Calendar No. 797

108TH CONGRESS *2d Session*	SENATE	REPORT 108–408

HIGH RISK NONPROFIT SECURITY ENHANCEMENT ACT OF 2004

R E P O R T

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 2275

together with

MINORITY VIEWS

AMENDING THE HOMELAND SECURITY ACT OF 2002 (6 U.S.C. 101 ET SEQ.) TO PROVIDE FOR HOMELAND SECURITY ASSISTANCE FOR HIGH-RISK NONPROFIT ORGANIZATIONS, AND FOR OTHER PURPOSES

NOVEMBER 10, 2004.—Ordered to be printed

Filed, under authority of the order of the Senate of October 11, 2004

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NOVEMBER 10, 2004.—Ordered to be printed

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Ms. COLLINS, from the Committee on Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 2275]

The Committee on Governmental Affairs, having considered the original bill (S. 2275) to amend the Homeland Security Act of 2002 (6 U.S.C. 101 et seq.) to provide for homeland security assistance for high-risk nonprofit organizations, and for other purposes, reports favorably thereon, with amendments and recommends that the bill do pass.

I. PURPOSE & SUMMARY

The purpose of S. 2275, the High Risk Nonprofit Security Enhancement Act of 2004, is to amend the Homeland Security Act of 2002 to provide for homeland security assistance for nonprofit organizations at high risk of international terrorist attacks, and for other purposes.

II. BACKGROUND & NEED FOR LEGISLATION

The Threat to Nonprofit Organizations

International terrorist organizations have increasingly demonstrated their willingness to attack "soft targets." As the 2003 Patterns of Global Terrorism Report concludes, attacks continue against "the international community, humanitarian organizations,

and people dedicated to helping mankind."[1] Last year, the Baghdad International Committee for the Red Cross was bombed; the Catholic Relief Services headquarters in Nassiryah was bombed; explosions occurred near Save the Children USA's offices in Kabul; five apparently coordinated bomb attacks occurred in Casablanca, Morocco at or near a restaurant, hotel, Jewish cemetery, Jewish Community Center, and the Belgian Consulate; in India, grenades exploded at a crowded community kitchen, a bomb exploded near a Hindu temple, militants opened fire on a Christian school, and a grenade was thrown at a Christian missionary school; and vehicle bombs exploded at the Beth Israel synagogue and at the Neve Shalom synagogue in Turkey.[2] "Churches, synagogues, and mosques were all targeted by terrorists in 2003."[3]

In testifying before the Select Committee on Intelligence, Robert S. Mueller, Director of the Federal Bureau of Investigation, noted that:

> We must not assume, however, that al-Qaeda will rely only on tried and true methods of attack. As attractive as a large-scale attack that produced mass casualties would be for al-Qaeda and as important as such an attack is to its credibility among its supporters and sympathizers, target vulnerability and the likelihood of success are increasingly important to the weakened organization. Indeed, the types of recent, smaller-scale operations al-Qaeda has directed and aided against a wide array of Western targets—such as in Mombassa, Bali and Kuwait and against the French oil tanker off Yemen—could readily be reproduced in the U.S.[4]

Mr. Mueller went on to note that multiple, smaller-scale attacks against soft targets would be easier to execute and would require minimal communication with the central leadership of the terrorist organization and, therefore, would lower our ability of detecting such an attack.[5]

The Director of the Central Intelligence Agency echoed this threat by stating that "[a]l-Qa'ida is still dedicated to striking the U.S. homeland, and much of the information we've received in the past year revolves around that goal."[6] The Director further noted that "[u]ntil al-Qa'ida finds an opportunity for the big attack, it will try to maintain its operational tempo by striking 'softer' targets . . . 'softer' [targets] are simply those targets al-Qa'ida planners may view as less well protected."[7]

Nonprofit organizations are valuable assets to the country. They provide services important to communities in a wide array of areas related to homelessness, the arts, education, culture, religion,

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[1] Patterns of Global Terrorism 2003, April 2004, Revised June 22, 2004, United States Department of State, Introduction, p. iii.

[2] Patterns of Global Terrorism 2003, April 2004, Revised June 22, 2004, United States Department of State, Introduction p. iii and Appendix A—Chronology of Significant International Terrorist Incidents, 2003 (Revised 6/22/04).

[3] Patterns of Global Terrorism 2003, April 2004, Revised June 22, 2004, United States Department of State, Introduction, p. iii.

[4] Testimony of Robert S. Mueller, III, Director, FBI, Before the Select Committee on Intelligence of the United States Senate, February 11, 2003.

[5] Ibid.

[6] DCI's World Threat Briefing (As Prepared for Delivery), The Worldwide Threat in 2003: Evolving Dangers in a Complex World, February 11, 2003.

[7] Ibid.

human services, and health. Unfortunately, some of these organizations may also provide ideal targets for those who want to harm the U.S., either because they are where many people gather on a regular basis or because of the nature of the mission of the particular nonprofit. Since some nonprofit organizations may be at high risk of an international terrorist attack and because these organizations carry out activities that are intended to serve the public good, providing some security assistance to protect them is justified.

The High Risk Nonprofit Security Enhancement Act of 2004 as Introduced

S. 2275, as introduced, would authorize the Secretary of Homeland Security to provide in FY 2005 up to $100 million in security assistance to 501(c)(3) organizations demonstrating a high risk of international terrorist attack. The Secretary would make this determination based on specific threats of international terrorist organizations; prior attacks against similarly situated organizations; the vulnerability of the specific site; the symbolic value of the site as a highly recognized American institution; or the role of the institution in responding to terrorist attacks.

The funds could be used for security enhancements, such as concrete barriers, and hardening of windows and doors, as well as technical assistance to assess needs, develop plans, and train personnel. After funds have been expended for the highest risk institutions, Federal loan guarantees would be available to make loans to qualifying nonprofit organizations. Funds would be administered by a new office in the Department of Homeland Security, the Office of Community Relations and Civic Affairs, dedicated to working with high-risk non-profit organizations.

The bill also authorizes $50 million in grant funds for local police departments to provide additional security in areas where there is a high concentration of high-risk non-profit organizations.

Amendments Adopted in Committee

An amendment offered by Senators Collins and Lieberman and adopted by the Committee altered several of the bill's provisions. First, it struck the provisions in the bill, as introduced, which would have limited qualifying nonprofit organizations to those that host gatherings of at least 100 persons at least once per month or those that provide services to at least 500 people each year at the site. The purpose of this change was to ensure that smaller nonprofit organizations are eligible to apply for assistance.

Second, the amendment added "the likelihood of physical harm to persons at the site or in the area surrounding the site" as one of the criteria for determining eligibility for assistance.

Third, S. 2275 as introduced would have required States to establish a State Homeland Security Authority to assist in the evaluation of applications from high risk non-profit organizations. Not all States have established separate Homeland Security agencies, and requiring them to create one solely in response to this program could potentially add an undue burden on certain States. The amendment would allow States simply to designate an existing agency to be the entity involved with this program.

The Committee also adopted an amendment offered by Senator Durbin removing specific requirements in S. 2275 regarding the favorable repayment terms for the loan guarantee program. The bill, as introduced, would have required that lending institutions under the loan guarantee program provide non-profit organizations with favorable repayment terms. Nonprofit organizations would already benefit from the loan guarantees themselves and the Committee believes that the additional benefit of requiring favorable terms is not necessary.

Constitutional Analysis

Because religious institutions would potentially be among those nonprofit organizations eligible for financial assistance under the legislation, some Committee members raised concerns about the bill's Establishment Clause ramifications. The First Amendment of the Constitution states, in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .". During Committee consideration of S. 2275, some raised questions regarding whether the participation of religious nonprofit organizations in the program would pass constitutional scrutiny.[8] The majority of the Committee believes that it would. Indeed, an opinion by the American Law Division of the Congressional Research Service concurs in that conclusion.[9]

Providing assistance, carefully limited to security technology and assistance, would serve a purely secular purpose of protecting potential and attractive terrorist targets. This is an important and valid secular purpose because the government has an interest in protecting the lives and property of its citizens, and because an attack on a religious institution is an attack on a significant part of American civil society. In addition to these wholly legitimate, indeed, urgent needs, providing security aid to particularly vulnerable institutions forestalls additional terrorist acts, acts which demoralize American citizens, spread fear and panic, and encourage further terrorist attacks. On similar reasoning, courts have upheld against Establishment Clause challenges statutes enhancing the penalties for vandalizing houses of worship.[10]

The Lemon Test

In *Lemon* v. *Kurtzman,*[11] the Supreme Court articulated a three prong test to determine whether a statute is constitutional under the Establishment Clause. Specifically, the Court adopted the fol-

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[8] The church-state constitutional issues arise primarily in the context of active religious institutions with religious functions. Synagogues and religious day schools, for example, are plainly religious institutions. Providing financial assistance to such institutions at least implicates the Establishment Clause, since the primary purpose of such institutions is religious teaching, worship, and observance. On the other hand, some institutions, although affiliated with religious groups, have little or no religious content. These may include hospitals, nursing homes, vocational services, and the like, although issues could arise if such institutions contain a chapel or other area of worship within its facilities. In between are institutions which are largely secular but which have a substantial religious component. Establishment Clause issues are most likely to be triggered with regard to generally applicable Federal programs when the Federal benefit goes to an active place of worship or to improve facilities that may be used, in part, to actively promote religion.

[9] Memorandum from the American Law Division, Congressional Research Service to the Senate Governmental Affairs Committee, July 19, 2004, Questions Regarding S. 2275, the High Risk Nonprofit Security Enhancement Act.

[10] See e.g., *Todd* v. *State,* 643 So 2d 625 (Fla App 1994); *State* v. *Vogenthaler,* 89 N.M. 150, 548 P. 2d 112 (Ct App 1976).

[11] 403 U.S. 602 (1971).

lowing test: (1) the statute must have a secular legislative purpose, (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) the statute must not foster an excessive government entanglement with religion.[12]

This bill meets each prong of the *Lemon* test. It has a clearly secular legislative purpose—to protect individuals who may be at or near nonprofit organizations determined to be at high risk of terrorist attack, by providing assistance for security enhancements to those nonprofit organizations. The bill does not have the primary effect of advancing religion, as recipients would be chosen from among all 501(c)(3) applicants based on neutral criteria of risk, and the assistance would be used for security enhancements, such as barriers and reinforced doors, that are not part of any religious activity. Finally, the bill does not foster an excessive government entanglement with religion, as the legislation provides no direct funding to religious institutions and would provide little or no opportunity for government involvement with the religious activities of any religious nonprofit organization selected for assistance.[13]

Physical Improvements

Nonetheless, some Committee members concerned about the Establishment Clause implications of S. 2275 point to the Supreme Court's decisions in *Tilton* v. *Richardson*,[14] and *Committee for Public Education & Religious Liberty* v. *Nyquist, Commissioner of Education of New York*,[15] in which the Court addressed the issue specifically of government aid related to physical improvements to property. *Tilton* was a challenge to a federal program that gave grants to colleges to build secular use facilities such as libraries, language laboratories, or classrooms. By statute, no funds could be given to buildings used even partially for religious purposes. However, the limitation on religious uses expired after 20 years and required the Federal government to actively enforce, during those years, the prohibition on the use of any of those facilities for religious purposes.

In a plurality opinion, the Court upheld the program. The Court, however, unanimously struck down the provision limiting the ban on religious uses to 20 years, although the Justices differed on the reasoning. Some Justices believed that the 20 years was not enough time, that even after 20 years there still would be value in the property and, therefore, there would be the potential of advancing religion, if after the 20 years the property was used for religious purposes. However, other Justices questioned whether the 20-years of continued enforcement violated the third prong of the *Lemon* test regarding excessive government entanglement with religion.

In *Nyquist,* New York established a grant program for nonpublic schools that would provide for the "maintenance and repair" of school facilities. The Court struck down the program as unconstitutional based on the second prong of the *Lemon* test related to ad-

[12] Ibid at 612–613.

[13] The American Law Division of the Congressional Research Service concurs in this assessment. *See* Memorandum from the American Law Division, Congressional Research Service to the Senate Governmental Affairs Committee, July 19, 2004, Questions Regarding S. 2275, the High Risk Nonprofit Security Enhancement Act, at 2–3.

[14] 403 U.S. 672 (1971).

[15] 413 U.S. 756 (1973).

vancing religion. The Court noted in the *Nyquist* case that the "maintenance and repair" program made no attempts to restrict the use of funds to be exclusively used for secular purposes. The Court, for example, indicated that there was nothing in statute that would prevent a Catholic school from paying the salary of an employee who maintains the school chapel. The Court then said, "[a]bsent appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools."[16]

Tilton appears to stand for the proposition that the government may not contribute financially to the construction of buildings used for religious worship or instruction. That reading of *Tilton* would be an obstacle to granting aid to the physical structure of religious institutions such as houses of worship. However, the program created by S. 2275 can be distinguished. Unlike the *Tilton* program, in which funding could be used to construct an entire building that could eventually be used as a church, the program established in S. 2275 (1) provides no direct funding, but rather offers contracts and loan guarantees to provide security enhancements; and (2) provides financial assistance for only a very narrow set of capital improvements—those aimed exclusively at enhancing the security of the citizens who use the facilities. Moreover, unlike both *Tilton* and *Nyquist,* where the Court appeared troubled by the fact that government assistance, at least in part or eventually, could be used for sectarian purposes, none of the enhancements supported by S. 2275—such as fences or other barriers or reinforced doors—could be diverted for use for religious purposes.

The program established by S. 2275 is better analogized to *Everson* v. *Board of Education*[17] and *Board of Education* v. *Allen*,[18] in which the Court upheld the reimbursement to parents for bus transportation and the provision of secular textbooks, respectively, regardless of whether a student attended public or parochial school. The Court did not seem to raise issues about indirect benefits to religious institutions as long the funds provided were used for secular purposes. In fact, the *Nyquist* Court distinguished these cases thusly:

> In *Everson,* the Court found the bus fare program analogous to the provision of services such as police and fire protection, sewage disposal, highways, and sidewalks for parochial schools . . . Such services, provided in common to all citizens, are "so separate and so indisputably marked off from the religious function," that they may fairly be viewed as reflections of a neutral posture toward religious institutions.[19]

The Court went on to state:

> *Allen* is founded upon a similar principle. The Court there repeatedly emphasized that upon the record in that

[16] Ibid. at 774.
[17] 330 U.S. 1 (1947).
[18] *Board of Education* v. *Allen,* 392 U.S. 236 (1968) (The Court upheld a New York law providing secular textbooks for children attending public and nonpublic schools).
[19] Ibid. at 781–782.

case there was no indication that textbooks would be provided for anything other than purely secular courses.[20]

The security-related capital improvements funded by this bill are more like the bus service and police protection for sectarian institutions that the Court has approved than the whole-scale construction of a building, which it has not.

Conclusion

The legal precedent related to assistance that has the potential of benefitting religious organizations suggests that religious organizations need not be excluded from a program that is available to religious and non-religious entities alike and serves a purely secular purpose. Indeed, there have been other legislative and policy precedents for such programs. In 1996, for example, Congress passed the Church Arson Prevention Act which was specifically in response to vandalism and other attacks on African-American churches. That act, through a loan guarantee program, provided Federal assistance to make actual repairs to houses of worship.

S. 2275 has been carefully crafted to satisfy the constitutional requirement of separation of church and state. The assistance program is generally-applicable to all high-risk non-profit organizations who meet certain criteria. The security enhancements, technical assistance, and loan guarantees are for purely secular purposes (securing high-risk targets) and, like in *Allen* and *Everson,* for purely secular functions (fences, bollards). No funds are going directly to any religious institution to be used without restriction, such as in the *Nyquist* case. Finally, Federal funds will not go directly to any sectarian institution; rather, the Department of Homeland Security will be hiring the contractors to build the enhancements. For these reasons, the Committee believes that S. 2275 is consistent with the requirements of the First Amendment.

III. LEGISLATIVE HISTORY

S. 2275 was introduced on April 1, 2004 by Senators Mikulski, Specter, Murray, Clinton, Landrieu, Schumer, Lieberman, Daschle, and Dayton. Since introduction additional co-sponsors of S. 2275 were added including Senators Collins, Baucus, Dodd, Reid, Smith, and Boxer. S. 2275 was referred to the Committee on Governmental Affairs. A companion bill, H.R. 4108 was introduced on that same day by Congressmen Nethercutt and Nadler and has 65 cosponsors. On July 21, 2004, the Committee considered S. 2275.

Senator Durbin offered two amendments to S. 2275. The first amendment would have only allowed contracts for security enhancements to the extent that the real property to be improved would not be used for sectarian instruction or religious worship, unless and until the security enhancements have no value. The first amendment was not adopted by rollcall vote. The Senators voting in the negative were Senators Collins, Stevens, Voinovich, Coleman, Specter, Bennett, Sununu, Shelby, Lieberman, and Carper. The Senators voting in the affirmative were Senators Fitzgerald, Levin, Akaka, Durbin, Lautenberg, and Pryor.

The second amendment offered by Senator Durbin removes the specific provisions in S. 2275, as introduced, that would have re-

[20] *Nyquist* at 782.

quired favorable terms for the loan guarantees. This amendment was adopted by the Committee by voice vote.

Senators Collins and Lieberman offered an amendment, which the Committee agreed to by voice vote. The amendment offered by Senators Collins and Lieberman strikes the provisions in the bill, as introduced, which would have limited qualifying nonprofit organizations to those that host gatherings of at least 100 persons at least once per month or those that provide services to at least 500 people each year at the site; adds "harm to persons" as one criteria for determining eligibility for assistance; and allows States to designate an existing agency to help administer the program.

The Committee ordered the bill reported, as amended, by voice vote.

IV. SECTION-BY-SECTION ANALYSIS

Section 1 titles the bill as the High Risk Nonprofit Security Enhancement Act of 2004.

Section 2 contains a congressional finding that there is a public interest in protecting high-risk nonprofit organizations from international terrorist attacks.

Section 3 states that purposes of the Act are to (1) establish within the Department of Homeland Security a program to protect U.S. citizens at or near high-risk nonprofit organizations from international terrorist attacks through loan guarantees and Federal contracts for security; (2) establish a program with the Department to provide grants to local governments to assist with incremental costs associated with law enforcement in areas in which there are a high concentration of high-risk nonprofit organizations; and (3) establish an Office of Community Relations and Civic Affairs within the Department of Homeland Security to focus on the security needs of high-risk nonprofit organizations.

Section 4 adds at the end of the Homeland Security Act of 2002 the following provisions:

Section 1801 contains definitions of "contract," "nonprofit organization," "security enhancements," and "technical assistance."

Section 1802(a) authorizes the Secretary of Homeland Security to enter into contracts with certified contractors for security enhancements and technical assistance for nonprofit organizations and issue Federal loan guarantees to financial institutions in connection with loans made to nonprofit organizations for security enhancements and technical assistance.

Section 1802(b) authorizes the Secretary of Homeland Security to guarantee loans under the Act only to the extent provided for by appropriations, under such conditions as the Secretary considers appropriate and consistent with section 503 of the Federal Credit Reform Act of 1990, and only to the extent that the terms and conditions include a requirement that the decision to provide a loan guarantee to a financial institution does not in any way depend on the purpose, function, or identity of the beneficiary organization.

Section 1803(a) requires the Secretary to designate nonprofit organizations as high-risk nonprofit organizations eligible under the program based on the vulnerability of the specific

site of the nonprofit organizations to international terrorist attacks.

Section 1803(b) establishes criteria for assessing vulnerability to international terrorist attacks including threat of international terrorist organizations against any group who operate or are the principle beneficiaries or users of the nonprofit organization; prior attacks by international terrorist organizations against the nonprofit organization or entities associated with or similarly situated as the nonprofit organization; the symbolic value of the site as a highly recognized United States cultural or historical institution; the role of the nonprofit organization in responding to international terrorist attacks, recommendations of the applicable designated State agency established under section 1806 or Federal, State, and local law enforcement authorities; and the likelihood of physical harm to persons at the site or in the area surrounding the site.

Section 1803(c) states that two or more nonprofit organizations that create a nonprofit to provide technical assistance may be eligible to receive security enhancements and technical assistance under this Act based upon the collective risk.

Section 1804 states that funds borrowed under the loan guarantees may be used for technical assistance and security enhancements.

Section 1805(a) requires nonprofit organizations applying for assistance to submit separate applications for each specific site needing security enhancements or technical assistance.

Section 1805(b) requires each application to include a detailed request for security enhancements and technical assistance; a description of the intended uses of funds to be borrowed under the loan guarantees; and other information as the Secretary shall require.

Section 1805(c) states that two or more nonprofit organizations located on contiguous sites may submit a joint application.

Section 1806(a) requires each state to designate a State agency to carry out this Act.

Section 1806(b) requires applications to be submitted to the designated State agency, requires the State agency to evaluate all applications and transmit all qualifying applications to the Secretary ranked by severity of risk, and allows an applicant to appeal the finding by the State agency to the Secretary.

Section 1807(a) states that the Secretary shall select applications for execution giving preference to nonprofit organizations determined to be at the greatest risk based upon criteria in section 1803.

Section 1807(b) states that the Secretary shall execute security enhancements and technical assistance contracts for the highest priority applicants until available funds are expended and to make loan guarantees available for additional applicants up to the authorized amount.

Section 1807(c) states that special preference shall be given to joint applications.

Section 1807(d) requires the Secretary to issue assistance in such amounts as to maximize the number of high-risk applicants receiving assistance.

Section 1807(e) requires notification to the applicant upon selection of that nonprofit organization for assistance.

Section 1807(f) establishes the process for selecting certified contractors to carry out security enhancements and technical assistance.

Section 1807(g) establishes a process to ensure the availability of contractors by allowing the nonprofit organization to submit a contractor to the Secretary for review.

Section 1807(h) requires the nonprofit organization to notify the Secretary upon selecting a certified contractor and requires the Secretary to deliver a contract to such contractor within 10 days of notification.

Section 1807(i) permits nonprofit organizations to enter into contracts for additional work with the certified contractor, using their own funds, and makes it clear such contracts are separate contracts between the nonprofit organization and the contractor.

Section 1807(j) establishes procedures to expedite assistance to nonprofit organizations.

Section 1808(a) authorizes the Secretary to provide grants to units of local government to offset incremental costs associated with law enforcement in areas where there is a high concentration of nonprofit organizations.

Section 1808(b) restricts the use of the grant funds to personnel costs or equipments needs.

Section 1808(c) requires the Secretary to award grants in such amounts as to maximize the impact of available funds.

Section 1809(a) establishes within the Department of Homeland Security the Office of Community Relations and Civic Affairs to administer the programs for nonprofit organizations and local law enforcement.

Section 1809(b) establishes additional responsibilities for the Office of Community Relations and Civic Affairs including coordinating community relations efforts of the Department, serving as the official liaison of the Secretary to the nonprofit, human and social services, and faith-based communities, and assisting in coordinating the needs of those communities with the Citizen Corps program.

Section 1810(a) authorizes $100 million for fiscal year 2005 and such sums as necessary for fiscal years 2006 and 2007 for the nonprofit organizations program.

Section 1810(b) authorizes $50 million for fiscal year 2005 and such sums as necessary for fiscal years 2006 and 2007 for the local law enforcement assistance grants.

Section 1810(c) authorizes $5 million for fiscal year 2005 and such sums as necessary for fiscal years 2006, and 2007 for the Office of Community Relations and Civic Affairs.

Section 1810(d) authorizes such sums as may be necessary for fiscal years 2005, 2006, and 2007 for the loan guarantee program but limits the authorization to $250 million for each of those fiscal years.

Section 5 makes technical and conforming amendments.

V. ESTIMATED COST OF LEGISLATION

S. 2275—High Risk Nonprofit Security Enhancement Act of 2004

Summary: Assuming appropriation of the necessary amounts, CBO estimates that implementing S. 2275 would cost $504 million over the 2005–2009 period. Enacting this bill would not affect direct spending or revenues.

S. 2275 would authorize the Department of Homeland Security (DHS) to contract with appropriate companies to improve security at those 501(c)3 nonprofit organizations that are determined to be most vulnerable to potential terrorist attacks. In addition, the bill would establish a new loan guarantee program for all nonprofit organizations that might need additional security enhancements to protect them from terrorist attacks. The bill also would establish a grant program for local law enforcement agencies to offset costs associated with increased security in areas with a high concentration of nonprofit organizations. Finally, the bill would establish a new Office of Community Relations and Civic Affairs to administer the new security program for nonprofit organizations, among other duties.

S. 2275 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA). CBO estimates the cost for state governments to comply with that mandate would be well below the threshold established in that act ($60 million in 2004, adjusted annually for inflation). State and local law enforcement agencies would benefit from the assistance grants authorized by the bill; any costs to those governments in connection with those grants would be incurred voluntarily. The bill contains no new private-sector mandates as defined in UMRA.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 2275 is shown in the following table. The costs of this legislation fall within budget function 450 (community and regional development).

	By fiscal year, in millions of dollars—				
	2005	2006	2007	2008	2009
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Security Contracts for Nonprofit Organizations: [1]					
Estimated Authorization Level	100	100	100	0	0
Estimated Outlays	25	75	100	75	25
Loan Guarantees for Nonprofit Organizations:					
Estimated Authorization Level	13	13	13	0	0
Estimated Outlays	3	10	13	10	3
Law Enforcement Grants: [1]					
Estimated Authorization Level	50	50	50	0	0
Estimated Outlays	12	38	50	38	12
Office of Community Relations and Civic Affairs: [1]					
Estimated Authorization Level	5	5	5	0	0
Estimated Outlays	5	5	5	0	0
Total Changes:					
Estimated Authorization Level	168	168	168	0	0
Estimated Outlays	45	128	168	123	40

[1] The 2006 and 2007 levels assume these programs continue at the bill's specific authorization level for 2005.

Basis of estimate: For this estimate, CBO assumes that S. 2275 will be enacted near the end of fiscal year 2004 and that the necessary amounts will be appropriated in each year starting in 2005.

CBO estimates that implementing S. 2275 would cost $504 million over the 2005–2009 period.

Security Contracts for Nonprofit Organizations

S. 2275 would authorize the DHS to contract with appropriate companies to improve security at those 501(c)3 nonprofit organizations that are determined to be most vulnerable to potential terrorist attacks. S. 2275 would authorize the appropriation of $100 million in 2005 and such sums as are necessary in 2006 and 2007 for such contracts. For this estimate, CBO assumes that amounts authorized to be appropriated in 2006 and 2007 would be equal to the 2005 authorization level. Assuming appropriation of the authorized funds, CBO estimates that entering into security enhancement contracts would cost $300 million over the 2005–2009 period.

Loan Guarantees for Nonprofit Organizations

This legislation also would establish a new loan guarantee program to improve security at nonprofit organizations. Under this new loan guarantee program, the federal government would insure loans, with at least a 25-year repayment term, made to nonprofits to support physical security enhancements or to provide related training to employees. The legislation would not require any guarantee fees to be charged to the nonprofits and would not limit the percentage of the loan that would be insured by the federal government. Consequently, CBO assumes that DHS would insure up to 100 percent of the loan value and that the borrower would not be charged any guarantee fees.

This legislation would authorize the appropriation of whatever amounts are necessary for the cost of loan guarantees over the 2005–2007 period and would authorize a $250 million limitation on the cumulative value of the loans that may be guaranteed for each fiscal year. The new loan program would be considered a discretionary federal credit program and would require appropriation action to establish this loan limitation and to provide a credit subsidy for the cost of such loan guarantees.

Based on information from various nonprofit organizations, CBO assumes that nonprofit organizations face financial risks similar to those of small businesses. Using the Small Business Administration's 7(a) general business loan program as a guide, CBO assumes that, like small businesses, the default rate for loans made to nonprofit organizations would be about 10 percent and that recoveries on such losses would be about 50 percent. Using those assumptions, CBO estimates that the subsidy rate for the new loan guarantee program would be about 5 percent, and that establishing this program would cost $39 million over the next five years, assuming appropriation of the necessary amounts. (The 7(a) program has a smaller net subsidy because it includes up-front fees that offset some of the default costs.)

Law Enforcement Grants

S. 2275 would authorize DHS to provide grants to local enforcement agencies in areas where there is a high concentration of nonprofit organizations. These grants would pay for increased costs associated with protecting such organizations. S. 2275 would authorize the appropriation of $50 million in 2005 and such sums as is

necessary in 2006 and 2007 for these grants. For this estimate, CBO assumes that the amount authorized to be appropriated in 2006 and 2007 would be equal to the 2005 authorization level. Assuming appropriation of the authorized funds, CBO estimates that providing these grants would cost $150 million over the 2005–2009 period.

Office of Community Relations and Civic Affairs

This bill would establish a new office within DHS to administer the new security enhancement program for nonprofit organizations. In addition, the office would coordinate community relations efforts for the department, serve as the liaison to nonprofit, social services, and faith-based organizations, and assist in coordinating the needs of communities for the department's Citizen Corps program. S. 2275 would authorize the appropriation of $5 million in 2005 and such sums as necessary in 2006 and 2007 for this office. For this estimate CBO assumes that amounts authorized to be appropriated in 2006 and 2007 would be equal to the 2005 authorization level. Assuming appropriations of the authorized funds, CBO estimates that this new office would cost $15 million over the 2005–2009 period.

Intergovernmental and private-sector impact: S. 2275 contains an intergovernmental mandate as defined in UMRA because it would require state agencies to receive and evaluate applications from nonprofit organizations for security assistance. No funds are authorized for those administrative tasks. According to state government representatives, the administrative costs for assistance programs are typically 3 to 5 percent of the monetary value of the assistance provided. Based on that information, CBO estimates that the cost for state governments to comply with that mandate would be less than $5 million annually, well below the threshold established in UMRA ($60 million in 2004, adjusted annually for inflation).

State and local law enforcement agencies would benefit from a new grant program for the incremental costs of providing services to certain high-risk nonprofit organizations. Assuming appropriation of the authorized funds, CBO estimates that state and local law enforcement agencies would receive $150 million over the next five years; any costs of participating in the grant program would be incurred voluntarily.

S. 2275 contains no new private-sector mandates as defined in UMRA.

Previous CBO estimates: On June 21, 2004, CBO transmitted a cost estimate for H.R. 3266, the Faster and Smarter Funding for First Responders Act of 2004, as ordered reported by the House Committee on the Judiciary on June 16, 2004. In addition to grants for first responders, H.R. 3266 also includes the provisions concerning nonprofit organizations that are in S. 2275. The estimated federal costs of these provisions are the same. CBO has determined that, unlike H.R. 3266, S. 2275 contains an intergovernmental mandate.

Estimate prepared by: Federal Costs: Julie Middleton and Susanne Mehlman. Impact on State, Local, and Tribal Governments: Melissa Merrell and Lauren McMahon. Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Robert A. Sunshine, Assistant Director for Budget Analysis.

VI. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill. CBO states that there is an intergovernmental impact as defined in the Unfunded Mandates Reform Act (UMRA). CBO estimates the cost for state governments to comply with that mandate would be well below the threshold established in that act. State and local law enforcement agencies would benefit from the assistance grants authorized by the bill; any costs to those governments in connection with those grants would be incurred voluntarily. The bill contains no new private-sector mandates as defined in UMRA. The legislation contains no other regulatory impact.

VII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, there are no changes in existing law made by the bill as reported.

VIII. MINORITY VIEWS OF SENATORS DURBIN AND LEVIN

A. INTRODUCTION

Nonprofit organizations make valuable contributions to our society by providing social, religious, educational, and cultural services. A terrorist attack—either international or domestic—on these institutions would disrupt these vital services and threaten the lives and well-being of the American citizens who operate, utilize, live, or work in proximity to such organizations. While we agree there is a public interest in protecting the lives and property of our citizens, we have many concerns regarding this legislation, from constitutional to practical.

B. CONSTITUTIONAL CONCERNS

This legislation, as introduced, raised two major constitutional concerns: (1) the provision of loan guarantees with favorable repayment terms and (2) the provision of physical security enhancements on buildings used for religious worship and instruction. Although the first issue was addressed by the Durbin-Levin amendment that was adopted by the Committee, the second issue was not resolved, and it unconstitutionally violates the First Amendment's separation between church and state.

We do not wish to suggest that all aid to religious organizations raises constitutional concerns. On the contrary, we agree with the majority report that there is no constitutional question regarding this bill's authorization of contracts for technical assistance. Similarly, we support the local law enforcement grants to offset incremental costs associated with law enforcement in areas where there is a high concentration of nonprofit organizations.

However, a laudable purpose does not sanction an unconstitutional government act. The issues discussed below reflect an area of law that certainly would have been worthy of a hearing so that the Committee could have heard testimony from expert witnesses on both sides before taking action affecting one of the most important principles on which our nation was founded.

1. Loan Guarantees

The legislation as introduced provided loan guarantees with favorable repayment terms. However, loan guarantees for construction or capital improvements in buildings where there is religious worship or instruction lead us to questionable constitutional territory, and proponents of this legislation have not clearly demonstrated that this aid is constitutional.

As the majority report notes, nonprofit organizations benefit from loan guarantees, and some argue that this would be an unconstitutional subsidy to religious organizations—with or without favorable

repayment terms. At the same time, others note that Congress provided similar loan guarantees when we responded to a series of church arsons by enacting the Church Arson Prevention Act of 1996 (104 P.L. 155).

Without specifically addressing the constitutionality of loan guarantees for religious organizations, Senators Durbin and Levin sought to ensure that this legislation would follow the model established in 1996 more precisely.

The legislation as introduced would have required that all loan guarantees be made under favorable repayment terms, defined as at least one full percentage point below market rate, with a repayment term of no less than 25 years. The Church Arson Prevention Act of 1996, on the other hand, did not specify any requirements for the interest rate or term of repayment. Instead, it had more neutral requirements. Therefore, the Durbin-Levin amendment removed the provisions of S. 2275 that would have required favorable repayment and replaced them with exactly the same loan terms Congress authorized in 1996.

In adopting this amendment, the Committee sought to address this constitutional concern by following previous Congressional precedent; however, it is unclear whether these changes would be sufficient to withstand a constitutional challenge to the overall issue of loan guarantees to religious organizations.

2. Physical Security Enhancements on Structures Used for Religious Worship and Instruction

The second constitutional concern, which remains unaddressed, is this legislation's authorization for the federal government to enter into contracts to purchase and install physical security enhancements on the real property of nonprofit organizations.

The majority report focuses on the purpose of this legislation, which is "protecting potential and attractive terrorist targets," and we agree this is "an important and valid secular purpose." However, the federal courts must examine more than a law's purpose to determine whether it is constitutional. For example, although the majority report notes that courts have upheld the constitutionality of enhanced criminal penalties based on legislative purposes similar to those of S. 2275, those cases have limited relevance here because they address criminal statutes and not government aid to religious organizations.

The majority report analyzes the constitutionality of S. 2275 by using three lines of Supreme Court cases: *Lemon* v. *Kurtzman* (403 U.S. 602), *Everson* v. *Board of Education* (330 U.S. 1), and *Tilton* v. *Richardson* (403 U.S. 672). However, two of these cases—*Lemon* and *Everson*—are not appropriately analogous to S. 2275; this legislation is more properly examined in light of *Tilton,* which addressed government aid for the physical improvement of property owned by religious institutions. Based on the Supreme Court ruling in *Tilton* (and in the subsequent, related case of *Committee for Public Education & Religious Liberty* v. *Nyquist, Commissioner of Education of New York* (413 U.S. 756)), S. 2275 is clearly unconstitutional. Since the majority report fails to distinguish this legislation from these cases, we conclude that S. 2275 violates the First Amendment's separation between church and state.

A. Tilton is the most appropriate case to examine the constitutionality of S. 2275

The majority report asserts that S. 2275 is constitutional because it meets the three prongs of the *Lemon* test. The *Lemon* test was established in a case regarding government aid to churchrelated educational institutions, and although this test may be useful in determining the constitutionality of some statutes, it does not directly address the physical improvement of structures used for religious worship and instruction. On the same day the Supreme Court decided *Lemon*—June 28, 1971—it also decided *Tilton*, which the majority report acknowledges "addressed the issue specifically of government aid related to physical improvements to property." Since the focus of *Tilton* is more analogous to S. 2275, it is a more persuasive case than *Lemon* for examining this legislation's constitutionality.

The majority report also attempts to analogize S. 2275 with the cases of *Everson* v. *Board of Education* and *Board of Education* v. *Allen*. The report states that "[t]he security-related capital improvements funded by this bill are more like the bus service and police protection for sectarian institutions that the Court has approved than the whole-scale construction of a building, which is has not."

As we noted above, we agree that police protection is constitutionally permissible, and we support the local law enforcement grants provided by this legislation. Although the physical security enhancements provided by S. 2275 are dedicated to the same purpose as police protection, namely safety and security, these capital improvements are not analogous to the assistance considered by the Court in *Everson*. That Court discussed police protection in the context of "*general* government services [such] as *ordinary* police and fire protection, connections for sewage disposal, public highways and sidewalks (emphasis added)." (*Everson* at 17.) These are public services that the government provides generally for all citizens. George Washington University Law School Professors Ira Lupu and Robert Tuttle, who analyze churchstate law and developments for the Roundtable on Religion and Social Welfare Policy, characterize these services as "matters of common right, available to all without regard to status in the community." (Lupu and Tuttle, "New Federal Policies on Grants for Disaster Relief or Historic Preservation at Houses of Worship and Places of Religious Instruction," June 1, 2003, <http://www.religionandsocialpolicy.org/legal/legal update—print.cfm?id=16> at 5.)

On the other hand, the capital improvements provided by S. 2275 would be far more limited and would aid only select groups of citizens and institutions. Professors Lupu and Tuttle also note that the scarcity of government aid for construction raises the danger of religious favoritism in allocating that aid. (Id.) Finally, the capital improvements provided by S. 2275 could hardly be classified as "ordinary police protection." Indeed, the purpose of this legislation is to provide extraordinary protection to certain institutions.

Therefore, we believe that S. 2275 is more analogous to the decisions in *Tilton* and *Nyquist*, which addressed government aid for the physical improvement of property owned by religious institutions, than it is to *Everson*, which addressed the provision of general government services.

B. Based on the Supreme Court rulings in Tilton and Nyquist, S. 2275 is clearly unconstitutional

The two major cases in this area of constitutional law are *Tilton* v. *Richardson* and *Committee for Public Education & Religious Liberty* v. *Nyquist, Commissioner of Education of New York*.

Tilton involved a challenge to the constitutionality of a federal law that authorized grants and loans to institutions of higher education for the construction of libraries and other academic facilities. Although that law allowed such funds to be granted to religious institutions, it also contained a provision that expressly excluded funds from being used for "any facility used or to be used for sectarian instruction or as a place for religious worship." This prohibition for religious use of the structures was limited to the period of government interest, which was defined by the legislation as 20 years.

The Supreme Court determined that the 20-year limitation on the prohibition for religious use was unconstitutional, thus demonstrating that the prohibition was constitutionally necessary to uphold the program. In doing so, the Court ruled the following:

> Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. (*Tilton* at 683.)

In other words, if the government is going to fund the construction of a building, there must be a prohibition on religious use of the structure until that structure has no value.

In *Nyquist*, the Supreme Court struck down a program that would have provided governmental maintenance and repair grants for nonpublic schools in the state of New York "to ensure the health, welfare and safety of enrolled pupils." Despite the worthy goals of the New York state legislature, the Supreme Court ruled that "the propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State." (*Nyquist* at 774.)

As the majority report quoted from the *Nyquist* decision, "Absent appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools." (Id.) Importantly, the Court further said that "[n]o attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, *nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions* (emphasis added)." (Id.)

Although there have been several major cases regarding the First Amendment and the separation between church and state since these decisions were handed down more than 30 years ago, these two cases are still good—and binding—law. Professors Lupu and Tuttle wrote the following:

> Despite [recent] movement in federal constitutional law, the rule of *Tilton* and *Nyquist*, which appears to require exclusively secular use for publicly financed buildings, has never been repudiated or even seriously questioned in the Supreme Court. (Lupu and Tuttle at 3.)

Based on this analysis of clear Supreme Court precedent, S. 2275 is unconstitutional because it authorizes contracts for physical improvements on structures used for religious worship and instruction.

C. The majority report fails to distinguish S. 2275 from Tilton and Nyquist

The majority report attempts to distinguish the program established in S. 2275 from the *Tilton-Nyquist* line of cases through the following arguments: (1) S. 2275 provides no direct funding, but rather offers contracts and loan guarantees to provide security enhancements; (2) S. 2275 provides financial assistance for only a very narrow set of capital improvements which are aimed at enhancing the security of the citizens who use the facilities; and (3) none of the enhancements supported by S. 2275 could be diverted for use for religious purposes. These arguments echo those in the Memorandum from the American Law Division, which is cited in the majority report and concluded that S. 2275 "*could* be distinguished" from *Tilton* and *Nyquist* (emphasis added). (Memorandum at 3–4.) However, none of these arguments is persuasive.

First, there is little constitutional significance to the legislation's requirement that security enhancements be provided through contracts with certified contractors, rather than through direct aid. If such contracts were sufficient to distinguish this program and address this constitutional concern, Congress could fund the entire construction of a house of worship, as long as the funds were paid to the construction company, rather than directly to the religious organization.

Secondly, the legislation's requirement that financial assistance be used only for a narrow set of capital improvements—while important—is not a sufficient distinction from either *Tilton* or *Nyquist*. The majority report and the Memorandum from the American Law Division both miss a critical point about *Tilton*: the prohibition on the use of government-financed structures for religious purposes was constitutionally necessary to uphold the program. Without such a restriction, a simple requirement that the capital improvements be used for security enhancements would not be sufficient to satisfy the *Tilton* rule. With respect to *Nyquist*, as noted above, but not addressed by the majority report or the Memorandum, the Court held that it is impossible within the context of certain religion-oriented institutions to impose restrictions on expenditures to exclusively secular purposes. Therefore, this argument and the Memorandum also miss a crucial aim of *Nyquist*, which was to prevent government expenditures from being used on *structures* that are not solely secular in their use.

Finally, the majority report argues that S. 2275 can be distinguished from *Tilton* and *Nyquist* because none of the security enhancements can be diverted for religious purposes. This theory is similar to the American Law Division argument that S. 2275 could

be distinguished from *Tilton* because S. 2275 "does not include elements that would shift the primary effect from what is arguably constitutionally permissible—providing greater security for nonprofit organizations—to something that is constitutionally impermissible—advancing religion." (Memorandum at 3.) These analyses again miss a central part of the Supreme Court's ruling in *Tilton*. The provision identified in *Tilton* that would have unconstitutionally diverted the effect of the program to support religious purposes was the 20-year limitation on using the structure built with government funds for sectarian instruction or religious worship. While it is accurate that S. 2275 does not have such a time limitation that could shift its effect, it fails the *Tilton* rule because it does not contain the prohibition at all.

We agree with the majority report that: "*Tilton* appears to stand for the proposition that the government may not contribute financially to the construction of buildings used for religious worship or instruction. That reading of *Tilton* would be an obstacle to granting aid to the physical structure of religious institutions such as houses of worship." However, the majority report's attempts to distinguish S. 2275 from *Tilton* and *Nyquist* fall short, and S. 2275 is unconstitutional because it clearly fails the *Tilton* rule that requires a specific restriction on the use of government-subsidized structures for religious activities.

D. The Durbin-Levin Amendment would have satisfied the Tilton rule

To address this constitutional concern, Senators Durbin and Levin offered an amendment to ensure that S. 2275 passed the *Tilton* rule. This amendment would have clarified that physical security enhancements only could be purchased and installed to the extent that the property to be improved would not be used for religious instruction or worship, unless and until the security enhancements had no value. In other words, when the security enhancements had depreciated to the point that they had no value, the building or land on which those enhancements were installed then—and only then—could be used for religious purposes. Although this amendment simply would have codified the Supreme Court ruling in *Tilton*, it was defeated by a vote of 6–10.

E. Without the Durbin-Levin Amendment, there are many examples of possible constitutional violations

From a practical perspective, consider the following examples that would be permissible under S. 2275 but would violate the Constitution and the precedents established by *Tilton* and *Nyquist*. First, a house of worship wants to deter a car bomber from attacking the main structure of its building, but instead of jersey barriers or bollards in front of the building, it obtains funds through this legislation to construct a vestibule at the front of the building. If the house of worship later decides to use that vestibule as a place for baptism, it clearly would have diverted the security enhancement to religious purposes. Although this is an unlikely possibility, nothing in this legislation would prohibit it from occurring.

Another example would be if government funds were used to fortify stained glass windows that have religious depictions. These

windows often play a role in the worship experience, and some legal commentators believe it would be unconstitutional for the government to fund the maintenance or historic preservation of such windows because doing so would lead to excessive government entanglement with religion. We believe this legal analysis equally applies to the aid in S. 2275 for the security enhancement of windows with religious themes.

Finally, consider the use of government funds to harden doors or install security cameras in buildings used for religious worship or instruction. Although this is not as obviously unconstitutional as the previous examples, it nonetheless fails the *Tilton* test because the *buildings* are being used for religious purposes.

F. Because of these constitutional concerns, even organizations that would benefit from this legislation oppose it

The Union for Reform Judaism and Jewish Reconstructionist Federation represent a combined 1,000 congregations and 1.5 million Americans. On June 10, 2004, they wrote a letter to Congress regarding S. 2275, in which they recognized that "[n]on-profit institutions, particularly religious organizations, and most particularly Jewish ones, are at great risk from [terrorist] acts of violence and hatred." However, they oppose this legislation based on the following principle:

> The security needs of our nation's high-risk non-profit institutions deserve the fullest attention of Congress, but not in a manner that dangerously threatens the wall separating church and state, which has been a bedrock of democracy and the foundation of religious liberty in our country for over two hundred years.

Similarly, Michael Lieberman, Washington Counsel for the Anti-Defamation League, said, "Jewish institutions really do have a special need for security. But government should not be involved in their funding. That approach is fraught with peril." (Rick Jervis, "Bill proposes security for synagogues: Foes of funding cite church-state issues," *Chicago Tribune,* April 17, 2004.)

G. The Bush Administration also recognizes that there is some limit to the use of government funds for the construction and physical improvement of structures used for religious purposes

The Bush Administration—which itself has often blurred the separation between church and state—also has acknowledged that in certain contexts, there is a limit to the use of government funds for "brick and mortar aid" to religious institutions. On July 9, 2004, the Department of Housing and Urban Development (HUD) issued a final rule regarding the "Equal Participation of Faith-Based Organizations." With respect to the acquisition, construction, and rehabilitation of structures, these regulations state the following: "HUD funds may not be used for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities." (Federal Register, Vol. 69, No. 131 at 41713.) Even more specifically, the rule further states: "Sanctuaries, chapels, and other rooms that a HUD-funded reli-

gious congregation uses as its principal place of worship . . . are ineligible for HUDfunded improvements." (Id.)

It is unclear if these provisions are sufficient to satisfy the *Tilton* rule, but it is important to note the S. 2275 does not even include these limitations.

3. Conclusion

We applaud the purpose of this legislation, but a laudable secular purpose clearly is not enough to allay constitutional concerns. Although the majority report analogizes S. 2275 with the Church Arson Prevention Act of 1996, S. 2275 goes much further because it would actually authorize contracts for physical security enhancements to structures used for religious worship and instruction. Furthermore, the constitutionality of the loan guarantees authorized by the Church Arson Prevention Act is uncertain (although that legislation has not been challenged in court).

In conclusion, we believe that S. 2275 does not pass constitutional muster. The most appropriate line of cases to examine the constitutionality of this legislation is the *Tilton-Nyquist* line, and the majority report has not sufficiently distinguished S. 2275 from these rulings. Without the Durbin-Levin amendment, S. 2275 does not satisfy the *Tilton* rule and therefore is unconstitutional.

C. Additional Concerns

In addition to these constitutional concerns about S. 2275, we have questions regarding the scope and practical implementation of this legislation.

First, we are concerned that establishing separate funding dedicated to the protection of high-risk nonprofit organizations may override or even ignore the security concerns that state and local governments already have prioritized. We agree with the majority report that nonprofit organizations are valuable assets to the country. At the same, we are facing dramatic reductions in homeland security funds in fiscal year 2005, including a reduction of at least $235 million in overall spending for our first responders. This new stream of funding for nonprofit organizations may deplete funds that would otherwise be available to augment this shortfall for first responders or to improve the security of our ports, railways, and critical infrastructure.

Furthermore, although S. 2275 requires a designated state agency to rank all applications by severity of risk of international terrorist attack, this ranking is only one of six criteria that the Secretary of Homeland Security will consider in selecting which applicants will receive federal contracts and loan guarantees. Especially since it is unclear if these factors should be weighed equally or if some are more critical than others, it is possible—if not likely—that the priorities of the state agency may be overridden.

We also believe that the establishment of an Office of Community Relations and Civic Affairs seems contradictory to efforts to consolidate grant programs for state and local recipients within the Department of Homeland Security in order to make it easier to apply and help streamline the flow of funds. It is unclear why the purpose of this new Office could not be fulfilled by the State and Local Coordination Office currently established within DHS.

There also is no provision in this legislation to require that the non-profit organizations that receive S. 2275 funds coordinate with state and local agencies or with the officials who are responsible for developing terrorism response plans, conducting exercises, and acquiring equipment, to ensure that there is no duplication and to engage in collaborative planning and prevention activities.

Finally, if Congress does establish this separate funding stream to secure nonprofit organizations, it should not limit such protection to international terrorist attacks. We fail to see the distinction between domestic and international attacks on such organizations and believe it would be more appropriate to guard these organizations from all attacks that would disrupt the vital services they provide or threaten the lives and well-being of the citizens who operate, utilize, or live or work in proximity to such organizations.

D. CONCLUSION

Although nonprofit organizations play a vital role in our society, we oppose S. 2275 because this legislation would unconstitutionally fund physical security enhancements to structures used for religious worship and instruction and because it may override or even ignore the security priorities set by state and local governments. Given these concerns, we support the provisions of this legislation that would provide technical assistance and local law enforcement assistance grants to help secure high-risk nonprofit organizations. We also would be willing to consider the loan guarantees authorized by S. 2275, if proponents of that approach could demonstrate clearly that such aid is constitutional.

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CARL LEVIN.

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