ABA Standing Committee on Law and National Security

**Homeland Security**

The Need for Essential Change: Four Models of Decision for Improved Governance and a Resilient Nation

Essential Conclusions

1. Is the U.S. government adequately organized to address current and emerging threats and opportunities in homeland security? No. Existing legal and organizational structures limit the Secretary of Homeland Security’s ability to effectively organize and direct necessary operations and activities of the Department of Homeland Security to protect the U.S., even in emergencies.

2. Do we need a change in the law or processes to address these gaps? Yes. Targeted statutory changes would provide the Secretary of Homeland Security with limited, temporary authorities during a crisis to effectively manage a Federal response in coordination with other Federal agencies, state governments and the private sector.

3. Does the U.S. government have adequate authorities and processes in place to partner with and, if needed, to direct third parties (NGO, IGO, private parties)? No. We need new, innovative approaches to strengthen partnerships between government and the private sector for homeland security, especially during emergencies.

**Homeland Security: Evolving Concept of Governance for a Multi-Risk World.**

Homeland security is both a strategic and legal concept, and describes governance activities to prepare for, prevent and respond to a range of events and conditions that present a risk of direct harm to the people, territory, property, and information of the United States, and risk to its underlying ability to maintain prosperity and constitutional order in the face of a diverse array of potential disaster and crises. It is also an evolving concept both legally and strategically.

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1 The “homeland” means the territorial U.S. See Homeland Security Act of 2002, 6 U.S.C. 101. However, homeland security activities are conducted both domestically and internationally to protect U.S. persons and U.S. interests.

2 The mission of the Department of Homeland Security (DHS) is codified in the Homeland Security Act of 2002: “The primary mission of the Department is to— (A) prevent terrorist attacks within the United States; (B) reduce the vulnerability of the United States to terrorism; (C) minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States; (D) carry out all functions of entities transferred to the Department, including by acting as a focal point regarding natural and manmade crises and emergency planning;
Because of its origins in concerns about terrorism, which resulted in foundational legislation after the horrific attacks of 9/11, homeland security as a concept remains principally associated with terrorism that threatens the U.S. However, a number of incidents and insights have broadened the functionality and concept of homeland security. These include the shifting nature of international terrorism, more prevalent violent extremist attacks originating in domestic movements and groups, the experience of civil breakdown after Hurricane Katrina, the regional and national impacts of the Deepwater Horizon oil spill, and the increased vulnerability of digital networks and associated technological systems to cascading cyber disruptions. All of these are combined with citizen expectations of effective government response to such events while maintaining customary legal order. Thus “homeland security” today is a much broader concept. Homeland security is about sustaining civil security, resilience and constitutional governance through a diverse range of law, policy and strategic activities to protect the U.S., its people and prosperity from a range of harms. In its focus on civil security, it both supplements and overlaps the national security framework established in the twentieth century.

Evolving threats to the U.S. are driven by a changing world:

- The terrorist threat is growing and increasingly de-centralized;
- Growing cyberspace threats raise danger to U.S. critical infrastructure;
- Biological concerns are growing: bioterrorism, pandemics;
- Growing risk of nuclear terrorism through proliferation of nuclear/radiological materials; and
- Transnational criminal organizations are increasing in strength and capability, accelerated by climate change and aging infrastructure.

Beyond these trends, there are additional changes in the world that present risks to the U.S. and demand government attention, including, for example:

- Human security: Transnational migration. There is a dramatic increase in massive population movements across traditional borders, driven by pressures of conflict, poverty

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(E) ensure that the functions of the agencies and subdivisions within the Department that are not related directly to securing the homeland are not diminished or neglected except by a specific explicit Act of Congress; (F) ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland; and (G) monitor connections between illegal drug trafficking and terrorism, coordinate efforts to sever such connections, and otherwise contribute to efforts to interdict illegal drug trafficking.” See 6 U.S.C. 111. The current statutory mission is as notable for how it restricts as much as empowers the Secretary (subparagraphs (E) and (F)). This reflects an understandable view at the time of enactment that although the 22 components of the new DHS brought their own original authorities and diverse missions, homeland security was about countering terrorism and other activities and operations of the Department were not given the same priority.


and food insecurity. Addressing transnational migration as a safety and security issue stresses international and domestic law and policy and U.S. capabilities.

- Human security: Technology security. The growth and advancement of technology, particularly in robotics, unmanned systems and nanotechnology, without enforceable legal and policy frameworks to manage the impacts of these technologies, present new risks to human security that are not yet fully understood.

- Climate change: Climate change is a security risk because it aggravates regional problems such as poverty, social tensions, environmental degradation and weakened governance that threaten stability in a number of countries. Changes in weather patterns, frequency and intensity of weather events, and sea level rise challenges access to food and water, spurs population movement across borders to escape impacts, and increases state competition for resources.

**Organizing for Homeland Security: Shared Responsibilities of Government and Private Sector**

The U.S. Constitution provides for a federal, dual-sovereign system of government, with a central Federal government with limited, specified powers and state, tribal and local governments with responsibility for public safety, emergency management and law enforcement within their respective jurisdictions. Outside of government, the private sector is a powerful actor in homeland security. Private companies own or operate the majority of property, including critical infrastructure, within the U.S. This includes, for example, power, telecommunications, transportation, manufacturing, trade and other commerce, banking, healthcare and agriculture. The activities of these private sector companies and other actors are governed by a range of statutes and executive directives, including varying levels of requirements concerning the security and resilience of those activities.

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6 See id. For example, rapid changes in seasonal Arctic sea ice coverage mean increased access to navigable waters and a dramatic rise in ship traffic and other human activity in the Arctic. States are increasing their presence and activity in the Arctic, which is rich in natural resources.
7 See Critical Infrastructure Protection Act, 42 U.S.C. 5195c. “Critical infrastructure” is defined as “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.” See id.
**The Executive Branch: Shared Responsibility.**

Within the Executive Office of the President, the National Security Council (NSC) is responsible for formulating national and homeland security strategy and policy for ultimate decisionmaking by the President.\(^8\)

The executive branch is organized by cabinet departments and subordinate operating agencies or elements. The Department of Homeland Security (DHS) is the primary executive agency with responsibility for homeland security. Additionally, most agencies of the executive branch have some level of responsibility that contributes to the security of the U.S. in relation to terrorism and the resilience of U.S. critical infrastructure more generally. For example, the Department of Justice is responsible for the investigation and prosecution of criminal activity, including terrorism. The Department of Defense is responsible for the national defense of the U.S. but also provides essential homeland security support to DHS and State governors upon the President’s direction during a domestic incident or crisis declared by the President.

Other Federal agencies also have authorities and capabilities for activities associated with homeland security. For example, the Department of Energy is responsible for electric grid resilience and security, the Environmental Protection agency is responsible for prevention and response to environmental disasters, and the Department of Health and Human Services is responsible for prevention, preparedness and response to pandemics.

Organizing the Federal government for homeland security when there are many agencies with overlapping responsibilities requires a unifying approach. Currently, U.S. policy establishes sixteen critical infrastructure sectors and assigns lead Federal responsibilities for each sector. These sector specific agencies are primarily responsible for strengthening partnerships with critical infrastructure owners and operators and coordinating with DHS.\(^9\)

Notwithstanding the broadened understanding of the mission of homeland security, DHS’ core statutory missions focus on preventing and responding to terrorism and related threats. However, its components, which are a mix of agencies that existed before DHS was created and were transferred from other departments to DHS when the new department was formed in 2002, carried with them substantial authorities that extend beyond narrowly understood terrorism concerns. For example, the Homeland Security Act brought within DHS the U.S. Secret Service with its protective duties, U.S. Coast Guard with maritime safety and stewardship duties, Federal Emergency Management Agency with its emergency response role, U.S. Customs Service with its broad inspection and tariff enforcement duties, and U.S. Immigration and Naturalization Service with its spectrum of immigration responsibilities. Although some of these agencies were

\(^8\) See Presidential Policy Directive (PPD) 1, Organizing the National Security Council (Feb 2009). At other times, the President has organized a Homeland Security Council, which is distinct from but works closely with the NSC. See HSPD-1 (Oct. 29, 2001).

reorganized upon transfer to DHS or subsequently,¹⁰ most retained their original authorities and missions that were broader than protecting against terrorism. While most of these responsibilities fall under the evolving rubric of homeland security aimed at sustaining constitutional governance and civil security in the face of a range of potential disasters or catastrophes, the Homeland Security Act did not fully articulate the broad homeland security mission and did not provide the Secretary of DHS with strong central authority to direct coordinated operations across the department that are called for to address these challenges.¹¹

**Necessary Congressional Oversight: A Continuous Challenge.**

The original Congressional oversight framework for the agencies and operating components brought into DHS was not altered from pre-existing oversight responsibilities. As a result, today the Department of Homeland Security and its components are subject to the jurisdiction of nearly 100 Congressional committees and subcommittees that exercise jurisdiction over DHS and its many component parts. This has resulted in a disjointed and uncoordinated mosaic of Congressional oversight of the Department and its operating elements. With this disparity of jurisdictional overlaps and turf battles, the Congress is not well-positioned to provide DHS and its elements the unified and rigorous oversight that the nation relies on to ensure the Executive branch is adequately performing its Constitutional duties. There are undoubtedly severe political challenges to untangle and unify the mosaic of committee jurisdictions. However, the Congress can only appropriately perform its Constitutional duty if it simplifies and unifies the oversight of the Department of Homeland Security and operating elements.

¹⁰ For example, the U.S. Customs Service and part of the U.S. Immigration and Naturalization Service (INS) responsible for immigration law enforcement became Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE). The remaining part of INS responsible for immigration and citizenship matters became U.S. Citizenship Immigration Services (USCIS).

¹¹ This structure contributes to a decentralized DHS that lacks a strong identity, ethos and mission. Perhaps this is only reflection of that DHS is still a young organization (2003) compared to other older institutions (Department of Justice, Department of Treasury, Department of Defense) that took time to mature. However, we should not underestimate the importance of organizational identity for DHS. Poor ethos and morale directly impact readiness and operational effectiveness, and DHS has consistently scored low on annual Federal employee surveys. Secretary Johnson has recognized this and made a concerted effort to improve the focus, leadership and morale of DHS employees to improve operational effectiveness. In May 2016, the Secretary announced a new DHS mission statement that was a striking change from prior lengthy attempts: “With honor and integrity, we will safeguard the American people, our homeland, and our values.” Also, DHS employee morale is beginning to improve from prior reports. See “Homeland Security finally shows employee morale improvement, though still rates low.” Washington Post, Sep. 20, 2016.
State, Territorial and Tribal Governments: A Team Approach.

The Constitution recognizes the dual-sovereignty of Federal and state/territorial/tribal governments. Within this construct, the State and Federal governments have legally distinct but complementary—and in practice overlapping—powers to provide for the safety of the U.S. and its people from harm. State, territorial and tribal governments within the U.S. are responsible for public safety and the general welfare of the people within its boundaries provided in state/territorial/tribal constitution and laws and as limited by the U.S. Constitution and Federal law.

States conduct homeland security functions through a range of centralized and decentralized law enforcement and emergency preparedness and response functions. These functions are typically shared between a central state authority and local governments. While states and tribal governments conduct emergency management and law enforcement functions, local governments also perform firefighting, rescue and other first-responder services in direct support of the public.


DHS should be reorganized with existing authorities to more effectively conduct the range of governance functions it is responsible for today. Originally, the principal mission of DHS was understood to focus on preventing and responding to terrorism, with an acknowledgement of other functions of the legacy agencies that were transferred to DHS. The Homeland Security Act of 2002 created a Department of Homeland Security with this clear principal mission, but without strong central authority vested in the Secretary and with a range of secondary missions that were viewed as related or independent of the department’s primary mission but in any event subordinate to it.

DHS performs a number of functions and activities to prepare for, prevent and respond to a range of threats to the U.S. and its people, including terrorism, transnational crime, cyber threats, undocumented immigration, natural disasters, and technological breakdowns whether accidental or human caused. DHS’ multiple agencies provide resources and carry out responsibilities principally in five broad areas of homeland security:

- Mobility security, including protection of borders and coasts, travel, transportation (air, maritime, and surface), shipping, immigration and migration;
- Cyber and other infrastructure security;
- Pandemics and special weapons defense, including chemical, biological, radiological, and nuclear; and
- Disaster preparedness and response.
What has become clear is that DHS is not focused primarily on terrorism and only in a subordinated way on other missions. Rather it is focused on countering multiple causes of terror by creating resilience. Terrorism, transnational organized crime, major accidents, cascading technology breakdown, and natural or environmental (or even political) disasters are causal factors to different degrees across the spectrum of homeland security risks and sectors of the U.S. economy, government and society. All of these can create situations of massive damage, terror, and civil breakdown. Indeed, anecdotally, the most resource intensive and visible response operations since 9/11 have been the DHS responses to Hurricane Katrina, the Deepwater Horizon oil spill, and Hurricane/Superstorm Sandy.

Notwithstanding this more coherent understanding, DHS has largely remained a department with the original construct of a core central organization and staffs reporting to the Secretary, with a range of federated and semi-autonomous operating elements and components. While there have been some changes to the organization of DHS, the decentralized organization with limited Secretarial authority prevails. The current model needs to be re-examined in light of the understanding of homeland security as the set of legal and strategic operational responses to multiple sources of terror, through various means of achieving security and resilience. With resilience as the principal driver of homeland security, it is worth examining potential models for better organizing DHS to achieve that goal.

**THE DHS JOINT MODEL: GOLDWATER-NICHOLS II**

Change the law to provide the Secretary stronger central legal and operational authority, including greater authority to control and direct the internal actions of components within DHS, to achieve the Department’s missions.

This model is comparable to the current model within the Department of Defense, which created a joint force structure distinct from the legacy military services to provide for more unified and coordinated operations. Applied to DHS, this statutory construct would create a stronger central authority in the Secretary with a number of regional senior officials reporting directly to the Secretary and responsible for directing operations of DHS entities. The components within DHS would be responsible for preparing and generating personnel, assets and capabilities for DHS, but the operation of those resources would be directed by the Secretary through the regional senior officials. The regional senior officials would be politically appointed with Senate confirmation. This construct would also be similar to the current structure within the Department of Justice, with strong central authority in the Attorney General and regional senior officials in the U.S. Attorneys for each District.

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THE DHS EMERGENCY AUTHORITY MODEL: LIMITED POWERS DURING CRISIS

Provide a strong set of emergency authorities for the Secretary and DHS in a crisis or major domestic incident, but limit the authorities to the duration of the crisis. This model would rely on the current, existing DHS organizational construct during steady state. In a temporary crisis or domestic emergency, including significant threats, the President could issue a finding and direct the implementation of the Secretary’s strong emergency powers within DHS for a limited duration, such as the time necessary to manage the crisis or incident. The emergency powers would enable the Secretary to temporarily direct the reorganization and coordinated operation of DHS components, either directly or through senior officials, to more effectively carry out the missions and functions of DHS. The temporal limit of these emergency powers could be specified in law, such as 90 days, after which specific Congressional authorization would be required to continue the emergency authorities. These would not disturb or affect the authorities of the Attorney General or other Departments.

THE DUAL DEPUTY SECRETARY MODEL: ORGANIZING FOR EFFECTIVE LEADERSHIP

The third model could be integrated with either of the two previous models. It would seek to make DHS’ functions and fundamental purposes more clearly visible and aligned with its organization. The department would gain a second deputy secretary. One Deputy Secretary would oversee all the entities concerned with mobile security: borders, coasts, travel, shipping, transportation, immigration and migration. The second Deputy Secretary would oversee DHS’ other major functions: pandemic and special weapons matters; cybersecurity and infrastructure protection; and emergency preparedness and response. Cybersecurity and infrastructure protection would also benefit from more attention to risk assessment and intrinsic security that

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13 The Secretary has very limited command and control authority (such as the Secretary of Defense does) to direct coordinated operational activities of DHS components. The Secretary must instead rely primarily on the authority of the individual component heads. There have been attempts to unify the effort of components. Homeland Security Task Force Southeast, established by the Secretary in 2003, created a task force structure and framework for planning and coordination of a unified response to a mass migration from a Caribbean nation. In 2014, the Secretary established three homeland security task forces (Joint Task Force East, Joint Task Force West, Joint Task Force Investigations) to improve unified effort to protect the U.S. southern land and maritime border. These efforts improved coordination among some DHS components, but did not enable the Secretary to centrally direct operations of DHS forces. For example, coordinated operation of ships, boats, aircraft and personnel from agencies such as Customs and Border Protection, the Coast Guard and Immigration and Customs Enforcement still relies on coordinated decision making by each involved component head.

14 The National Defense Authorization Act of 2017, which became law on December 25, 2016, included provisions that authorize the Secretary of Homeland Security to establish DHS Joint Task Forces to secure the land and maritime borders of the U.S., respond to homeland security crises, and establish regionally based operations. This is a significant expansion of the Secretary’s existing authority, but includes significant restrictions. See S.2943 (114th Cong.)
would mitigate risks over the long term, rather than exclusive emphasis on incident response. Cross-departmental functions would report to the Secretary.

These models are worth considering to ensure the Secretary and Department of Homeland Security are able to execute the homeland security missions and functions under clear legal authority to address the full range of risks today.

**Public-Private Partnerships: Demand for a New Model.**

Given that most of U.S. critical infrastructure is owned or operated by the private sector, there must be a stronger legal and policy framework to enable coordination and cooperation between the Federal government and private sector during a crisis or domestic incident.

The current landscape provides a combination of prescriptive and incentive-based frameworks to ensure information sharing between the private sector and government. For example, the Cybersecurity and Information Sharing Act of 2015 provided indemnity incentives for private companies to share information regarding cyber incidents with DHS.

Although this is a positive step forward, it is not enough.

**A Special Private-Public Model During Crisis**

The government should establish a temporary framework that applies during domestic emergencies for limited indemnity of private industry to facilitate information sharing and operational activities to protect the public.

For example, in the event of a domestic incident that presents a clear threat to the security of U.S. critical infrastructure, DHS should have the power to temporarily deputize certain senior private company officers within critical infrastructure sectors with government authority (and limited qualified immunity or privilege) to share information or take specific, limited operational actions to achieve a broader government homeland security objective. This emergency power would enable those private officers to share defined categories of information in a way that enables the government to take appropriate action to safeguard U.S. critical infrastructure while limiting liability of private action. This deputization regime could also permit private actors to take limited operational actions on behalf of the government. For example, in response to a major cyberattack that disrupts regional or nationwide internet or telecommunication services, the Secretary of DHS could temporarily deputize the Chief Information Security Officers of impacted Internet Service Providers, enabling them to voluntarily share sensitive business or proprietary information with qualified immunity from civil liability. Although there are established statutory and policy provisions for Federal deputization of state and local government
officials, deputation of private individuals is more limited. This structure would require specific grants of limited authority for temporary periods, including qualified immunity from civil torts for acts taken within the scope of the deputization.

Further, this authority could enable DHS to have specific, directive authority for crisis situations where speed and agility are essential to achieve government objectives while preserving civil liberties.

**Conclusion**

The Federal government today is better positioned than before to address the range of threats to homeland security. However, the U.S. must take steps to ensure its domestic security, including resilience of our critical infrastructure, during steady state and time of crisis, with appropriate Congressional oversight to maintain the appropriate balance of constitutional power. The models and structures proposed here are intended to increase the effectiveness of the Federal government for homeland security. We must at the same time understand the implications of a more effective Federal government on civil liberties and reinforce the critical role that Congress and the Judiciary have to ensure those interests are preserved.

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15 See, e.g., 28 C.F.R. 0.112 – Special deputation; permitting the Director, U.S. Marshals Service to deputize selected employees of private security companies for providing courtroom security for the Federal judiciary.