

## A NOTE FROM THE EDITOR

Welcome to the days of Summer. This edition of the Homeland Security and National Defense newsletter will achieve a new mark for the word "brief," very appropriate for this time of year. Nonetheless, I am pleased that this short newsletter includes a well-summarized report on the *5<sup>th</sup> Annual Homeland Security Law Institute* by Scott Rafferty.

Additionally, we are hard at work on planning with many others the **6<sup>th</sup> Annual Homeland Security Law Institute** scheduled for **March 2 & 3, 2011** at the Capital Hilton in Washington, DC. Please make a note on your calendar to attend. We expect next year's program to be the best ever. We are extending invitations to high-level officials within the Obama Administration to present remarks at the Institute.

Please feel free to contact Anne Kiefer at 202-662-1690 for additional program information or visit the AdLaw Section's website at <http://new.abanet.org/calendar/6th-annual-homeland-security-law-institute/Pages/default.aspx>.

For our next newsletter, I would like to encourage you to email me at [whitleyj@gtlaw.com](mailto:whitleyj@gtlaw.com) or contact me at 202-331-3131, if you are interested in contributing an article to the Fall/Winter edition. As you know, Cross-Border Protection, E-Verify and Cybersecurity are hot topics within the Homeland Security arena and we would like to provide our readers with the latest updates on these and other areas of interest in our next publication.

Thank you for your continued support.

Joe D. Whitley

*Joe Whitley, Chair of the Homeland Security Law Institute and Co-chair of the Homeland Security and National Defense Committee, is the former first General Counsel for the Department of Homeland Security. He is also a twice-appointed U.S. Attorney for the Northern (Atlanta) and Middle (Macon) Districts of Georgia. Joe is currently a Shareholder with Greenberg Traurig LLP in the Atlanta, GA and Washington, DC offices.*

## SAVE THE DATE!

**6<sup>TH</sup> ANNUAL ABA ADMINISTRATIVE LAW &  
REGULATORY PRACTICE SECTION**



## HOMELAND SECURITY LAW INSTITUTE

**MARCH 2-3, 2011**

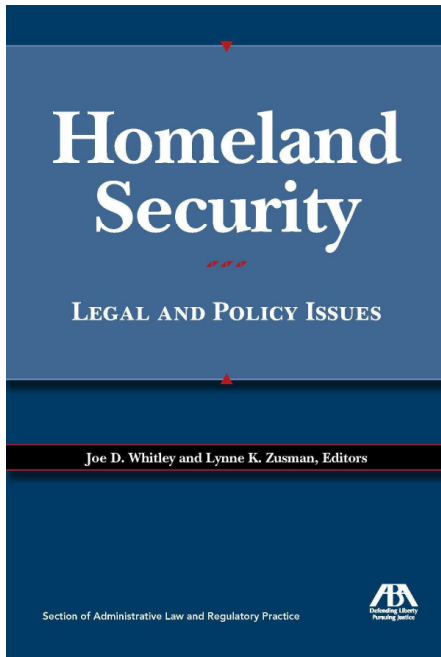


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**PROCEEDINGS OF THE FIFTH ANNUAL  
HOMELAND SECURITY LAW INSTITUTE**

*By Scott Rafferty, Esq.*

Truly informative and cutting-edge presentations, by an unprecedented number of current and prior Homeland Security decision-makers, was the hallmark of the Fifth Annual Homeland Security Law Institute in Washington, DC held on March 3-4, 2010. This two-day program was organized and led by Joe D. Whitley, Shareholder at Greenberg Traurig LLP. Joe is the *first General Counsel of the Department of Homeland Security (DHS)* and is Chair of the Administrative Law and Regulatory Practice Section's Homeland Security Law Institute Committee, as well as Co-Chair of the Homeland Security and National Defense Committee. Co-Chairs for the Institute were Elizabeth Branch, Partner at Smith, Gambrell & Russell LLP, *former Counselor to the Office of Information and Regulatory Affairs (OIRA) Administrator and former DHS Associate General Counsel* and George Koenig, Principal at Koenig Law Group, PC, *former Counsel to the DHS General Counsel*.

Over 320 individuals attended the program, which included 90 presenters in 21 separate sessions throughout the event. Speakers gave the Institute a distinct bipartisan flavor with representatives of the current Obama and prior Bush Administrations. These individuals focused on the common objective of improving Homeland Security and identifying applicable legal and policy issues. Individual sessions were recorded and copies can be requested from the ABA Administrative Law and Regulatory Practice Section's Director, Anne Kiefer.

Former Speaker of the U.S. House of Representatives, Dennis Hastert, now a Partner at Dickstein Shapiro LLP, opened the first day of the Institute by providing the audience with a Keynote Address on a "View from the Legislative Branch," discussing Congress's perspective on Homeland Security.

Ivan Fong, DHS General Counsel, followed Speaker Hastert's presentation with an address outlining DHS' vision for homeland security – safety, security, and resiliency. Mr. Fong stated that security is not simply preventing attacks, but protecting the American way of life, including civil liberties and ability to trade. He noted that attacks and disasters will occur over time,

and that we need to prepare in order to maintain and resume our way of life after these instances. Mr. Fong said that distributing responsibilities among federal, state, and local agencies combines the nation's full assets, but is also a potential vulnerability if not well coordinated. Mr. Fong also stated that we must lead an international initiative to deploy new technology. In his concluding remarks, Mr. Fong emphasized that the American society must build resiliency in the face of disruption and ensure that constant readiness does not impair our national efficiency and mental health.

Immediately following Mr. Fong's address, conference co-chair Elizabeth Branch moderated a panel presentation on new regulatory policies from the Obama Administration's first year. Members of this panel included: Neil Eisner, DoT Assistant General Counsel for Regulation and Enforcement; Michael Fitzpatrick, Associate Administrator at OIRA; George Korch, Senior Science Advisor to the HHS Assistant Secretary for Preparedness and Response; and Mary Kate Whalen, DHS Associate General Counsel for Regulatory Affairs at DHS.

Twenty tables, organized by homeland security topics, facilitated networking and offered lively discussions during lunch, aspects of which were reported to the group.

The first set of plenary sessions in the mid-afternoon included a panel discussion on international issues, which was moderated by Paul Rosenzweig, Principal at Red Branch Consulting and *former Deputy Assistant DHS Secretary for Policy*. Panel members included: Richard Barrett, Coordinator of the UN Al-Qaida Taliban Monitoring Team; Ambassador C. Donald Johnson, Director at the Dean Rusk Center, University of Georgia School of Law; and Luc Veron, Minister-Counselor with the European Commission Delegation.

A second panel was moderated by Joel Webber, Counsel at Couri & Couri, on re-regulation of freight shipping and its impact on the supply chain. Participants included Joan Bondareff, Of Counsel, Blank Rome; Rear Admiral Charles Michel, *retired Military Advisor to the DHS Secretary*; and Michael Penders, CEO of Environment Security International. The panel reviewed issues between DHS and the freight industry.

Julie Myers Wood, President of ICS Consulting LLC, *former Assistant Secretary ICE, DHS*, moderated a third panel discussion on immigration that included panelists: Elizabeth Dickson, Manager of Global Immigration Services, Ingersoll Rand Company; Beth Gibson, Senior Counsel to the Assistant Secretary, ICE, DHS; Jessica Herrera-Flanigan, partner, Monument Policy Group, *former Staff Director and General Counsel, House Homeland Security Committee*; and Dawn Lurie, Shareholder, Greenberg Traurig. This panel discussed handling paperwork required of employers and ways in which DHS seeks to build a culture of compliance and prioritizes investigations on companies who engage in abusive practices, low wages, and poor working conditions. There was also a discussion regarding perspectives on upcoming legislation, which will be dealing with enforcement, future flows, and pathways to citizenship.

Heading into the afternoon plenary sessions, Chad Boudreaux of Baker & Botts, *former DHS Deputy Chief of Staff*, moderated a panel on chemical infrastructure. Panelists included: Sue Armstrong, DHS Acting Assistant Secretary for Infrastructure Protection, Jamie Conrad, Jr. of Conrad Law & Policy Counsel, Meghan Ludtke, DHS Associate General Counsel for National Protection & Programs, and Brandon Milhorn, Chief Republican Counsel, Senate Homeland Security Committee. The group lauded the cooperative regime that has developed, in which industry helped train inspectors and strengthened security practices for all companies.

Another panel on foreign investments was moderated by Stewart Baker, Partner at Steptoe & Johnson and *former Assistant Secretary for Policy, DHS*, which included panel members: Mark Jaskowiak, Deputy Assistant Treasury Secretary for Investment Security, Sanchitha Jayaram, Director for Foreign Investment and Trade, DHS, and Ted Kassinger, Partner at O'Melveny & Myers. The panel discussed the creation of CFIUS and its role, as well as its focus on national security and how it operates within our broad open investment policy, so it always seeks expeditious mitigation to allow transactions to go forward.

Paul McHale, Partner McKenna Long & Aldridge, *former Assistant Secretary of Defense, and previously a Member of Congress*, moderated a third panel discussion on DoD and Homeland Defense. Jeff



Greene, Counsel on the Senate Homeland Security and Governmental Affairs Committee; Christian Rofrano, Chief Counsel, National Guard Bureau; David Trissell, Chief Counsel of FEMA; and Carl M. Wagner, Associate General Counsel for Homeland Defense, DoD were among the panel members for this informative session. Panelists discussed the military's capability to intervene in natural disasters to save lives, mitigate property damage, and process paperwork. Issues on new legislation that allows the National Guard to perform public safety missions under state control while being federally funded and how Interstate compacts allow states to share emergency assistance were also discussed. In addition, this panel touched on posse comitatus issues affecting the National Guard, related interactions between FEMA and DoD, congressional oversight and future legislation.

FEMA Administrator Craig Fugate gave an inspiring address to finish out the first day of the program. He stressed the need for engaging the private sector and individual citizens in planning and responding to emergencies. Administrator Fugate explained how FEMA operates, that it does not respond itself; but FEMA facilitates, coordinates, and provides grants to those who do respond. He noted that while a declaration of emergency empowers government when it is most needed, we must also build relationships with private capabilities. In large-scale disasters, Administrator Fugate believes we will fail as a nation unless we engage the entire community.

An inspiring Keynote address to open the second day of the Institute was given by New York City Police Commissioner Raymond Kelly who described NYC's extensive organization to handle security and terrorist threats.

The Institute began its morning plenary breakout sessions with a panel discussion on prosecuting terror suspects. Jim Turner, Partner at Arnold & Porter LLP, *formerly Ranking Member on the House Homeland Security Committee and Armed Services Terrorism Subcommittee*, moderated the panel, together with panel members: John Bellinger, III, Partner at Arnold & Porter and *former Legal Advisor, State Department*; Brad Wiegmann, Principal Deputy Assistant Attorney General for the National Security Division, DoJ; Benjamin Wittes, Senior Fellow, Brookings Institute; and Juan Zarate, Senior Adviser with the Center for

Strategic and International Studies, *former Deputy National Security Advisor for Combating Terrorism*. Panel members discussed charging terrorists both in military commissions and federal courts to preserve the message they are both criminals and war criminals. The panel also discussed how Congress has banned domestic release of detainees and that even if the law were held unconstitutional, the Administration would use immigration laws to deport these individuals, absent issues of potential torture in their home country.

Another panel discussion was moderated by *former FEMA general counsel*, Ernie Abbott of FEMA Law Associates, regarding state and local government homeland security involvement. Panel members included: Otto Hetzel, Principal, Otto J. Hetzel, Esq. and Professor of Law Emeritus at Wayne State University Law School; David Maxwell, Director of Arkansas Emergency Management Agency and President of the National Emergency Management Association (NEMA); and Ellis M. Stanley of Dewberry Associates and Director of Western Emergency Management Services in Brunswick County, NC.

The third morning panel discussion on SAFETY ACT implementation was moderated by Mark Robertson, Principal at Robertson Anderson, *former Associate General Counsel for the Science and Technology Directorate and former Chief of Staff to DHS General Counsel*, together with panel members: Bruce Davidson, Director with the Office of SAFETY Act Implementation, DHS; John Mitnick, Vice President and General Counsel at Raytheon Technical Services, *former Associate General Counsel for Science and Technology at DHS and former DoJ Counsel to the Assistant Attorney General in the Antitrust Division*; and Kevin Mullen, a Partner at Cooley Godward Kronish.

Following a short break, the mid-afternoon plenary sessions began with a panel discussion on cybersecurity, moderated by Chad Boudreaux. Panel members for this informative discussion on legal developments within the cyber security community included: Gus Coldebella, *Former Acting DHS General Counsel*; Sigal Mandelker, Senior Counsel at Proskauer Rose LLP and *former DoJ Deputy Assistant Attorney, Criminal Division*; Asha Mathew, Senate Senior Counsel for Minority, Committee on Homeland Security and Governmental Affairs; and Andy Purdy, Chief

Cybersecurity Strategist with CSC in Virginia.

The second panel discussion on privacy and civil liberties was moderated by Hugo Teufel, Director of the Federal Advisory Practice for PricewaterhouseCoopers and former DHS Chief Privacy Officer. This session included panelists: Stewart Baker; Erick Lichtblau, a Reporter with the Washington Bureau, New York Times; and Gregory Nojeim, Director of Project on Freedom, Security & Technology, Center for Democracy and Technology (CDT).

Joshua Filler, President of Filler Security Strategies, Inc. and former DHS Director of the Office of State and Local Government Coordination, moderated the third morning panel discussion on understanding Homeland Security grants and opportunities. Panel members included: David Hagy, Principal with Booz Allen and Hamilton and former DoJ Director of the National Institute of Justice; Tracy Henke, Partner at Thomas Advisors, Inc. and former DHS Assistant Secretary; and Dennis Schrader, President of DRS International, LLC and former Deputy Administrator with the National Preparedness Directorate (NPD), FEMA.

During the second day's luncheon, a panel presentation provided a unique White House perspective spanning two Administrations. Moderated by Ken Wainstein, a Partner at O'Melveny & Myers and former Homeland Security Advisor to President George W. Bush, Mr. Wainstein was joined in this discussion by panel members: John Brennan, the President's Advisor on Homeland Security and Counterterrorism, former Head of NCTC, Admiral Jim Loy, Senior Counsel at the Cohen Group and former DHS Acting Secretary and Deputy Secretary and Commandant of the U.S. Coast Guard, and Juan Zarate Senior Advisor at CSIS and former NSC Deputy.

The final afternoon set of plenary sessions for this program included a private sector panel moderated by Al Martinez-Fonts, Fellow, U.S. Chamber of Commerce and former DHS Assistant Secretary for the Private Sector Office. Panel members included: John Imhoff, Director of Firm Security at Ernst & Young; George Koenig, Ashley Moore, Senior Preparedness Policy Advisor at FEMA; and William Raisch, Director of InterCEP at NYU. The panel discussed the PS-Prep voluntary program which was designed to provide

preparedness standards for corporations and how it would create industry-specific criteria and metrics, which could ultimately be enforced through contracting or regulatory requirements.

The second afternoon panel on Criminal Justice moderated by Jayson Ahern, Principal, The Chertoff Group and former Acting Commissioner CBP, DHS, together with panelists: Rear Admiral William Baumgartner, Chief Counsel, USCG; Valerie Caproni, FBI General Counsel; and Peter Vincent, Principal Legal Advisor, ICE, DHS; examined a number of topics including increased resources at the border and the need to prioritize.

Michael Greenberger, Professor and Director of University of Maryland's Center for Health and Homeland Security, moderated a public health and safety panel. Panelists included: Brooke Courtney, Associate, Center for Biosecurity, University of Pittsburgh; Professor Wendy Mariner of Boston University; and Marita Mike, Health Director at the Center. This panel warned that flu often has a third wave. They discussed the disturbing fact that more individuals are not taking vaccines to prevent contamination now that it has been made available to the public in general.

The final address of the day was delivered by Michael Chertoff, President of the Chertoff Group, Senior Counsel, Covington & Burling, former Circuit Judge and DHS Secretary. Secretary Chertoff stated that threats may be simultaneously military, criminal, or within categories that did not previously exist and that we need a better set of legal tools to pull off the shelf in an emergency. Secretary Chertoff also stated that the legal structure must address cybersecurity threats, including transnational attacks that may be crimes or acts of war. He mentioned the fact that we have no policy in place on preemption and retaliation. The current administration, according to Secretary Chertoff, wisely declassified the summary of the National Cybersecurity Initiative. He said that the real danger of unsettled authority is not an indecisive president, but the failure of his subordinates to accept directives. Secretary Chertoff stated that the absence of clear rules could threaten command and control in an given crisis. Secretary Chertoff said that some issues require vigorous debate that respects Administration personalities and their good faith. He

said that Miranda does not bar extensive questioning, provided any prosecution foregoes using its fruits and that we have no domestic system for confinement where prosecution is not possible. Secretary Chertoff concluded this inspiring address by calling upon the American Bar Association to take the lead in the solution of the fascinating cutting-edge legal problems that our country must address before the next crisis.

Next year's 6<sup>th</sup> Annual ABA Homeland Security Law Institute will be held on March 2 & 3, 2010 at the Capital Hilton, Washington, DC. Please mark your calendars to attend. Registration begins soon.

Scott Rafferty is an attorney with The Aerie Group in Washington, DC.

## UPCOMING EVENTS:



**2010 ANNUAL MEETING**  
*August 5 - 10, 2010*  
San Francisco, CA

To register go to <http://new.abanet.org/calendar/2010-annual-meeting/Pages/default.aspx>. Microso

### **Homeland Security Coordinating Committee**



Business Meeting  
**FRIDAY AUGUST 6, 2010**  
10:30am-11:30am  
San Francisco, CA  
*Marriott Marquis*  
Pacific Suite C, 4th Floor

### **ADMINISTRATIVE LAW FALL CONFERENCE**

**November 4-5, 2010**

*The Capital Hilton - Washington, DC*

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### **20<sup>TH</sup> ANNUAL REVIEW OF THE FIELD OF NATIONAL SECURITY LAW CONFERENCE**

*Sponsored by the ABA Standing Committee on Law & National Security*

**November 4-5, 2010**

*Renaissance Washington, DC Hotel  
Washington, DC*

Visit: [www.abanet.org/natsecurity](http://www.abanet.org/natsecurity) for registration information

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### **6<sup>TH</sup> ANNUAL HOMELAND SECURITY LAW INSTITUTE**

**March 2-3, 2011**

*The Capital Hilton, Washington, DC*

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### **ADMINISTRATIVE LAW SPRING CONFERENCE**

**April 8-10, 2011**

*The Boar's Head Inn, Charlottesville, VA*

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ISSN 1939-7070