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THE CHEMICAL SECURITY ACT: USING TERRORISM AS AN EXCUSE TO CRIMINALIZE PRODUCTIVE ECONOMIC ACTIVITY

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The Chemical Security Act of 2001 (S. 1602) has been passed by the Senate Committee on Environment and Public Works and may now go to the full Senate for consideration. Because of its putative connection to terrorism, some of its supporters want the bill to be included as an amendment to the proposed Homeland Security Act of 2002. That would be a mistake. S. 1602 is bad policy that would punish victims of terrorism, not deter terrorists.

Making Innocent Victims of Terrorism the Criminals. The unarguable premise of S. 1602 is that terrorists could attack chemical facilities in the United States with potentially horrific consequences. The bill also assumes (with much less basis) that chemical companies could take certain steps to lessen those dangers, and that such steps are not being taken.

Thus, the bill posits that risks arising from a criminal terrorist attack on a chemical facility could be lessened by government-mandated changes in production methods that reduce the use and storage of chemicals; the employment of "inherently safer" technologies (whatever those are) to manufacture, transport, and use chemicals; the enhancement of containment structures and other mitigation methods; and the improvement of security at chemical plants.

These seemingly sound ideas are being used to justify S. 1602's two highly intrusive and unsound "solutions." First, the bill would enact into law the highly debatable proposition that, whatever the cost, the government should require chemical companies to take extraordinary steps to reduce the risk of injury from terrorist attacks on their plants. The bill in effect would make the Administrator of the Environmental Protection Agency (EPA) a czar of the chemical industry with the power to promulgate regulations that oblige chemical companies to take whatever steps the Administrator deems necessary—including, presumably, changing production methods or plant location or eliminating the production of some products.

If that were not bad enough, the bill also includes provisions that would make it a crime for the chemical industry *not* to take the steps the Administrator demands. In other words, the bill's supporters believe it should be a crime for the inno-

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cent victim of a criminal act to fail to take "adequate" steps that might have lessened the potentially adverse effects of the terrorist's criminal activity. The bill turns justice on its head: The intervening criminal act by the terrorist is not the problem; rather, the problem is the victim's failure to avoid becoming a victim.

Imagine what would happen if the logic of this proposal were applied to other criminal activity. There are plenty of steps that a homeowner could take to prevent a burglary at his house. For example, the homeowner can put bars on the windows or install a burglar alarm. The logic of S. 1602 argues that it should be a crime for homeowners *not* to take these precautions.

Or consider a case where the harm from the crime is done to both the victim and third parties: What about the owner of a car stolen by thieves who take it on a joy ride, hit an innocent pedestrian, and then crash the car? The logic of the bill would make it a crime for the car owner *not* to have used an anti-theft device like "The Club."

Aiding the Terrorists. The criminalization of the victim of terrorism is not the only flaw in S. 1602. Section 4 of the legislation requires the EPA Administrator to identify in publicly available regulations all of the vulnerabilities existing in American chemical facilities today. But in doing so, she would be providing a blueprint of those facilities to anyone, including a terrorist, who chooses to read the *Federal Register*. With the threat of terrorism currently ranked "high" by the Administration, broadcasting the weaknesses of the chemical industry would be ludicrous, if not immoral.

Attempting to Achieve Counterproductive Environmental Goals. S. 1602 also represents a return to the failed policy approaches of the past. When environmental regulation began, the federal government used a command-and-control model of top-down management and direction. Orders came from the EPA with no discretion or flexibility for those subject to its regulation.

In the past 10 years, this command-and-control model has been widely acknowledged to be inefficient and ineffective. Policymakers generally recognize that change is achieved much more readily through the tort and insurance system or, if government intervention is necessary, through goal setting and the creation of market-like structures. If Washington really wants to improve safety at the nation's chemical plants, all it has to do is let the market, and the tort system, work.

Conclusion. But improved safety at chemical facilities is not what some supporters of S. 1602 really want. Rather than adopting a market-based approach, some backers of the bill are attempting to marry the long-held environmentalist agenda of chemical-use reduction to the war on terrorism.

By waving the red flag of chemical danger, these supporters of S. 1602 are not really attempting to combat terrorism; terrorists will continue to find ways to thwart whatever technological and methodological changes are made to their targets to achieve their end. Those supporting S. 1602 as written have a different agenda: taking a large step toward their goal of a chemical-free world.

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