faith, to respond to the reported activity.

(2) SAVINGS CLAUSE.—Nothing in this subsection shall—

(A) affect the ability of any authorized official to assert any defense, privilege, or immunity that would otherwise be available; and

(B) be construed as affecting any such defense, privilege, or immunity.

(c) *ATTORNEY FEES AND COSTS.*—Any authorized official or other person found to be immune from civil liability under this section shall be entitled to recover from the plaintiff all reasonable costs and attorney fees.

(d) *DEFINITIONS.*—In this section:

(1) *AUTHORIZED OFFICIAL.*—The term “authorized official” means—

(A) any officer, employee, or agent of the Federal government with responsibility for preventing, protecting against, disrupting, or responding to a “covered activity;” or

(B) any Federal, State, or local law enforcement officer.

(2) *COVERED ACTIVITY.*—The term “covered activity” means any suspicious transaction, activity, or occurrence indicating that an individual may be engaging, or preparing to engage, in a violation of law relating to an act of terrorism (as that term is defined in section 3077 of title 18, United States Code).

\* \* \* \* \*

## Dissenting Views

While we have long supported efforts to promote cooperation between civilians and law enforcement, H.R. 963, the “See Something, Say Something Act of 2011,” would actually undermine those efforts. H.R. 963 would provide immunity from civil liability for individuals who report suspicious activities that relate to terrorism and law enforcement officials who act on those reports. Based on the debate during the Committee markup, and the Majority’s rejection of an amendment that would have ensured that racial profiling not be protected by this bill, we remain concerned that the bill’s protections could extend to reports based on an individual’s actual or perceived race, religion, or national origin. We are also concerned that H.R. 963 would permit an individual who had been the subject of a suit alleging racial profiling to seek attorneys’ fees and costs from the plaintiff *if* the suit was dismissed as a result of the immunities provided under this bill, even if that suit had been brought in good faith.

While proponents of H.R. 963 argue that this legislation is necessary to encourage private citizens and law enforcement officials to work cooperatively and take action against objectively suspicious acts that relate to terrorism, we believe that it would more likely have the effect of chilling the right of an individual who has been unlawfully subject to racial profiling to seek redress in court. As a result, H.R. 963 could have the unintended consequence of encouraging racial profiling, thereby violating the constitutional rights of the profiled victims, and undermining bona fide law enforcement efforts.

For these reasons, and those discussed below, we respectfully dissent.

### I. OVERVIEW

H.R. 963 grants immunity from civil liability to individuals who—in good faith and based on an objectively reasonable suspicion—report suspicious activity indicating that an individual may be engaging, or preparing to engage, in a violation of law relating to an act of terrorism as defined in 18 U.S.C. § 3077.<sup>1</sup> The bill also

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<sup>1</sup> H.R. 963, § 2(a), adding a new 6 U.S.C. § 890A(a)(1). 18 U.S.C. § 3077 references 18 U.S.C. § 2331, which defines “international terrorism” as activities that:

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

grants qualified immunity from civil liability to any authorized official<sup>2</sup> who observes, or receives a report of, such activity and takes reasonable action in good faith to respond, consistent with applicable law in the relevant jurisdiction.<sup>3</sup> The bill further provides that an authorized official not entitled to assert the defense of qualified immunity shall nonetheless be immune from civil liability, if that official takes reasonable action, in good faith, to respond to the reported activity.<sup>4</sup> Any individual found to be immune from civil liability under this legislation would be entitled to recover reasonable costs and attorney fees.<sup>5</sup>

Criminal justice experts report that there is inevitably an increase in tips from the public concerning suspicious activity following any high profile incident.<sup>6</sup> In the case of the September 11th attacks, the expected increase in the number of these kinds of reports was exacerbated by media accounts of a traffic stop involving the hijackers and their attempts to blend in with the local minority community.<sup>7</sup> The resulting belief that the tragedy might have been averted had someone simply reported suspicious activities prompted Congress to enact information sharing legislation, which in turn has led to the Suspicious Activity Reporting Initiative (SAR).<sup>8</sup>

## II. CONCERNS WITH THE LEGISLATION

### A. *H.R. 963 Increases the Risk of Racial Profiling.*

Civil liberties advocates have been particularly critical of suspicious activity initiatives. In its testimony on the bill, the Rights Working Group observed that minorities have been disproportionately targeted in suspicious activity reports:

Since 9/11, suspicion has often been reported based on appearance rather than behavior. Among those reported for “suspicious activities,” have been peaceful groups, including anti-death penalty activists and Amnesty International

Section 2331 defines “domestic terrorism” as activities that:

(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily within the territorial jurisdiction of the United States.”

<sup>2</sup>An “authorized official” is defined as “any officer, employee, or agent of the Federal government with responsibility for preventing, protecting against, disrupting, or responding to a ‘covered activity’; or any Federal, State, or local law enforcement officer.” H.R. 963, §2(a), adding a new 6 U.S.C. 890A(d)(1).

<sup>3</sup>*Id.* § 890A(b)(10).

<sup>4</sup>*Id.* § 890A(a)(2) and (b)(1).

<sup>5</sup>*Id.* § 890A(c).

<sup>6</sup>See Mike German & Jay Stanley, Fusion Center Update, American Civil Liberties Union (June 2008), available at [http://www.aclu.org/files/pdfs/privacy/fusion\\_update\\_20080729.pdf](http://www.aclu.org/files/pdfs/privacy/fusion_update_20080729.pdf) (last visited: June 17, 2011).

<sup>7</sup>See Sanctioned Bias: Racial Profiling Since 9/11, American Civil Liberties Union (Feb. 2004), available at <http://www.aclu.org/FilesPDFs/racial%20profiling%20report.pdf> (last visited: Sept. 6, 2011).

<sup>8</sup>This program is designed to centralize information sharing efforts between Federal state and local law enforcement agencies. See Overview of the Nationwide SAR Initiative, at [http://nsi.ncirc.gov/documents/NSI\\_Overview.pdf](http://nsi.ncirc.gov/documents/NSI_Overview.pdf) (last visited Sept. 6, 2011). For a discussion of the development and potentially discriminatory impact of the SAR initiative, see Thomas Cincotta, Platform for Prejudice, Political Research Associates (Mar. 2010), available at [http://www.publiceye.org/liberty/matrix/reports/sar\\_initiative/sar-full-report.pdf](http://www.publiceye.org/liberty/matrix/reports/sar_initiative/sar-full-report.pdf) (last visited: September 6, 2011).

members. People have been yanked off of airplanes, and others have found their face in major newspapers such as the New York Times listed as terrorism suspects—all because of reports of suspicious activity. More often than not, the people targeted by such reports were not engaged in any illegal activity, and they were often Arab, Middle Eastern, Muslim, South Asian or perceived to be so.<sup>9</sup>

The proponents of this legislation seem to have missed the lessons learned by law enforcement agencies across the country that a focus on behavior, rather than perceived religion or ethnicity, is the most effective law enforcement strategy. In his testimony before the Subcommittee on the Constitution, Salt Lake City Police Chief Christopher Burbank observed that tips based on racial, religious or national origin disrupt the work of law enforcement authorities who still must expend significant resources to investigate such tips. Chief Burbank was particularly concerned that, in addition to sidetracking law enforcement with reports based on race or religion, racial profiling undermines successful efforts to enlist local communities in cooperative efforts with police. The Rights Working Group's testimony took the position that H.R. 963 ran the risk of emboldening bias-based behavior:

H.R. 963 provides cover for those who would use race, religion, ethnicity or national origin as a proxy for criminal behavior, and offers no remedy to those who are harmed by their actions. Rather than looking for ways to immunize those who act improperly on vague and unsubstantiated tips, this Committee's time would be better spent looking for ways to effectively identify criminal behavior and target law enforcement resources accordingly.<sup>10</sup>

Tips based on perceived race, religion, or national origin distract law enforcement from its core mission and violate the rights of individuals.<sup>11</sup> Since September 11th, complaints about racial profiling in the Arab, Muslim and south-Asian communities have increased dramatically and have been the subject of hearings by this Subcommittee.<sup>12</sup> Examples include the following:

- Representative Darrell Issa (R-CA), an Arab-American Member of Congress was prevented from boarding a flight at Dulles International Airport while traveling on official business, even after providing his congressional identification.<sup>13</sup>
- An executive for Lucent Industries was ejected from a flight in Boston after the United Airlines crew refused to fly with him on board.

<sup>9</sup> See *Something, Say Something Act of 2011: Hearing on H.R. 963 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. (2011) (testimony of Margaret Huang, Executive Director, Rights Working Group).

<sup>10</sup> *Id.*  
<sup>11</sup> Mike German & Jay Stanley, Fusion Center Update, American Civil Liberties Union (June 2008).

<sup>12</sup> See, e.g., *Racial Profiling and the Use of Suspect Classifications in Law Enforcement Policy: Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (2010).

<sup>13</sup> See Mark Sherman, Rep. Issa: I Was Profiling Victim, THE WASHINGTON POST (Oct. 26, 2001) available at: [http://www.washingtonpost.com/wp-srv/aponline/20011026/aponline175845\\_000.htm](http://www.washingtonpost.com/wp-srv/aponline/20011026/aponline175845_000.htm) (last visited: September 7, 2011).



- A Muslim staff person with the Judiciary Committee was harassed by airline employees after boarding and was asked to produce four pieces of identification in addition to his congressional I.D.

Incidents in which reports were based not on suspicious behavior, but on the perceived race, religion, or nationality of an individual, serve no legitimate law enforcement purpose. By further encouraging the targeting of innocent individuals based on race and ethnicity and diverting focus from rooting out those with malicious intentions, profiling can seriously impede these important public safety missions.

*B. H.R. 963 Would Have a Chilling Effect on the Right of Victims of Racial Profiling to Seek Redress in Court.*

H.R. 963 allows any authorized official or other person found to be immune from civil liability under this section to recover from the plaintiff all reasonable costs and attorney fees.<sup>14</sup> In contrast, the legislation does not provide for fees and costs for a successful plaintiff who has been the victim of profiling no matter how malicious the report. Representative Judy Chu (D-CA) offered an amendment to make clear that a report based on a person's race, religion, ethnicity, or national origin would not receive protection under the bill. This amendment was rejected by a vote of 4–16.

Additionally, this measure has the strong potential to chill access to the courts for those individuals targeted by even the most malicious tips. Conversely, there is no similar penalty imposed on a defendant no matter how egregious the conduct or frivolous the assertion of immunity. Because numerous ordinary activities have been deemed potentially suspicious, ordinary citizens would effectively lose access to the courts for fear of financial ruin in the event of an adverse ruling.<sup>15</sup> The losers would be those who are genuinely victims of profiling, but who could not afford the risk of losing on the question of immunity. Representative Bobby Scott (D-VA) offered an amendment to allow a defendant to recover fees and costs only if the plaintiff did not act in good faith. The amendment was rejected on a voice vote.

*C. H.R. 963 Would Expand the Reach of Existing Immunities and Penalties.*

While H.R. 963 largely restates current law, it also expands the law in ways that are particularly troubling. In 2007, Congress passed legislation that included similar immunity language, but confined that immunity to cases involving a “suspicious transaction, activity, or occurrence that involves, or is directed against, a passenger transportation system or vehicle or its passengers.”<sup>16</sup> That legislation also provided for payment by the plaintiff to the

<sup>14</sup>H.R. 963, §2(a), adding a new 6 U.S.C. 890A(c).

<sup>15</sup>The Los Angeles Police Department list of SAR suspect actions includes: using binoculars or cameras; taking measurements; taking pictures or video footage and drawing diagrams or taking notes. See Jerome P. Bjelopera, Terrorism Information Sharing and the Nationwide Suspicious Activity Report Initiative: Background and Issues for Congress, Congressional Research Service, at 8 (June 10, 2001) available at: <http://www.fas.org/sgp/crs/intel/R40901.pdf> (last visited Sept. 6, 2011).

<sup>16</sup>The “Implementing Recommendations of the 9/11 Commission Act of 2007,” Pub. L. No. 110–53, § 1206; 121 Stat. 388 (2007), codified as 6 U.S.C. § 1104.

defendant of attorneys fees and costs if the case is dismissed on the basis of the immunities specified in the section.<sup>17</sup> While the 2007 legislation was confined to reports of terrorist threats against the passenger transportation system, H.R. 963 covers all reports about any suspected terrorist threat.

H.R. 963 also fails to clarify what legal standard would be employed to determine if an individual's report was made "in good faith and based on objectively reasonable suspicion."<sup>18</sup> The terms "good faith" and "objectively reasonable suspicion" are not defined in the bill. Federal statutes in any given area of law employ different legal standards in different contexts because there is no uniform guide to federal legal standards.<sup>19</sup> Consequently, a party would have no way of knowing how the Court might apply the "good faith" and "objectively reasonable" standards in determining whether a defendant was subject to immunity or qualified immunity. A plaintiff, therefore, would not be able to adequately assess the viability of his claim until court proceedings have begun.

*D. H.R. 963 Would Unnecessarily Trample on States' Rights by Preempting State Tort Liability Laws.*

While respect for states' rights has become a rallying cry among many members of Congress, this blanket preemption of state tort law appears to have raised no such concerns among its proponents. As the Supreme Court has observed, "[a]lthough the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a Federal system."<sup>20</sup> We do not take the position that this legislation necessarily transgresses the Tenth Amendment. Nevertheless, we would urge our colleagues who have made a habit of trumpeting it to consider carefully the extent to which this legislation sweeps aside generations of state tort law in the pursuit of a theory roundly rejected by experienced law enforcement, including the only law enforcement officer to testify at the Subcommittee's hearing.

### III. CONCLUSION

H.R. 963 is a solution in search of a problem. The Committee has no record of a pattern of unfounded lawsuits against individuals who make good faith reports of suspicious activities to law enforcement. Nonetheless, H.R. 963 may end up promoting racial profiling, thereby violating the constitutional rights of those targeted individuals. It will also undermine, rather than support, efforts to promote greater cooperation between law enforcement and citizens.

<sup>17</sup>*Id.* at § 1104(c).

<sup>18</sup>If a court interprets the 6 U.S.C. § 1104(a) immunity provision with respect to individuals, then such a decision may be useful in interpreting H.R. 963.

<sup>19</sup>For example, federal criminal provisions include a varying array of *mens rea* standards, some of which are drawn from language in Supreme Court opinions, others which use new terms created by Congress, and still others which combine two or more phrases to create new standards. Similarly, multiple standards apply to industry requirements, agency discretion, and other issues throughout federal environmental statutes. As exemplified in those laws, Congress can create many standards to govern the scope of immunity for suspicious activity reporting.

<sup>20</sup>*Fry v. United States*, 421 U.S. 542, 547 n.7 (1975) (citations omitted).

For these reasons we respectfully dissent.

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ROBERT C. "BOBBY" SCOTT.  
HENRY C. "HANK" JOHNSON, JR.  
JUDY CHU.

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