

TURF WARS: HOW A JURISDICTIONAL QUAGMIRE IN CONGRESS COMPROMISES HOMELAND SECURITY

Joan V. O’Hara,*
James A. Murphy, II,†
Jacobus A. Vreeburg,‡
Steven Giaier,§
Derek Maurer,**
Michael Geffroy†† &
Tyler K. Lowe‡‡

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* Joan V. O’Hara, of the House Committee on Homeland Security, is a 2011 graduate of New York Law School.

† James A. Murphy, II, of the House Committee on Homeland Security, is a 2009 graduate of the Univeristy of Southern Maine.

‡ Jacobus A. Vreeburg, formerly of the House Committee on Homeland Security, is a 2011 graduate of American University.

§ Steven Giaier, of the House Committee on Homeland Security, is a 2007 graduate of Gonzaga University School of Law.

** Derek Maurer, formerly of the House Committee on Homeland Security, is a 2000 graduate of Georgetown University Law Center.

†† Michael Geffroy, formerly of the House Committee on Homeland Security, is a 1992 graduate of the Catholic University of America, Columbus School of Law.

‡‡ Tyler K. Lowe, of the House Committee on Homeland Security, is a 2014 graduate of St. Mary’s University School of Law.

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INTRODUCTION***

On September 11, 2001, nineteen hijackers passed through security at four U.S. airports carrying knives, box-cutters, and concealed weapons both on their persons and in their hand luggage.¹ None of the hijackers were prevented from getting on their morning flights.² The

*** The views expressed herein are the authors’ alone, and do not necessarily represent the positions of the Committee or its Chairman.

1. *September 11 Chronology*, DEP’T OF HOMELAND SEC., <https://www.dhs.gov/september-11-chronology> (last updated Sept. 10, 2014).

2. *Id.*

events that followed will live in infamy. Nearly 3000 people were killed in the attacks of that day,³ when two planes were flown into the north and south towers of the World Trade Center, another crashed into the Pentagon, and a fourth plane crashed into an empty field in Western Pennsylvania after passengers forced it down.⁴

The September 11th terrorist attacks became the defining event that shaped America's modern national security policy. In late 2002, President George W. Bush established the National Commission on Terrorist Attacks Upon the United States, commonly referred to as the 9/11 Commission.⁵ This independent and bipartisan commission was created to evaluate the government's response to the terrorist attacks on 9/11 as well as the failures that led to the attacks of that day.⁶ In August 2004, the Commission released its final report outlining its findings and recommendations to ensure another 9/11 would never happen again.⁷ The vast majority of the Commission's recommendations have been addressed with one exception: the consolidation of congressional oversight authority over homeland security.⁸ The 9/11 Commission report recommended, "Congress should create a single, principal point of oversight and review for homeland security."⁹ The Commissioners believed this was one of the most important of the forty-one recommendations, and that the Department of Homeland Security ("DHS") needed the same "kind of clear authority and responsibility" enjoyed by other Cabinet-level agencies, such as the Department of Defense and the Department of Justice with respect to their missions.¹⁰ In 2013, the chair and vice chair of the Commission observed in an op-ed:

Nine years after the 9/11 Commission made its case, our country is still not as safe as it could and should be. Though the vast majority of our recommendations have been followed, at least in part, Con-

3. *FAQ About 9/11*, NAT'L SEPT. 11 MEM'L & MUSEUM, <http://www.911memorial.org/faq-about-911> (last visited Nov. 10, 2014).

4. *Id.*

5. *About the Commission*, NAT'L COMM'N ON THE TERRORIST ATTACKS UPON THE U.S., <http://govinfo.library.unt.edu/911/about/index.htm> (last visited Nov. 10, 2014).

6. *Id.*

7. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT* (2004), available at <http://govinfo.library.unt.edu/911/report/911Report.pdf>.

8. See Thomas H. Kean & Lee H. Hamilton, Op-Ed., *Homeland Confusion*, N.Y. TIMES, Sept. 11, 2013, <http://www.nytimes.com/2013/09/11/opinion/homeland-confusion.html>.

9. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 7, at 421.

10. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 7, at 419-21.

gress has not acted on one of our major proposals: to streamline the way it oversees homeland security.¹¹

Congress created DHS but did not adapt its oversight structure to the largest reorganization of the executive branch since the creation of the Department of Defense.¹² Congressional oversight of homeland security and counterterrorism is currently dysfunctional, and Congress must address this problem. In 2013, more than 100 congressional committees and subcommittees claimed jurisdiction over various and overlapping components of DHS.¹³ The sheer number of committees claiming jurisdiction over DHS places an unneeded burden on each of the Department's components.¹⁴ More than 100 congressional committees and subcommittees claiming jurisdiction means that DHS officials spend more time on Capitol Hill than officials from any other executive agency.¹⁵ Competing demands from multiple committees complicate the passage of security legislation.¹⁶ This means that routine pieces of legislation take several months to be enacted, if they are enacted at all.¹⁷ Although Congress has succeeded in making the Committee on Homeland Security permanent, it has yet to satisfy the rationale behind that permanence: to provide one central congressional authority through which to coordinate with the executive branch and direct the policy and mission of DHS.¹⁸

DHS is a national security agency tasked with protecting American lives and property.¹⁹ Today, Congress is unable or unwilling to recognize that it is compromising national security by playing politics

11. Kean & Hamilton, *supra* note 8.

12. See *Hearing on Perspectives on House Reform: Committees and the Executive Branch: Before the Subcomm. on Rules of the H. Select Comm. on Homeland Sec.*, 108th Cong. 4 (2003) (statement of Rep. Christopher Cox, Chairman, H. Select. Comm. on Homeland Sec.).

13. See ASPEN INST., TASK FORCE REPORT ON STREAMLINING AND CONSOLIDATING CONGRESSIONAL OVERSIGHT OF THE U.S. DEPARTMENT OF HOMELAND SECURITY 10 (2013), available at <http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/Sunnylands%20report%2009-11-13.pdf>.

14. See *The Secretary's Vision for the Future—Challenges and Priorities: Hearing Before the H. Comm. On Homeland Sec.*, 113th Cong. 20 (2014) (statement of Hon. Jeh C. Johnson, Secretary, U.S. Dep't of Homeland Sec.) ("I do agree that when I have 108 committees and subcommittees of Congress performing an oversight function, it takes a lot of time to . . . deal with all of the oversight, which detracts from the core mission that I think you want me to pay attention to."); *infra* notes 129–41 and accompanying text.

15. See ASPEN INST., *supra* note 13, at 10.

16. See *infra* notes 102–15, 163–86 and accompanying text.

17. See *infra* notes 102–15, 163–86 and accompanying text.

18. See 151 CONG. REC. H14 (daily ed. Jan. 4, 2005) (statement of Rep. David Dreier).

19. Homeland Security Act of 2002, 6 U.S.C. § 111 (2012).

with congressional oversight jurisdiction over homeland security functions. Instead of fighting over jurisdiction and the power and access that come with it, members of Congress should focus on national security problems and protecting American lives. To do this, Congress should consolidate congressional authority over homeland security into one committee in the House and one in the Senate, as was recommended by the 9/11 Commission. This jurisdictional consolidation is necessary to ensure that DHS is able to accomplish its mission of protecting Americans.

This article will first detail the history and formation of DHS and the Committee on Homeland Security.²⁰ It will then lay out the arguments for consolidation²¹ and conclude with specific recommendations as to how these jurisdictional issues should be resolved.²²

I.

THE HISTORY AND FORMATION OF DHS

Ten days after the terrorist attacks of September 11, 2001, the Senate Committee on Government Affairs convened a hearing to examine possibilities for government reorganization in response to the attacks.²³ Testifying at the hearing were former Senators Gary Hart and Warren Rudman who had served as Co-Chairs of the U.S. Commission on National Security/21st Century.²⁴ In their final report for that Commission, they had noted, “The United States is today very poorly organized to design and implement any comprehensive strategy to protect the homeland.”²⁵ In light of this finding, the Co-Chairs offered several recommendations to the Committee. Among them were:

1. Congress must create a new federal agency tasked with “planning, coordinating, and integrating various U.S. government activities involved in homeland security.”²⁶
2. The new agency would be made up of the Customs service, the Border Patrol, and the Coast Guard.²⁷

20. *See infra* Part I.

21. *See infra* Part II.

22. *See infra* Part III.

23. *Responding to Homeland Threats: Is Our Government Organized for the Challenge?: Hearing Before the S. Comm. on Gov't Affairs*, 107th Cong. 1 (2001).

24. *Id.* at III.

25. U.S. COMM'N ON NAT'L SEC./21ST CENTURY, ROAD MAP FOR NATIONAL SECURITY: IMPERATIVE FOR CHANGE 10 (2001), available at <http://fas.org/irp/threat/nssg.pdf>.

26. *Id.* at viii.

27. *Id.* at viii, 15.

The co-chairs did not envision a military agency but rather an agency that would be the central coordinating mechanism for anticipating, preventing, and responding to attacks on the homeland.²⁸

Shortly after receiving this input, Senator Joseph Lieberman, Chairman of the Senate Committee on Government Affairs, introduced Senate Bill 1534 to create the Department of National Homeland Security as a new Cabinet-level agency.²⁹

As originally envisioned by Senator Lieberman, the new department would be organized into three directorates:

1. The “prevention” directorate would be made up of the Coast Guard, the Border Patrol, and the Customs Service.³⁰
2. The “protection” directorate would be made up of the Critical Infrastructure Assurance Office, the Information Infrastructure Protection Institute, and the Federal Bureau of Investigation’s (“FBI”)’s National Infrastructure Protection Center.³¹
3. The “Directorate of Preparedness and Response” would be comprised of the Federal Emergency Management Agency (FEMA) and the FBI’s National Domestic Preparedness Office.³²

However, this legislation changed drastically during the legislative process, and was markedly different from the bill that would ultimately pass the Congress over a year later and be signed into law by President Bush.³³

In June 2002, President Bush announced his vision for a new Department of Homeland Security.³⁴ Rather than three small directorates, the Bush Administration’s plan called for a vast reorganization of the federal government that would consolidate twenty-two federal agencies covering 170,000 federal employees and a budget of over \$37 billion.³⁵ Congressman Dick Arme, the Majority Leader of the House of Representatives, introduced accompanying legislation to

28. *See id.* at viii.

29. Department of National Homeland Security Act of 2001, S. 1534, 107th Cong. (2001).

30. *See id.* § 5(a)(1) (establishing a Directorate of Prevention responsible for border security, maritime security, and “international standards for enhanced security in transportation nodes”).

31. *See id.* § 5(a)(2).

32. *See id.* § 5(a)(3).

33. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

34. *See* GEORGE W. BUSH, THE DEPARTMENT OF HOMELAND SECURITY (2002), available at <http://www.dhs.gov/xlibrary/assets/book.pdf>.

35. Adriel Bettelheim, *Some in GOP Join Democrats in Questioning Homeland Plan*, CQ WKLY., June 29, 2002, at 1720–23.

Senator Lieberman's bill that incorporated President Bush's ideas as the Homeland Security Act of 2002.³⁶

Coupled with Majority Leader Arme'y's bill was House Resolution 449.³⁷ This resolution amended the Rules of the House of Representatives to create a Select Committee on Homeland Security to "develop recommendations and report to the House on such matters that relate to the establishment of a department of homeland security."³⁸ Perhaps most importantly, the resolution contained a jurisdictional clause mandating that each piece of legislation introduced relating to the creation of a new Department of Homeland Security would lie in the jurisdiction of the Select Committee on Homeland Security.³⁹ This jurisdictional clause vested all of the recommendations in one place and put the Select Committee on Homeland Security and its new chairman, Majority Leader Arme'y,⁴⁰ in firm control of the contours and outcome of the Homeland Security Act of 2002.

While primary jurisdiction over the Homeland Security Act of 2002 was vested in the new Select Committee, secondary jurisdiction lay with twelve other House Committees, nine of which held markup sessions on the bill.⁴¹ A committee markup is "the key formal step a committee takes for the bill to advance to the floor," where members of the committee debate any changes to be made to the bill.⁴² These changes come in the form of amendments proposed by individual members of the committee.⁴³

Jurisdictional reorganization questions during committee markups generally boil down to "who stands to lose how much, and what offsetting benefits, if any, are provided by the reorganization proposal?"⁴⁴ For instance, the House Committee on Energy and Commerce rejected the proposal in the Act to transfer health research from the

36. Homeland Security Act of 2002, H.R. 5005, 107th Cong. (2002).

37. H.R. Res. 449, 107th Cong. (2002).

38. *Id.* § 3.

39. *Id.*

40. 148 CONG. REC. H3699 (daily ed. June 19, 2002) (statement of Henry Bonilla announcing the appointment of members to the Select Committee on Homeland Security).

41. *H.R. 5005 Committees*, LIBRARY OF CONG. (last visited Nov. 8, 2014), <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR05005:@@C>.

42. *The Legislative Process: Committee Consideration*, LIBRARY OF CONG. (last visited Nov. 8, 2014), <http://beta.congress.gov/legislative-process/committee-consideration>.

43. *Id.*

44. DONALD R. WOLFENBERGER, WOODROW WILSON INT'L CTR. FOR SCHOLARS, REORGANIZING CONGRESS AND THE EXECUTIVE IN RESPONSE TO FOCUSING EVENTS: LESSONS OF THE PAST, PORTENTS FOR THE FUTURE 44 (2004), available at <http://www.wilsoncenter.org/sites/default/files/reorgcong.pdf>.

National Institutes of Health and the Centers for Disease Control and Prevention to the new Department.⁴⁵ During its markup session, the House Committee on Government Reform defeated by one vote an amendment that would have blocked the Secret Service from being transferred to the Department.⁴⁶ The House Science Committee, rather than introducing amendments to dismantle the proposed Department of Homeland Security, inserted a new Office and Undersecretary for Science and Technology at the Department.⁴⁷

The House Committee on Transportation and Infrastructure proposed perhaps the most wide-sweeping amendments. During its markup, the Committee approved amendments crafted by Chairman Don Young to keep the Coast Guard in the Department of Transportation and retain FEMA as an independent agency.⁴⁸ Chairman Young also wanted to mandate that the newly created Transportation Security Administration remain in the Department of Transportation until certain statutory deadlines were met.⁴⁹ Chairman Young was so insistent that he promised floor amendments if the Homeland Security Committee rejected his recommendations, but he was ultimately unsuccessful.⁵⁰

The Ways and Means Committee took issue with the transfer of the Customs Service out of the Treasury Department, and when the committee marked up the legislation, they included a provision to ensure that the Treasury Department would retain jurisdiction over customs revenue and trade act enforcement, ensuring that the Ways and Means Committee would retain its jurisdiction over tax and trade legislation.⁵¹

45. Rich Daly, *Panel Opts to Keep Health Research with NIH and CDC*, CQ NEWS (July 11, 2002), <http://www.cq.com/doc/news-469064?10&search=VD9hpfZW>.

46. Mary Dalrymple & David Miller, *Panel Backs Off Plan to Defy Administration's Homeland Security Plan*, CQ NEWS (July 11, 2002), <http://www.cq.com/doc/committees-2002071100043439?19&search=C7vTd8DG>.

47. See Adriel Bettelheim & Peter Cohn, *Panel Adds Science Official to Proposed Homeland Security Department*, CQ NEWS (July 11, 2002), <http://www.cq.com/doc/committees-2002071000043453?16&search=lzjcaVME>.

48. See Nick Anderson, *House Committee Balks at Bush's Security Plan*, L.A. TIMES, July 12, 2002, <http://articles.latimes.com/2002/jul/12/nation/na-secure12> (reporting the Committee's vote to block transfer of the Coast Guard and FEMA to the Department, and its vote to pass Chairman Young's version of the homeland security bill).

49. See Peter Cohn, *Transportation Panel Keeps Coast Guard, FEMA in Place*, CQ NEWS (July 11, 2002), <http://www.cq.com/doc/news-469179?15&search=lzjcaVME> (describing Chairman Young's amendment).

50. See *id.*

51. See John Godfrey, *Ways and Means Wants to Keep Control of Customs' Revenue*, CQ NEWS (July 10, 2002), <http://www.cq.com/doc/committees-2002071000043455?12&search=2tESRCMk>.

The most the committees could do was offer recommendations, however. It was the job of the newly created Select Committee on Homeland Security to collect those recommendations, accept some, reject others, and create new text to be approved by the Committee and reported to the House of Representatives.⁵²

After both chambers considered and approved the measure, President Bush signed the Homeland Security Act of 2002 on November 25, 2002, marking it as an “historic action to defend the United States and protect our citizens against the dangers of a new era.”⁵³ The bill had been enacted, but the battles in Congress were just beginning.

Battles for new jurisdiction began as numerous Senate committees vied for the right to review the nomination of DHS’s first secretary, Tom Ridge; its first deputy secretary, Gordon England; and the first Undersecretary for Border and Transportation Security, Asa Hutchinson.⁵⁴ The Senate Governmental Affairs Committee; Judiciary Committee; Commerce, Science, and Transportation Committee; and Finance Committee all claimed jurisdictional supremacy.⁵⁵ In the end, the Senate Governmental Affairs Committee won out with Ridge and England, while the Commerce, Science, and Transportation Committee reviewed Hutchinson’s nomination.⁵⁶

With the issue of creating a new Department of Homeland Security settled, Congress was then forced to deal with difficult follow-up questions: how should it exercise oversight over a mammoth new federal agency?⁵⁷ Should new committees be created in the House and Senate to conduct the primary oversight responsibilities, or should an existing committee be given that task? Should oversight of the new

52. 148 CONG. REC. H3693 (daily ed. June 19, 2002).

53. Press Release, The White House, President Bush Signs Homeland Security Act (Nov. 25, 2002), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/11/20021125-6.html>.

54. Mary Dalrymple, *Senate Committees Jostle for Right to Review Ridge Nomination*, CQ NEWS (Nov. 26, 2002), <http://www.cq.com/doc/news-551774?19&search=Y3iYLQfn>.

55. *Id.*

56. See *Nomination of Hon. Gordon R. England: Hearing Before the S. Comm. on Gov’t Affairs*, 108th Cong. (2003); *Nomination of Asa Hutchinson to Be Under Secretary for Border and Transportation Security of the Department of Homeland Security: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 108th Cong. (2003); Lloyd Vries, *Senate Confirms Tom Ridge*, CBS NEWS (Jan. 24, 2003, 5:51 AM), <http://www.cbsnews.com/news/senate-confirms-tom-ridge>.

57. In creating DHS, Congress created the third largest agency in the federal government. See *Collaboration at the Department of Homeland Security*, DEP’T OF HOMELAND SEC. (Oct. 29, 2012), <http://www.dhs.gov/collaboration>.

Department be split up amongst the committees already in place and, if so, which committee would get to take the lead?⁵⁸

Reorganization of committee structure in the House to accommodate a new committee is not unprecedented: there are numerous instances of the House reorganizing itself and adjusting committee jurisdiction to meet its various needs.⁵⁹ These needs have ranged from streamlining the total number of committees to improve workflow to avoiding a fight between two senior members over who gets to be chairman of a particularly powerful committee.⁶⁰ Congressional reorganization has historically occurred when there is a national crisis of some sort, a political will to do so exists, or congressional leadership supports the idea.⁶¹

The Select Committee on Homeland Security from the 107th Congress expired upon enactment of the Homeland Security Act of 2002.⁶² In its place, the House created a new Select Committee on Homeland Security.⁶³ The new Select Committee was tasked with “develop[ing] recommendations and report[ing] to the House by bill or otherwise on such matters that relate to the Homeland Security Act of 2002 . . . as may be referred to it by the Speaker.”⁶⁴ Further, and more importantly, the Select Committee was authorized to review the rules of the House with respect to the issue of homeland security—including Rule X, which governs the jurisdiction of House committees.⁶⁵ In the months that followed, the Select Committee’s Subcommittee on Rules convened hearings to examine whether a new permanent House Committee on Homeland Security should be created in the 109th Congress and, if so, how broad its jurisdiction should be.⁶⁶

58. At this point, the 9/11 Commission had not released its recommendations.

59. See generally JUDY SCHNEIDER, CHRISTOPHER M. DAVIS & BETSY PALMER, CONG. RESEARCH SERV., RL31835, REORGANIZATION OF THE HOUSE OF REPRESENTATIVES: MODERN REFORM EFFORTS (2003), available at <http://archives.democrats.rules.house.gov/archives/RL31835.pdf> (describing efforts to reorganize the House committee system since 1946).

60. *Id.* at 2, 17.

61. See MICHAEL KOEMPEL, CONG. RESEARCH SERV., RL40233, HOUSE AD HOC SELECT COMMITTEES WITH LEGISLATIVE AUTHORITY: AN ANALYSIS 2 (2009).

62. See H.R. Res. 449, 107th Cong. (2002).

63. H.R. Res. 5, 108th Cong. § 4 (2003).

64. *Id.* § 4(b)(1).

65. *Id.* § 4(b)(3).

66. The Subcommittee on Rules conducted a series of four hearings. *Hearing on Perspectives on House Reform: Lessons from the Past: Hearing Before the Subcomm. on Rules of the H. Select Comm. on Homeland Sec.*, 108th Cong. (2003); *Hearing on Perspectives on House Reform: Committees and the Executive Branch: Hearing Before the Subcomm. on Rules of the H. Select Comm. on Homeland Sec.*, 108th

One by one, congressional experts and scholars testified resoundingly in favor of creating a new permanent committee with broad jurisdiction.⁶⁷ Characterizing the risks of not creating a standing committee, the Honorable James Schlesinger testified that failing to create such a committee “means that you will not be helping this new department to become more unified on the mission of homeland security, that the agencies that go into that department will continue more than is necessary to focus on their historic function, and it will tend to preserve the existing cultures of those agencies.”⁶⁸ Another witness noted: “A permanent Committee on Homeland Security is the only way to effectively see whether DHS, and other homeland security programs, are doing their jobs of addressing the problems of terrorist threats.”⁶⁹ The same witness testified:

After Pearl Harbor, we did not have a series of temporary panels. We did not have disbursement of jurisdiction. We came together, in the executive branch, but also on the Hill, with the central focus on events. And the analogy is here probably even worse now than it was then in terms of disbursement of jurisdiction.⁷⁰

Members of the Select Committee agreed but were met with serious opposition from the leaders of other standing committees in the House of Representatives who were eager to preserve their respective committees’ jurisdiction.⁷¹ Congressman Henry Waxman, then the ranking minority member of the House Government Reform Committee, testified that taking jurisdiction away from certain committees to

Cong. (2003) [hereinafter *Hearing on Perspectives*]; *Perspectives on 9/11: Building Effectively on Hard Lessons: Hearing Before the Subcomm. on Rules of the H. Select Comm. on Homeland Sec.*, 108th Cong. (2003); *Homeland Security Jurisdiction: The Perspectives of Committee Leaders: Hearing Before the Subcomm. on Rules of the H. Select Comm. on Homeland Sec.*, 108th Cong. (2004) [hereinafter *Homeland Security Jurisdiction*].

67. See *Hearing on Perspectives*, *supra* note 66, at 18, 26, 33, 38 (statements of Hon. James Schlesinger, Chairman, Mitre Corp.; Dr. James Thurber, Professor and Director, Ctr. for Cong. & Presidential Studies, Sch. of Pub. Affairs, Am. Univ.; Donald Wolfensberger, Director, Cong. Project, Woodrow Wilson Int’l Ctr. for Scholars; Dr. David King, Associate Professor of Pub. Pol’y, the Kennedy Sch. of Gov’t, Harvard Univ.).

68. *Hearing on Perspectives*, *supra* note 66, at 18 (statement of Hon. James Schlesinger).

69. *Hearing on Perspectives*, *supra* note 66, at 30 (statement of Dr. James Thurber).

70. *Hearing on Perspectives*, *supra* note 66, at 45.

71. Congressman Jim Turner, the ranking minority member of the Select Committee, stated: “If you take homeland security seriously, you must reach the conclusion that there needs to be one Committee in the House of Representatives with oversight and legislative jurisdiction over the functions of the Department of Homeland Security.” *Homeland Security Jurisdiction*, *supra* note 66, at 9.

give to a new standing Committee on Homeland Security would be “a serious mistake.”⁷² Chairman Don Young, representing the House Committee on Transportation and Infrastructure, stated, “I did not believe a Homeland Security Committee was necessary for the House to address the terrorist threat last year, and not much has happened since then to change my mind.”⁷³ These examples illustrate the fundamental battle over the creation of the Committee on Homeland Security: the power struggle over who would have jurisdiction, and thus, who would oversee DHS. The self-interested motivations that many Senators and Representatives had in maintaining jurisdiction in their own committees would only fragment oversight of DHS, and would not be in the best interest of national security.⁷⁴

At a hearing, Chairman of the House Select Committee on Homeland Security Christopher Cox said:

In the House alone, thirteen standing committees and thirty-eight subcommittees claim a piece of the DHS pie. This is simply too many. It is not going to work. We need to move beyond jurisdictional turf and partisan politics to establish a central point for substantive jurisdiction over DHS. Without it, we will have continuing problems with oversight, legislation and authorization for the department.⁷⁵

The result of the Select Committee’s work was a change to the House rules at the beginning of the 109th Congress in January of 2005 to accommodate a new Standing Committee on Homeland Security.⁷⁶ The contours of the new Committee’s jurisdiction were crafted behind closed doors by leadership, members of the new Committee, and the

72. *Homeland Security Jurisdiction*, *supra* note 66, at 72–73 (Statement of Rep. Waxman) (“When you have only one committee, that committee tends to get to be quite comfortable with the bureaucracy, and you don’t get that kind of oversight that you need when you have multiple committees looking at it from different perspectives.”).

73. *Homeland Security Jurisdiction*, *supra* note 66, at 78 (statement of Rep. Don Young).

74. Cf. E. Scott Adler & John Wilkerson, *Intended Consequences: Jurisdictional Reform and Issue Control in the House of Representatives*, 33 LEGIS. STUD. Q. 85, 85–107 (describing past research indicating that “[c]ommittees resist change not because they believe that change will be detrimental to the institution, but because they think it will be detrimental to their own electoral and career goals,” and finding that after past formal committee reforms, “authority over related policy areas became more coherent and less fragmented”).

75. *Hearing on Perspectives*, *supra* note 66, at 4 (statement of Rep. Christopher Cox).

76. H.R. Res. 5 § 2, 109th Cong. (2005).

Rules Committee.⁷⁷ The Chairman of the Rules Committee, David Dreier, described it as “delicately crafted architecture” that would give DHS “more certainty as to which committee has the primary responsibility for homeland security.”⁷⁸

The Committee’s jurisdiction was in some parts miniscule, and in other parts hollow. For example, the Committee was given jurisdiction over “overall Homeland Security Policy.”⁷⁹ However, while discussing the merits of the resolution at its introduction on the House floor, Chairman Dreier assured the House that “surgical addresses of homeland security policy in sundry areas of jurisdiction occupied by other committees would not be referred to the Committee on Homeland Security on the basis of ‘overall’ homeland security policy jurisdiction.”⁸⁰ The phrase “overall homeland security policy” was therefore rendered effectively meaningless. The new Committee also had jurisdiction over “port security.”⁸¹ However, the Committee on Transportation and Infrastructure retained primary jurisdiction over the U.S. Coast Guard. Therefore, the Committee on Homeland Security would be unable to legislate on matters of port security on its own if the policy regulated or involved the Coast Guard.⁸²

The same power struggle that was evident during the creation of the Select Committee on Homeland Security continued. Congressman John Dingell, then the ranking minority member of the House Committee on Energy and Commerce, maintained his position that the new Committee was not needed, stating, “[W]e simply do not need a special committee every time we face a crisis.”⁸³ Similarly Congressman James Oberstar, then the ranking minority member of the House Committee on Transportation and Infrastructure, lamented the loss of jurisdiction from his Committee. He stated, “It will take years for a new committee to provide the House and the Nation with reports and recommendations of the quality that existing committees provide.”⁸⁴

77. See Sarah Laskow, *Is Congress Failing on Homeland Security Oversight?*, THE CTR. FOR PUB. INTEGRITY (July 16, 2009), <http://www.publicintegrity.org/2009/07/16/2822/congress-failing-homeland-security-oversight>.

78. 151 CONG. REC. H14, H24 (daily ed. Jan. 4, 2005) (statement of Rep. David Dreier).

79. H.R. Res. 5 § 2(a)(1)(i)(1).

80. 151 CONG. REC. H25 (statement of Rep. David Dreier).

81. H.R. Res. 5 § 2(a)(1)(i)(3)(A).

82. See RULES OF THE HOUSE OF REPRESENTATIVES, R. X, cl.1(j), H.R. DOC. NO. 112-161, at 455–56 (2013), available at <http://www.gpo.gov/fdsys/pkg/HMAN-113.pdf>.

83. 151 CONG. REC. H27 (statement of Rep. John Dingell).

84. 151 CONG. REC. H26–27 (statement of Rep. Jim Oberstar).

Ultimately, both the House and Senate created congressional committees to oversee homeland security operations across the government.⁸⁵ When Congress created these new committees, they did not consolidate existing oversight authority. In many cases, Congress reaffirmed existing congressional oversight authority or granted shared oversight jurisdiction to multiple committees.⁸⁶ Today, as specified in the Rules of the House of Representatives, clause 1(j) of Rule X, regarding the jurisdiction of the House Committee on Homeland Security, is limited to:

- (1) Overall homeland security policy
- (2) Organizations, administration, and general management of the Department of Homeland Security
- (3) Functions of the Department of Homeland Security relating to the following:
 - (A) Border and port security (except immigration policy and non-border enforcement)
 - (B) Customs (except customs revenue)
 - (C) Integration, analysis, and dissemination of homeland security information
 - (D) Domestic preparedness for and collective response to terrorism
 - (E) Research and development
 - (F) Transportation security.⁸⁷

II.

MAKING THE CASE FOR CONSOLIDATION

Ten years after its creation, DHS reports to over 100 congressional committees and subcommittees.⁸⁸ Many of these committees have no significant role in national security, but their strongholds over certain policies date back to before DHS was created.⁸⁹ Those who oppose committee consolidation argue that these committees are subject-matter experts and that the members and staff of these committees are in the best positions to hold DHS accountable for properly carrying out the missions of each component.⁹⁰ In addition, critics point out

85. See *History*, U.S. SENATE COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, <http://www.hsgac.senate.gov/about/history> (last visited Nov. 18, 2014).

86. See *Homeland Security Jurisdiction*, *supra* note 66, at 8.

87. H.R. DOC NO. 112-161, at 455–56 (clause (1)(j) of Rule X).

88. THE ASPEN INST., *supra* note 13, at 14.

89. For example, the Committee on Transportation and Infrastructure has limited national security expertise, but retains jurisdiction over the United States Coast Guard. See H.R. Doc. No. 112-161 at 475 (clause 1(r)(1) of Rule X of the Rules of the House of Representatives).

90. See *Homeland Security Jurisdiction*, *supra* note 66, at 10.

that many components of DHS are responsible for non-security missions in addition to their missions related to security.⁹¹ For example, the U.S. Coast Guard's role in counterterrorism and port security has increased since September 11, 2001, but it still is responsible for its original missions: search and rescue operations, marine safety and environment protections, and icebreaking operations.⁹²

These arguments were also acknowledged during the debate over the creation of the House Homeland Security Committee.⁹³ Homeland security oversight is vital, and legislation is needed to ensure the safety and security of the American people. Consolidation of homeland security jurisdiction enjoys broad support from numerous stakeholders. Of course the 9/11 Commission supported this consolidation,⁹⁴ but other groups have voiced concerns over the status quo: the WMD Commission,⁹⁵ relatives of three 9/11 victims,⁹⁶ the Heritage Foundation,⁹⁷ the Brookings Institution,⁹⁸ the Center for Strategic and International Studies,⁹⁹ and the Aspen Institute.¹⁰⁰ In addition, the three former DHS Secretaries have voiced their support for consolidation.¹⁰¹

91. See, e.g., *Homeland Security Jurisdiction*, *supra* note 66, at 81.

92. See *Missions of the United States Coast Guard*, U.S. COAST GUARD, <http://www.uscg.mil/top/missions/> (last updated Mar. 30, 2014).

93. See *Homeland Security Jurisdiction*, *supra* note 66, at 5 (statement of Rep. Christopher Cox).

94. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 7, at 421.

95. See ASPEN INST., *supra* note 13, at 17.

96. Letter from Carol Ashley, Mary Fetchet, Frank Fetchet & Carie Lemack to Michael McCaul, Chairman, House Comm. on Homeland Sec., (Sept. 16, 2014), available at <https://rules.house.gov/sites/republicans.rules.house.gov/files/113-2/PDF/HHRG-113-RU04-MState-M001157-20140917.pdf>.

97. Jessica Zuckerman, *Politics Over Security: Homeland Security Congressional Oversight in Dire Need of Reform*, HERITAGE FOUND. (Sept. 10, 2012), <http://www.heritage.org/research/reports/2012/09/homeland-security-congressional-oversight-in-dire-need-of-reform>.

98. Norm Ornstein & Thomas Mann, *A New Permanent Standing Committee on Homeland Security?*, BROOKINGS INST. (May 19, 2003), <http://www.brookings.edu/research/testimony/2003/05/19governance-mann>.

99. CSIS-BENS TASK FORCE ON CONGRESSIONAL OVERSIGHT OF THE DEP'T OF HOMELAND SEC., *UNTANGLING THE WEB: CONGRESSIONAL OVERSIGHT AND THE DEPARTMENT OF HOMELAND SECURITY 1* (2004).

100. ASPEN INST., *supra* note 13, at 3.

101. Letter from Tom Ridge, Michael Chertoff, & Janet Napolitano, former Homeland Sec. Sec'ys, to Michael McCaul, Chairman, House Comm. on Homeland Sec. (Sept. 11, 2014), available at <https://rules.house.gov/sites/republicans.rules.house.gov/files/113-2/PDF/HHRG-113-RU04-MState-M001157-20140917.pdf>.

A. *The Nation Is Less Secure Without Consolidation*

The illogical sharing of jurisdiction over DHS not only defies common sense, but actually harms DHS's ability to protect the nation.¹⁰² Former DHS Secretary Michael Chertoff stated that committees that have no homeland security focus (like the Agriculture or Small Business panels, for example) risk directing DHS agencies in a way that conflicts with broader national security strategy.¹⁰³ Members of Congress like having a say over homeland security and the programs DHS administers, since more turf means more control and ultimately more power.¹⁰⁴ However, the promotion of individual interests that are not necessarily a part of, or in line with, the broader homeland security mission distracts from DHS's ultimate goal. Thus, while increasing the number of involved committees may maximize the electoral benefits for members, it may also undercut the ability of Congress to direct and respond to the actions of the Department.¹⁰⁵ Fractured jurisdiction prevents Congress from properly responding to evolving threats like foreign fighters affiliated with the Islamic State of Iraq and the Levant, Ebola, cybersecurity vulnerabilities, or other emerging issues. As former Heritage Foundation President Ed Feulner observed, "The slowdowns and turf battles that go hand in hand with excessive oversight hamper the Homeland Security Department's efforts to better protect the nation."¹⁰⁶

In addition, critical pieces of legislation have failed to become law because they cannot pass out of non-homeland-security committees. When solving a problem, there are likely to be many possible courses of legislative action, and it takes time and resources to coordinate and pursue any particular approach. Agreeing upon and implementing a legislative plan, however, becomes more costly in time and resources as the number of involved committees increases.¹⁰⁷ This is

102. See Zuckerman, *supra* note 97.

103. See Ambreen Ali, *Oversight Confusion Hinders Security Policy*, ROLL CALL (Sept. 8, 2011), http://www.rollcall.com/issues/57_25/oversight-confusion-hinders-security-policy-208537-1.html.

104. Michelle Norris & Robert Siegel, *Who Oversees Homeland Security? Um, Who Doesn't?*, NPR (July 20, 2010, 2:33 PM), <http://www.npr.org/templates/story/story.php?storyId=128642876>.

105. Joshua D. Clinton et al., *Influencing the Bureaucracy: The Irony of Congressional Oversight* 58 AM. J. POL. SCI. 387, 393 (2014).

106. Edwin J. Feulner, *For Homeland Security, It's Bureaucracy as Usual*, HERITAGE FOUND. (Sept. 11, 2012), <http://www.heritage.org/research/commentary/2012/09/for-homeland-security-its-bureaucracy-as-usual>.

107. See Norris & Siegel, *supra* note 104 (quoting former Secretary Chertoff who stated, "We calculated that in 2007–2008, there were more than 5,000 briefings and 370 hearings That consumes an awful lot of time. But truthfully . . . most people

true not only because of relatively mundane but time-consuming tasks such as setting up meetings, circulating legislation, holding hearings, and finding time on the legislative calendar, but also because some committees may decide not to act on a bill referred to them, thus exerting something like veto authority over legislative activity in particular policy areas.¹⁰⁸ Influencing agency policy becomes increasingly more difficult when congressional actors fail to agree on a policy.¹⁰⁹

The perpetuation of security vulnerabilities, while legislation intended to address them has stalled, remains one of the most disturbing unintended consequences of fractured jurisdiction. For example, in the 112th Congress, the Committee considered House Bill 2356, the WMD Prevention and Preparedness Act of 2012.¹¹⁰ House Bill 2356 established a Special Assistant to the President for Biodefense, and directed the intelligence and homeland-security-related agencies to collaborate on a strategic plan to counter threats coming from chemical, biological, radiological, and nuclear threats.¹¹¹ The measure was referred primarily to the Homeland Security Committee in the House, but additionally to five other committees.¹¹² The Homeland Security Committee was the only committee to hold a markup of the legislation.¹¹³ As a result, the legislation sat dormant for eight months until the end of the Congress in December, when inaction by the five additional committees prevented consideration by the full House.¹¹⁴ Legislation enhancing cybersecurity would also address important security vulnerabilities, but congressional infighting has prevented such legislation from being enacted. Instead of a coherent government-wide policy, the executive branch continues with a fractured federal cybersecurity policy, located in favored agencies inside and outside

miss the biggest problem. And that is that the direction you get from the committees tends to be inconsistent.”).

108. Essentially, a measure will die in committee as a result of a committee of jurisdiction choosing not to mark up or advance the legislation. *See About Committees*, OPEN CONG., <http://www.opencongress.org/about/congress> (last visited Dec. 22, 2014).

109. Clinton et al., *supra* note 105, at 6.

110. H.R. 2356, 112th Cong. (2012).

111. *Id.* §§ 101, 2105.

112. *See H.R.2356—WMD Prevention and Preparedness Act of 2012*, CONGRESS.GOV, <https://www.congress.gov/bill/112th-congress/house-bill/2356/committees> (last visited Dec. 22, 2014) (showing that the measure was also referred to the Committees on Transportation & Infrastructure; Foreign Affairs; Energy & Commerce; Science, Space, & Technology; and the House Permanent Select Committee on Intelligence).

113. *Id.*

114. *Id.*

DHS.¹¹⁵ This problem appears to be a direct consequence of committee responsibility redundancy—the overlap of legislative roles that ultimately complicates congressional oversight and results in less effective and less focused congressional control over policy.

This exact practice remains one of the main reasons why a DHS authorization measure has failed to pass. The need for this legislation will be discussed later.¹¹⁶

B. Congress Is Ceding Power to the Executive Branch

The dispersion of jurisdiction renders Congress less effective and increases the President's power to direct DHS and determine its policies.¹¹⁷ The number of recommendations made by over 100 congressional committees not only leaves DHS without a clear picture of congressional intent, but the volume of messages also allows DHS to selectively ignore congressional wishes.¹¹⁸ This problem was demonstrated explicitly during consideration of the measure mentioned above, House Bill 2356, the WMD Prevention and Preparedness Act of 2012.¹¹⁹ The legislation established the position of a Special Assistant to the President for Biodefense, a position that existed under Presidents Bill Clinton and George W. Bush but was eliminated in the Obama administration.¹²⁰ The Committee urged the Obama Administration to reestablish the position, but those calls went unheeded. Congressional inaction on bioterrorism legislation has therefore allowed the executive branch to unilaterally make decisions like eliminating key positions that affect national security.

Inaction has also led the executive branch to act when Congress fails to provide guidance. The House has taken a piecemeal approach to the authorization of cybersecurity legislation since 2002,¹²¹ despite cybersecurity emerging as one of the fastest growing threats to our

115. See ASPEN INST., *supra* note 13, at 16.

116. See *infra* Part II.D.

117. See ASPEN INST., *supra* note 13, at 13.

118. Zuckerman, *supra* note 97.

119. H.R. 2356, 112th Cong. (2012).

120. See *id.* § 101; *The WMD Prevention and Preparedness Act of 2011: Joint Hearing on H.R. 2356 Before the Subcomm. on Cybersec., Infrastructure Prot., & Sec. Techs. & the Subcomm. on Emergency Preparedness, Response & Comm'ns of the H. Comm. on Homeland Sec.*, 112th Cong. 20 (2011) (statement of Dr. Robert Kaldec, former Special Assistant to the President for Biodefense).

121. See *e.g.*, National Cybersecurity Protection Act of 2014, Pub. L. No. 113-282, 128 Stat. 3066; Federal Information Security Modernization Act of 2014, Pub. L. No. 113-283, 128 Stat. 3073; Cybersecurity Enhancement Act of 2014, Pub. L. No. 113-274, 128 Stat. 2971; Federal Information Security Management Act of 2002, Pub. L. No. 107-347, § 301-05, 116 Stat. 2946.

nation. In the 113th Congress alone, the Committee on Homeland Security; the Committee on Science, Space, and Technology; the Committee on Oversight and Government Reform; and the House Permanent Select Committee on Intelligence all produced cybersecurity bills, only a portion of which were enacted.¹²² As a result of the dueling processes and ultimate inaction, the Obama Administration issued an Executive Order in 2013 calling for the development of a voluntary cybersecurity framework that includes interagency cooperation between DHS and the National Institute of Standards and Technology, also involving the Departments of Treasury, Justice, and Commerce, as well as the General Services Administration.¹²³ In addition, over the years, National Security Presidential Directive 54, Office of Management and Budget Memorandum 10-28, and Office of Management and Budget Memorandum 14-03 have delegated operational authority of federal information security to DHS.¹²⁴ Congress has authorized some—but not all—of this activity, and some members of Congress may not approve of certain provisions in the Executive Order or memorandum; but a lack of cohesion on cybersecurity policy, partially caused by fractured jurisdiction, has allowed the executive branch to take these steps.

As Clinton et al. have concluded, “[W]hen more committees are involved in monitoring and potentially directing agency policymaking, Congress is less influential than the President for determining agency policy.”¹²⁵ Since the Executive has the ability to unilaterally affect agency policy without having to coordinate collective action, that office becomes the most important and most effective influence over DHS. Moreover, because agency executives perceive greater influence from the White House than from either congressional committees or the majority party in Congress, oversight by congressional committees may become less effective.¹²⁶

122. National Cybersecurity and Critical Infrastructure Protection Act of 2014, H.R. 3696, 113th Cong. (2013); Cybersecurity Enhancement Act of 2012, H.R. 2096, 112th Cong. (2012); Federal Information Security Amendments Act of 2013, H.R. 1163, 113th Cong. (2013); and Cyber Intelligence Sharing and Protection Act, H.R. 624, 113th Cong. (2013), respectively.

123. Exec. Order No. 13,636, 78 Fed. Reg. 11,739 (Feb. 12, 2013).

124. NATIONAL SECURITY PRESIDENTIAL DIRECTIVE 54 (2008), available at <http://fas.org/irp/offdocs/nspd/nspd-54.pdf>; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB MEMO. 14-03, ENHANCING THE SECURITY OF FEDERAL INFORMATION & INFORMATION SYSTEMS (2013).

125. Clinton et al., *supra* note 105, at 2.

126. See ASPEN INST., *supra* note 13, at 13.

C. DHS Leaders Have Less Time to Do Their Jobs and to Focus on the Mission of Ensuring Homeland Security

Requiring DHS to take direction from so many committees negatively impacts the Department. According to former Homeland Security Secretary Michael Chertoff, “This [jurisdictional arrangement] is not just a nuisance. . . . [T]his really affects the ability [of the Department Secretary] to execute a coherent, comprehensive strategy for homeland Security.”¹²⁷ Another former Homeland Security Secretary, Tom Ridge, stated that it was important for Congress to be in charge of oversight for DHS: “Oversight is the duty of Congress. It is your responsibility and it is absolutely necessary. But the current number of congressional committees with homeland security jurisdiction is not oversight, it is overkill.”¹²⁸

DHS personnel spend thousands of hours preparing for hearings, briefings, and meetings with dozens of committees.¹²⁹ In 2009, DHS spent the equivalent of sixty-six working years responding to congressional inquiries, at a cost of \$10 million in taxpayer money.¹³⁰ In 2007 and 2008, the Department of Veterans Affairs, with roughly the same budget as DHS, testified at half the number of hearings and gave less than one-tenth the number of briefings that DHS did in that same time period.¹³¹ In comparison to DHS, the Department of Veterans Affairs has two primary authorizing committees, the House Committee on Veterans’ Affairs and the Senate Committee on Veterans’ Affairs, as well as two appropriating subcommittees.¹³² As shown below, similarly lean oversight structures are common among the majority of Cabinet-level departments and agencies.¹³³

Department	House Committee(s)	Senate Committee(s)
Agriculture	Agriculture	Agriculture, Nutrition & Forestry
Defense	Armed Services/Intelligence	Armed Services/Intelligence
Education	Education & the Workforce	Health, Education, Labor & Pensions
Energy	Energy & Commerce	Energy & Natural Resources

127. See Ali, *supra* note 103 (quoting Michael Chertoff).

128. *Help Wanted at DHS: Implications of Leadership Vacancies on the Mission and Morale: Hearing Before the H. Comm. on Homeland Sec.*, 113th Cong. 11 (2013) (statement of Hon. Tom Ridge, former Sec’y, Dep’t of Homeland Sec.).

129. ASPEN INST., *supra* note 13, at 12.

130. ASPEN INST., *supra* note 13.

131. ASPEN INST., *supra* note 13, at 10.

132. See ASPEN INST., *supra* note 13, at 8.

133. ASPEN INST., *supra* note 13.

Justice	Judiciary	Judiciary
Labor	Education & the Workforce	Health, Education, Labor & Pensions
Director of National Intelligence/CIA	Intelligence	Intelligence
State	Foreign Affairs	Foreign Relations
Treasury	Financial Services/Ways & Means	Finance/Banking, Housing & Urban Affairs
Veterans' Affairs	Veterans' Affairs	Veterans' Affairs

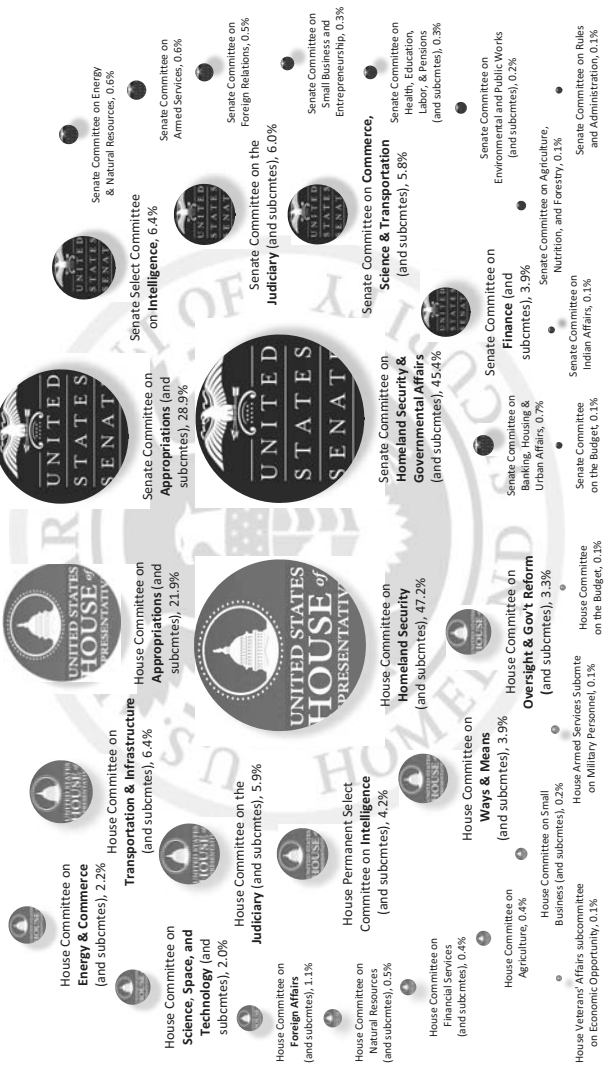
Lee Hamilton, Vice Chairman of the 9/11 Commission, stated, “The most effective oversight is where you concentrate primary oversight in a single committee”¹³⁴ Unfortunately, the exact opposite has occurred for DHS. The graphic below helps illustrate exactly how severe this problem is.

134. HOMELAND CONFUSION (Annenberg Pub. Pol’y Ctr. 2014), *available at* <http://www.annenbergpublicpolicycenter.org/homeland-confusion-video-stream/>.

DHS Congressional Engagement ~ 112th Congress ~ 119 Committees, Subcommittees, caucuses and commissions

1650 engagements with 17 of the
21 standing House Committees;
204 were hearings

1346 engagements with 17 of the
25 standing Senate Committees;
82 were hearings



Circle size is proportioned as percentage of total chamber engagements.
A committee shadowed in yellow or blue has held hearing(s) where DHS has testified.



DHS Office of Legislative Affairs

January 2013

There are 119 committees and subcommittees that have claimed a piece of DHS jurisdiction.¹³⁵ Just examining the House, the Committee on Homeland Security accounts for less than half of all engagements¹³⁶ with DHS, approximately 47.2%.¹³⁷ To compare, the Department of Defense has a budget that is ten times the size of DHS's and employs millions more, yet it reports to only thirty-six committees and subcommittees.¹³⁸ Unfortunately, the situation does not look to be improving. According to DHS, in fiscal year 2014 DHS officials met with House offices and committees on 1742 occasions, a 6.5% increase from fiscal year 2013.¹³⁹ In addition, DHS testified at 123 hearings in fiscal year 2014, a 35.1% increase, which resulted in 180 witnesses, a 30.4% increase.¹⁴⁰ All of these engagements create an enormous burden on DHS and result in its officials spending large amounts of time on Capitol Hill rather than running their respective agencies and carrying out the Department's missions.¹⁴¹

With DHS accountable to so many "bosses," it is effectively accountable to no one. Overlapping hearings, briefings, and congressional inquiries from so many committees result in conflicting guidance in carrying out specific mission sets, allowing DHS to essentially ignore congressional recommendations.¹⁴² Since its inception, DHS has consistently been on the Government Accountability Office's High Risk List of agencies and programs at risk for waste, fraud, abuse, and mismanagement,¹⁴³ and it has been designated as one of the worst places to work in the federal

135. ASPEN INST., *supra* note 13, at 11.

136. Engagements are hearings, briefings and meetings. These do not include responses to letters or phone calls from members and staff. *Id.*

137. *Id.*

138. *Id.* at 10.

139. DEP'T OF HOMELAND SEC. OFFICE OF LEGISLATIVE AFFAIRS, CONGRESSIONAL ENGAGEMENT METRICS (Sept. 30, 2014) (on file with author).

140. *Id.*

141. See *The Secretary's Vision for the Future—Challenges and Priorities: Hearing Before the H. Comm. on Homeland Sec.*, *supra* note 14 (statement of Hon. Jeh C. Johnson, Sec'y, U.S. Dep't of Homeland Sec.).

142. ASPEN INST., *supra* note 13, at 13.

143. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-444T, HIGH RISK SERIES: GOVERNMENT-WIDE 2013 UPDATE AND PROGRESS MADE BY THE DEPARTMENT OF HOMELAND SECURITY 1, 13 (2013). DHS was considered high risk at the time of its creation because the department had to create one agency from twenty-two agencies, and the GAO determined that a failure to address the inherent challenges would have negative effects. *Id.* at 1. In 2013, the GAO noted: "DHS has made considerable progress in transforming its original component agencies into a single department. As a result, GAO narrowed the scope of the high-risk area and changed the name from *Implementing and Transforming the Department of Homeland Security to Strengthening the Department of Homeland Security Management Functions*." *Id.*

government.¹⁴⁴ While DHS has done little to remedy these problems, it is Congress's responsibility to help fix them. Unfortunately, Congress has been woefully inadequate.

D. *DHS Needs to Be Reauthorized*

The Department of Homeland Security is the third largest agency in the government with a wide range of missions, from securing hundreds of flights a day and patrolling thousands of miles of border, to preventing acts of terrorism and safeguarding cyberspace.¹⁴⁵ With a budget of nearly \$60 billion¹⁴⁶ and more than 240,000 employees,¹⁴⁷ DHS has not been reauthorized since it was created in 2002. Many attempts have been made over the years, but every venture has failed.¹⁴⁸ For example, in the 112th Congress, House Bill 3116—the Department of Homeland Security Authorization Act for Fiscal Year 2012—was held up in the committee process by another committee,¹⁴⁹ and in the 110th Congress, an authorization measure was completely stripped of important homeland security provisions in order to appease other committee chairmen before a blessing was given for the legislation to move forward.¹⁵⁰ The lack of reauthorization results in a defi-

144. *The Best Places to Work in the Federal Government 2013 Rankings*, P'SHIP FOR PUB. SERV., <http://bestplacetowork.org/BPTW/rankings/detail/HS00> (last visited Nov. 15, 2014) (ranking DHS as the lowest rated agency in terms of leadership, strategy, and opportunity for advancement).

145. *See About DHS*, DEP'T OF HOMELAND SEC., <http://www.dhs.gov/about-dhs> (last updated Feb. 27, 2014).

146. *See DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF—FISCAL YEAR 2015 10* (2014), available at <http://www.dhs.gov/sites/default/files/publications/FY15BIB.pdf>.

147. *See id.*

148. *See H.R. 5814—Department of Homeland Security Authorization Act for Fiscal Year 2007*, CONGRESS.GOV, <https://www.congress.gov/bill/109th-congress/house-bill/5814> (last visited Dec. 22, 2014); *H.R. 1684—Department of Homeland Security Authorization Act for Fiscal Year 2008*, CONGRESS.GOV, <https://www.congress.gov/bill/110th-congress/house-bill/1684> (last visited Dec. 22, 2014); *H.R. 3116—Department of Homeland Security Authorization Act for Fiscal Year 2012*, CONGRESS.GOV, <https://www.congress.gov/bill/112th-congress/house-bill/3116> (last visited Nov. 14, 2014).

149. *See H.R. 3116—Department of Homeland Security Authorization Act for Fiscal Year 2012*, CONGRESS.GOV, <https://www.congress.gov/bill/112th-congress/house-bill/3116> (last visited Nov. 14, 2014).

150. *See* 153 CONG. REC. 11,807 (2007) (statement of Rep. Peter King). These differences in text can be seen when examining the reported version from the Committee on Homeland Security to the engrossed version in the House, which was the version of text brought up for consideration after concessions were made. *See H.R. 1684—Department of Homeland Security Authorization Act for Fiscal Year 2008*, CONGRESS.GOV, <https://www.congress.gov/bill/110th-congress/house-bill/1684/text/3799> (last visited Dec. 22, 2014) (listing different versions of the bill).

ciency of policy direction and congressional guidance, and an overreliance on the appropriations process.¹⁵¹

Many programs within DHS operate without proper authorization and so depend on annual appropriations for their continued existence and do not have statutes specifying the responsibilities they should carry out.¹⁵² In addition, some DHS components have never been authorized, like the U.S. Immigration and Customs Enforcement,¹⁵³ or are operating with borrowed statutory authority that was granted to other agencies, like the U.S. Customs and Border Protection when it existed at the U.S. Customs Service before creation of DHS.¹⁵⁴ Streamlined jurisdiction will assist in achieving an annual reauthorization process for DHS, and one that promotes efficient and effective policies, provides thorough oversight for a myriad of missions, and ensures that duplication, waste, fraud, and abuse are kept in check.

III.

RECOMMENDED CHANGES TO THE RULES OF THE HOUSE OF REPRESENTATIVES, RULE X: WHAT SHOULD STREAMLINED JURISDICTION LOOK LIKE?

The proposals below are not a bare power grab. Rather, these recommendations are meant to provide clearer guidance to DHS, create a more favorable environment to pass vital legislation, and to end the waste of limited resources because of duplicative oversight. But first and foremost, these proposals are meant to make the United States more secure. They are modeled after the jurisdiction of the House Armed Services Committee¹⁵⁵ and based on sound policy principles. As previously stated, the Department of Defense has a budget that is ten times greater than DHS's and has millions more employees.¹⁵⁶ Despite these facts, oversight of the Department of Defense is consolidated within two primary committees, the House Armed Services Committee and the Senate Armed Services Committee.¹⁵⁷ Congress accomplishes an annual defense authorization measure, and

151. ASPEN INST., *supra* note 13, at 12.

152. ASPEN INST., *supra* note 13, at 12.

153. Responsibilities for the Immigration and Customs Enforcement Agency are not included in the Homeland Security Act of 2002 or any other statute. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. As such, the Agency lacks any statutory guidance for purposes of carrying out its responsibilities.

154. 6 U.S.C. § 203 (2012) (transferring the functions, personnel, assets, and liabilities of the United States Customs Service to the Secretary of Homeland Security).

155. *See* H.R. COMM. ON ARMED SERVS., 113TH CONG., RULES OF THE COMM. ON ARMED SERVS. (Comm. Print 2013).

156. ASPEN INST., *supra* note 13, at 10.

157. ASPEN INST., *supra* note 13, at 8.

whatever legislative provisions that fall under the jurisdiction of additional committees are protected through a letter exchange between committee chairmen and the inclusion of conferees from multiple committees at any House-Senate conference on legislation.¹⁵⁸ If Congress can streamline jurisdiction over a robust department with a large national security presence like the Department of Defense, it should certainly be able to refocus itself to consolidate oversight over the Department of Homeland Security and put an end to harmful turf battles that have resulted in making Americans less safe. These changes are designed to realign the focus of congressional and departmental resources to ensure they are used optimally to address homeland security priorities.

A. *Overall Homeland Security Policy*

While on its face the term “overall homeland security policy” is broad and all-encompassing and so appears to greatly expand the jurisdiction of the Committee on Homeland Security, it is limited to those activities not already in the jurisdiction of another committee.¹⁵⁹ In fact, the Committee has only received one referral of a legislative measure under this specific prong of jurisdiction in its history, the 9/11 Commission Review Act.¹⁶⁰

A change to clause 1(j)(1) of Rule X to “overall homeland security and domestic counterterrorism policy” would provide for a more robust examination of government-wide homeland security and counterterrorism policies. But first, the interpretation of the clause must be broadened. Without such a change, this prong of jurisdiction would continue to be meaningless, as homeland security activities already in the jurisdiction of existing committees would remain there and consolidation would remain elusive. Overall homeland security and domestic counterterrorism policy must encompass any activity that is inherently counterterrorism or homeland-security related. As it stands now, if the Department of Agriculture were to create a Homeland Security Communications Center to address agro-terrorism concerns regarding the threat to crops and livestock from terrorist attacks, the Committee on Homeland Security would not have any jurisdiction

158. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011).

159. *See* 151 CONG. REC. H25 (daily ed. Jan. 4, 2005) (submission by Rep. Dreier of legislative history to accompany changes to Rule X).

160. H.R. 2623, 112th Cong. (2011).

under the existing interpretation and rules.¹⁶¹ However, if the Committee on Homeland Security were to focus on the protection of agricultural interests, then the Committee on Agriculture would be involved since this policy area already exists within its jurisdiction.¹⁶² While members of the Committee on Agriculture may have expertise in crops and livestock, they likely do not have expertise in national security matters or emerging security threats. If jurisdiction over homeland security is not broadened to include counterterrorism efforts that involve other federal entities, homeland security matters will remain in committees whose interests are not primarily security. Of course, there must be limitations on this jurisdiction to prevent duplication and conflicting guidance as currently exists with DHS. Efforts within the Department of Defense, the intelligence community, and the Federal Bureau of Investigation should not fall under the broader definition of “overall homeland security and counterterrorism policy.” These agencies are robust and experienced national security entities that are already overseen by national security committees with the expertise to ensure that mission sets are properly carried out.

In addition to a broad interpretation, this rule change would do away with the requirement of a textual nexus to terrorism for any bill referred to the Committee on Homeland Security. Currently, if the word “terrorism” does not appear in a bill’s text, the Committee does not receive a referral of the legislation, either initially or sequentially.¹⁶³ An example of this requirement is apparent in jurisdiction over the Chemical Facilities Anti-Terrorism Standards program (CFATS) at DHS. CFATS is a program established to provide risk-based performance standards for the security of our nation’s chemical facilities against acts of terrorism.¹⁶⁴ In the 112th Congress, the Committee introduced House Bill 901, the Chemicals Facilities Anti-Terrorism Security Authorization Act of 2011,¹⁶⁵ which was referred primarily to the Committee on Homeland Security and additionally to the Committee on Energy and Commerce because the word “terrorism” appeared in the text of the Bill.¹⁶⁶ Simultaneously, the Commit-

161. See 151 CONG. REC. H25 (submission by Rep. Dreier of legislative history to accompany changes to Rule X).

162. See *id.*

163. *Id.*

164. See *Chemical Facility Anti-Terrorism Standards*, DEP’T OF HOMELAND SEC., <http://www.dhs.gov/chemical-facility-anti-terrorism-standards> (last visited Nov. 24, 2014).

165. H.R. 901, 112th Cong. (2011).

166. See *H.R. 901—Chemical Facility Anti-Terrorism Security Authorization Act of 2011*, CONGRESS.GOV, <https://www.congress.gov/bill/112th-congress/house-bill/901> (last visited Dec. 2, 2014).

tee on Energy and Commerce introduced House Bill 908, the Full Implementation of the Chemical Facility Anti-Terrorism Standards Act.¹⁶⁷ This legislation was referred solely to the Committee on Energy and Commerce.¹⁶⁸ After a markup was held by the Committee on Energy and Commerce, the Committee on Homeland Security could not successfully seek a sequential referral of House Bill 908 because it lacked a textual nexus to terrorism, despite authorizing the exact same program as House Bill 901—a program to protect chemical facilities from acts of terrorism.¹⁶⁹ As a result of fractured jurisdiction and the two committees being unable to come to agreement, the program has historically failed to achieve a long-term authorization, and has relied solely on annual appropriations for survival.¹⁷⁰

CFATS is just one example of committees omitting the word “terrorism” in order to avoid a referral to the Committee on Homeland Security. Other recent examples include the following:

An authorization of the Integrated Public Alert and Warning Systems (IPAWS), which uses the nation’s alert and warning structure to allow public safety officials to alert the public in a specific area or region about serious emergencies or threats, has stalled in the last two Congresses.¹⁷¹ The Committee on Homeland Security and the Committee on Transportation and Infrastructure have introduced competing pieces of legislation.¹⁷² While the Committee on Homeland Security’s bill authorizes IPAWS for use during acts of terrorism as well as in other emergencies,¹⁷³ the bill within the Committee on Transportation and Infrastructure authorizes the issuance of alerts under “all conditions,” which arguably includes acts of terrorism.¹⁷⁴ As a result of the omission of the word “terrorism,” the Committee on Homeland Security did not receive an initial referral of the legisla-

167. H.R. 908, 112th Cong. (as introduced in House, Mar. 3, 2011).

168. See *H.R. 908—Full Implementation of the Chemical Facility Anti-Terrorism Standards Act*, CONGRESS.GOV, <https://www.congress.gov/bill/112th-congress/house-bill/908> (last visited Dec. 2, 2014).

169. See 151 CONG. REC. H25 (daily ed. Jan. 4, 2005) (submission by Rep. Dreier of legislative history to accompany changes to Rule X); interview with Staff of the House Parliamentarian in D.C. (May 26, 2011).

170. See ASPEN INST., *supra* note 13, at 12–13. *But see* An Act to Recodify and Reauthorize the Chemical Facility Anti-Terrorism Standards Program, Pub. L. No. 113-254, 128 Stat. 2898 (2014) (authorizing the CFATS program for four years).

171. See H.R. 3283, 113th Cong. (2013); H.R. 3563, 112th Cong. (2011).

172. H.R. 3283 (introduced by the Committee on Homeland Security); H.R. 3300, 113th Cong. (2013) (introduced by the Committee on Transportation and Infrastructure).

173. H.R. 3283 § 526.

174. H.R. 3300 § 102(b).

tion.¹⁷⁵ IPAWS has been used in response to terrorism: it was used following the 2013 Boston Marathon bombing and during the ensuing manhunt to alert the residents of Massachusetts of developing information and potential threats.¹⁷⁶ Still, the Committee on Transportation and Infrastructure would not amend their legislation to include acts of terrorism as a proper use of IPAWS.¹⁷⁷

House Bill 3635, the Safe and Secure Websites Act, is a measure introduced in the 113th Congress that addresses the federal government's response to attacks on federal information systems, or the ".gov" domain.¹⁷⁸ Currently the operational responsibility lies with DHS to counter attacks against federal information systems, but the committee with jurisdiction is the Committee on Oversight and Government Reform.¹⁷⁹ Although an act of terrorism is a legitimate threat against federal information systems, it is not considered in the bill text.¹⁸⁰ The authors rely on the term "breach" to encompass all intrusions, including acts of terror.¹⁸¹ As a result, the Committee on Homeland Security was unsuccessful in seeking a sequential referral of the legislation, on the basis that its jurisdiction was not triggered even though DHS was responsible for the activity.¹⁸² This jurisdiction, however, has not been tested since the passage of the Federal Information Security Modernization Act of 2014, which could be interpreted to bolster the jurisdiction of the Committee on Homeland Security.

Finally, in the 112th and 113th Congresses, multiple attempts were made to authorize pandemic and all-hazards preparedness efforts, but the Committee on Homeland Security played no role in this process.¹⁸³ The legislation protected the American public from illnesses stemming from a chemical or biological attack or an unintentional outbreak, but the Committee's jurisdiction was not triggered

175. Because the bill does not specifically identify an act of terrorism as a permissible use of the system, the Committee on Homeland Security's jurisdiction is not triggered. *Id.*

176. See ASSEMBLY COMM. ON UTILS. & COMMERCE & JOINT LEGISLATIVE COMM. ON EMERGENCY MGMT., CAL. LEGISLATURE, BRIEFING PAPER ON: WIRELESS EMERGENCY ALERT SYSTEM 4, available at <http://autl.assembly.ca.gov/sites/autl.assembly.ca.gov/files/reports/WEA%20White%20paper.pdf>.

177. Meeting between staff of the Committee on Homeland Security and staff of the Committee on Transportation and Infrastructure in D.C. (June 9, 2014) (on file with author).

178. H.R. 3635, 113th Cong. (2013).

179. *Id.*

180. See *id.*

181. See *id.* § 3.

182. Telephone Conversation with the House Parliamentarian (July 28, 2014).

183. See H.R. 6672, 112th Cong. (2012); H.R. 307, 113th Cong. (2013).

because the term “terrorism” was not included in the bill text.¹⁸⁴ In reality, the Department of Homeland Security works with the Department of Health and Human Services to operate a national stockpile and biodefense fund that directs research and purchases necessary vaccinations in preparation for an outbreak or attack.¹⁸⁵ The phrase “all hazards” certainly should include acts of terror, so it is inherently counterterrorism-related in nature, but because the legislation does not use the precise word “terrorism,” the Committee has no ability to exercise proper oversight over activities in preparation for a chemical or biological attack on the homeland.¹⁸⁶

This insistence on a so-called textual nexus is detrimental to good policy, and appears to be used only to prohibit the Committee on Homeland Security from receiving referrals of legislation. Such tactics result in poor policy and ultimately congressional infighting where the only parties who suffer are DHS and the American people, who expect Congress to work past these differences and provide legislation for the security of the nation. By including overall domestic counterterrorism policy in the Committee’s jurisdiction and lifting the requirement that a policy not already exist within another committee’s jurisdiction, Congress can ensure that policies that deal with national security receive proper oversight from the individuals who have the most expertise in these areas: the members on the Homeland Security Committee. As it stands, the expertise of the Homeland Security Committee can be bypassed by simply removing a single word from the text of a bill. But if a policy or program is inherently counterterrorism-related in nature, then it is the obligation of the members of the Committee on Homeland Security to ensure that it is properly executed and receives the necessary resources and oversight to guarantee success.

B. Proposed Changes to Rule X

Jurisdiction over the organization, administration, and general management of DHS is limited to administrative efforts not already in the jurisdiction of other committees.¹⁸⁷ In addition, the phrase “overall homeland security policy” has been interpreted to cover only the man-

184. Conversation with Staff of the House Parliamentarian in D.C. (Nov. 15, 2011).

185. 42 U.S.C. § 247d-6b (2012).

186. See 151 CONG. REC. H25 (daily ed. Jan. 4, 2005) (submission by Rep. Dreier of legislative history to accompany changes to Rule X).

187. *Id.* (legislative history inserted by Rep. David Dreier) (“The jurisdiction of the Committee on Homeland Security would apply only to organizational or administrative aspects of the Department where another committee’s jurisdiction did not clearly apply. The Committee’s jurisdiction is to be confined to organizational and administrative efforts . . .”).

agerial side of the Department's functions, and does not apply to new programs or activities within the components.¹⁸⁸ Historically, the Committee has received referrals of legislation under this clause if legislation affects upper-level management at DHS or moves components in or out of the Department.¹⁸⁹ In the 113th Congress, the phrase "general management" was added to the Committee's Rule X jurisdiction¹⁹⁰ which might have transferred day-to-day programmatic operations to the Committee. However, a clarification was issued in the Congressional Record, stating that the change to Rule X was "intended to clarify the Committee's existing jurisdiction over organization and administration of the department, and is not intended to alter the pattern of bill referrals to the Committee on Homeland Security, nor is it intended to alter the existing oversight jurisdiction of the Committee on Homeland Security."¹⁹¹

DHS deserves the same clear instruction that Congress has given to other departments. For example, clause 1(c) of Rule X of the Rules of the House of Representatives lists the different branches of the military under the Department of Defense and makes clear that they are under the primary jurisdiction of the House Committee on Armed Services.¹⁹² A parallel approach should be taken with DHS and its components for the Committee on Homeland Security. Components of DHS are still operating within a mosaic of bureaucratic cultures maintained since the Department was created in 2003.¹⁹³ It is time that DHS is treated as one agency, not a mere aggregation of twenty-two separate entities. Congress still insists on treating Customs and Border Protection differently from Immigration and Customs Enforcement, and the U.S. Coast Guard differently from the Federal Emergency Management Agency.¹⁹⁴ As a result, Congress, through its fractured

188. *Id.*

189. Conversation with Staff of the House Parliamentarian in D.C. (May 21, 2012).

190. RULES OF THE HOUSE OF REPRESENTATIVES, R. X, cl. (1)(j)(2) H.R. DOC. NO. 121-161 at 455 (2013).

191. 158 CONG. REC. H12 (statement of Rep. Sessions).

192. H.R. DOC. NO. 121-161, at 439 (clause 1(c)(4) of Rule X).

193. For example, the U.S. Customs and Border Protection has not been authorized in the Homeland Security Act of 2002, but the authorities for the U.S. Customs Service within the Treasury Department were transferred to the Department of Homeland Security. 6 U.S.C. § 203(1) (2012). *But see* GOV'T ACCOUNTABILITY OFFICE, *supra* note 143, at 1 ("DHS has made considerable progress in transforming its original component agencies into a single department.").

194. *See* Steve Watkins, *DHS Head: Cybersecurity, Unity of Effort Top Priority List*, FED. TIMES (Oct. 17, 2014, 5:58 PM), <http://www.federaltimes.com/article/20141017/DHS/310170024/DHS-head-Cybersecurity-Unity-Effort-top-priority-list>.

jurisdiction, has perpetuated the existence of distinct and incongruent agency cultures.¹⁹⁵

It is absolutely necessary that the Committee on Homeland Security have primary jurisdiction over DHS and its components generally. While existing committees are reluctant to give up authority, without jurisdictional consolidation the Committee on Homeland Security is ineffective. According to Thomas M. Susman, "If we were to take a page from the Department of Homeland Security's Threat Advisory System, with green being exemplary and red counterproductive, the consensus would likely be that congressional oversight of homeland security rates an Orange: it is at the same time both duplicative and inadequate; in a word, a failure."¹⁹⁶ This change would ensure that the Committee could properly oversee the organization and administration of DHS in its entirety, including the strategic planning, budgeting, integration, reorganization and restructuring, and acquisitions of every component. As the primary authorizing committee over the operational components of DHS, the Committee can ensure federal homeland security programs are streamlined, cost-saving reforms are enacted, and programs critical to the security of the nation are effectively and efficiently authorized.¹⁹⁷ Furthermore, a comprehensive, department-wide strategy could be given to break down stove-piped mission areas. Additionally, costs could be reduced through a decrease in the number of personnel hours required due to duplicative testimonies, reports, and congressional briefings.

C. *"Functions of the Department of Homeland Security Relating to the Following"*

As shown previously, Rule X limits the jurisdiction of the Committee on Homeland Security to DHS's activities in specific areas

195. One culture is more desirable than twenty-two if DHS is to have a cohesive mission. An analogy to the Department of Defense is helpful: it would not be efficient or logical to treat the Army, Navy, and Air Force completely differently, and similarly there should not be different standards for Customs and Border Protection, the Coast Guard, and the Transportation Security Administration.

196. Thomas M. Susman, *Congressional Oversight of Homeland Security*, ADMIN. & REG. L. NEWS, Fall 2004, at 2.

197. This change would allow other committees to retain jurisdiction over non-homeland-security responsibilities of affected components. For example, an authorization of the U.S. Coast Guard would be in the primary jurisdiction of the Committee on Homeland Security, but jurisdiction over the Coast Guard's responsibilities pertaining to lifesaving services, lightships, and ocean derelicts would be retained within the Committee on Transportation and Infrastructure.

rather than broader subject matters.¹⁹⁸ The Committee on Homeland Security is the only House committee that has piecemeal jurisdiction over the department it oversees, and its jurisdiction is limited to the activities of that specific agency instead of over government-wide policy.¹⁹⁹ This means that, for example, the Committee would receive a referral of legislation that directs DHS to take steps to prepare for an attack that uses chemical, biological, radiological, or nuclear material, but would not receive a referral of legislation that directs the Department of Health and Human Services to complete the same task,²⁰⁰ despite the fact that the Department of Health and Human Services would rely on DHS for threat analysis and risk-based strategies, and to mediate relationships with state and local law enforcement on the front lines of any attack.²⁰¹ The Committee on Agriculture has jurisdiction over agricultural policy across the government (even agro-terrorism and the establishment of an agricultural biosecurity communication center).²⁰² The Committee on Armed Services has jurisdiction over military personnel, whether they perform military duties, help protect the border, or assist during federal disaster declarations.²⁰³ The Committee on the Judiciary has jurisdiction over immigration policy that is not limited to any one department, but has been interpreted to include actions and policies within DHS, the Department of Justice, and the Department of State.²⁰⁴ It is feared that the limitation placed on the Committee on Homeland Security discourages cooperation between committees on homeland security mat-

198. RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC NO. 112-161 at 455–56 R. X, cl. 1(j)(3), (2013) (giving the Committee jurisdiction over functions of DHS related to six categories: border and port security (except immigration policy and non-border enforcement); customs (except customs revenue); integration, analysis, and dissemination of homeland security information; domestic preparedness for and collective responses to terrorism; research and development; and transportation security).
199. *See id.* at 432–83 (Rule X, clause 1).

200. *See id.* at 475, 445 (Rule X, clauses 1(r)(1) & 1(f)(12)).

201. *See Furthering Public Health Security: Project Bioshield: Joint Hearing Before the Subcomm. on Health of the H. Comm. on Energy & Commerce and the Subcomm. on Emergency Preparedness & Response of the H. Select Comm. on Homeland Sec.*, 109th Cong. 18 (2003 statement of Hon. Tommy G. Thompson, Sec’y, Dep’t of Health & Human Servs.).

202. *See supra* text accompanying note 161.

203. *See* RULES OF THE HOUSE OF REPRESENTATIVES, R. X, cl. 1(c), H.R. DOC. NO. 112-161, at 439–41 (2013).

204. *See id.* at 460 (clause 1(l)(9) of Rule X of the Rules of the House of Representatives). Immigration policies are established through collaboration with the Departments of Homeland Security, Justice, and State. Quotas and visas are issued through the Department of State, the Department of Homeland Security enforces immigration at and within the country’s borders, and the Department of Justice investigates immigration-related crimes.

ters and in some cases results in other committees creating duplicative programs. The Committee's jurisdiction over homeland security policy should be expanded beyond simple Department functions. The following additions to Rule X would replace the current jurisdiction of the Committee on Homeland Security, which is limited within the confines of functions of DHS.

1. General management of the Department of Homeland Security, including the pay, promotion, retirement, and other benefits and privileges of personnel

As stated above, the Committee has jurisdiction over the management of DHS, which includes its organization and administration, and is triggered by legislation that addresses upper-level management positions and moving entities into and out of DHS.²⁰⁵ This change would preserve that jurisdiction, but include an additional layer of jurisdiction over DHS personnel. Currently the Committee does not have primary jurisdiction over DHS employees; the Committee on Oversight and Government Reform has jurisdiction over the “[f]ederal civil service, including intergovernmental personnel; and the status of officers and employees of the United States including their compensation, classification, and retirement.”²⁰⁶ However, this jurisdiction is not exclusive. A notable exception is the Committee on Armed Services, which has jurisdiction over the “pay, promotion, retirement, and other benefits and privileges of members of the armed forces.”²⁰⁷ As a national security committee, the Committee on Homeland Security should have the same jurisdiction over DHS personnel as the House Armed Services Committee has over Department of Defense personnel.

The current committee structure has delayed legislation affecting the overtime pay of border patrol agents. The Border Patrol Pay Reform Act was passed by the Senate and referred to the House Committee on Oversight and Government Reform primarily and the House Committee on Homeland Security additionally.²⁰⁸ The measure put more border patrol agents on the border, saved \$100 million annually,

205. See *supra* notes 198–199 and accompanying text.

206. H.R. Doc. No. 112-161, at 467 (clause 1(n)(1) of Rule X of the Rules of the House of Representatives).

207. *Id.* at 439 (clause 1(c)(10) of Rule X of the rules of the House of Representatives).

208. See *S. 1691—Border Patrol Agent Pay Reform Act of 2014*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/1691> (last visited Dec. 3, 2014) (tracking the bill's progress through Congress).

and addressed concerns regarding overtime pay.²⁰⁹ Despite the good-government and national security aspects of this legislation, the Committee on Homeland Security could not move on it until the Committee on Oversight and Government Reform acted, which took almost three months.²¹⁰

Some critics might argue that a separation is necessary between the armed forces and civil servants, and that only Department of Defense personnel should be managed separately from federal civil servants. However, other federal civil servants are exempt from the Committee on Oversight and Government Reform's close supervision, as well. For example, recent intelligence authorization acts, referred solely to the House Permanent Select Committee on Intelligence, included provisions regarding the "Central Intelligence Agency Retirement and Disability System" and authorized an increase in employee compensation and benefits.²¹¹ Many members of the intelligence community are not members of the armed forces, but do not fall within the Committee on Oversight and Government Reform's jurisdiction over the "[f]ederal civil service."²¹² Based on this precedent, Department of Homeland Security personnel, who carry out national security responsibilities, should fall under the jurisdiction of the Committee on Homeland Security to ensure that the personnel carrying out DHS's missions are properly compensated.

2. *Efforts of the Department of Homeland Security to prevent, prepare for, and respond to domestic acts of terrorism*

The Committee on Homeland Security currently has jurisdiction over DHS's functions pertaining to the domestic preparedness for and collective response to terrorism,²¹³ and this proposed language ensures that the Committee retains its jurisdiction over such functions. This jurisdictional prong would not alter that jurisdiction or infringe on the jurisdiction of other committees.

209. See Ramsey Cox, *Senate Passes Bill to Save Money on Border Patrol Overtime*, THE HILL (Sept. 19, 2014, 10:43 AM), <http://thehill.com/blogs/floor-action/senate/218316-senate-passes-bill-to-save-money-on-border-patrol-overtime>.

210. See *S. 1691—Border Patrol Agent Pay Reform Act of 2014*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/1691> (last visited Dec. 3, 2014).

211. See *H.R. 5743—Intelligence Authorization Act for Fiscal Year 2013*, CONGRESS.GOV, <https://www.congress.gov/bill/112th-congress/house-bill/5743> (last visited Dec. 3, 2014).

212. H.R. 5743, 112th Cong. § 301 (2012).

213. RULES OF THE HOUSE OF REPRESENTATIVES, R. X, cl. 1(j)(2), H.R. DOC. NO. 112-161, at 455 (2013).

3. *Intelligence, information sharing, and related activities of the Department of Homeland Security*

One of DHS's core missions is to coordinate information sharing and intelligence collection related to terrorism.²¹⁴ The Committee on Homeland Security should have clear jurisdiction over this mission.

The dissemination of homeland security information and intelligence products is currently within the jurisdiction of the Committee on Homeland Security.²¹⁵ The Office of Intelligence and Analysis (I&A) within DHS is the central conduit for information sharing among stakeholders, which include all members of the Intelligence Community, DHS's components, and federal, state, and local entities.²¹⁶ In this role, I&A supports the National Network of Fusion Centers, provides intelligence and information analysis and support to departmental components, and collaborates with state and local law enforcement agencies on homeland security information.²¹⁷ Additionally, I&A works closely with the intelligence branches of individual components of DHS, including the U.S. Coast Guard, Customs and Border Protection, Immigration and Customs Enforcement, and the Transportation Security Administration.²¹⁸ In addition to benefitting the broader intelligence community, DHS's intelligence and information-sharing activities also benefit departmental missions.²¹⁹ As a result, the Committee on Homeland Security should have jurisdiction over DHS's intelligence functions in order to ensure that the components have the appropriate resources to carry out their respective missions. Again, this is similar to the House Armed Services Committee's jurisdiction over "tactical intelligence and intelligence-related activities of the Department of Defense."²²⁰ Oversight of the individual intelligence offices of the branches of the armed forces all lie in the House Armed Forces Committee, as they are vital to the success of the activities of the Army, Navy, and Air Force.²²¹ Similarly, DHS's intelligence efforts are not only vital to the components carrying out

214. See 6 U.S.C. § 482 (2012).

215. RULES OF THE HOUSE OF REPRESENTATIVES, R. X, cl. 1(j)(3)(C), H.R. DOC. NO. 112-161, at 456 (2013).

216. *More About the Office of Intelligence and Analysis*, DEP'T OF HOMELAND SEC., <http://www.dhs.gov/more-about-office-intelligence-and-analysis-mission> (last updated Dec. 19, 2013).

217. See *id.*

218. *Id.*

219. See *id.*

220. H.R. DOC. NO. 112-161, at 439 (clause 1(c)(8) of Rule X of the Rules of the House of Representatives).

221. *Id.*

homeland security missions, but also to state and local officials partnering with the Department in a joint effort to keep the homeland secure.²²²

4. *Federal management of emergencies and disasters*

Currently, FEMA is within the primary jurisdiction of the Committee on Transportation and Infrastructure.²²³ The Committee on Homeland Security has jurisdiction over FEMA's response efforts relating to acts of terrorism, and the National Preparedness Grant Program.²²⁴ By moving the emergency and disaster responsibilities of FEMA away from the Committee on Transportation and Infrastructure and into the Committee on Homeland Security, the arbitrary distinction between disasters involving acts of terrorism and those that do not would be eliminated. In the early hours of an emergency, it is often unclear if actions were deliberately caused or naturally occurring. In addition, it is likely that interagency coordination does not drastically change from one emergency to the next, so having two committees oversee similar sets of protocol is redundant. One committee needs to be vested with jurisdiction over such functions to ensure uniformity and build on lessons learned. A logical distinction would be to place disaster recovery and the rebuilding efforts after an event under the purview of the Committee on Transportation and Infrastructure, and have the Committee on Homeland Security responsible for overseeing the interagency coordination and management of operations during the actual emergency.

5. *Security of the United States borders and ports of entry, including the Department of Homeland Security's responsibilities related to visas and other forms of permission to enter the United States*

First and foremost, this prong of jurisdiction would preserve the Committee's jurisdiction over border and port security functions of DHS, which include activities of Customs and Border Protection and the Coast Guard. In addition, this recommendation would address visa security concerns. Jurisdiction over the Visa Waiver Program is cur-

222. See *About the Office of Intelligence and Analysis*, DEP'T OF HOMELAND SEC., <http://www.dhs.gov/about-office-intelligence-and-analysis> (last updated Mar. 28, 2014).

223. H.R. DOC. NO. 112-161, at 475 (clause 1(r)(2) of rule X of the Rules of the House of Representatives).

224. 151 CONG. REC. H26 (daily ed. Jan. 4, 2005) (submission by Rep. Dreier of legislative history to accompany changes to Rule X).

rently shared between the Committee on Homeland Security and the Committee on the Judiciary.²²⁵ Nonetheless, the Visa Waiver Program's nexus to security and counterterrorism efforts has been greatly strengthened since 9/11.²²⁶ It is only logical that the Committee on Homeland Security should have primary jurisdiction over individuals who cross the country's borders and are permitted as temporary visitors. Since the emergence of the Islamic State of Iraq and the Levant, the threat of western fighters in Syria and Iraq traveling to the United States poses a serious concern.²²⁷ While this program currently exists between the United States and thirty-eight foreign nations,²²⁸ there can be no doubt that potential security risks may be exploited by terrorists or other individuals looking to cause harm. The Committee on Homeland Security, through its vigorous oversight over counterterrorism efforts, is in the best position to oversee this program and ensure that the nation's borders are as secure as possible.

6. *Non-border enforcement of federal immigration laws*

The Committee on the Judiciary currently has jurisdiction over non-border enforcement of the country's immigration laws.²²⁹ The border security and interior enforcement missions of DHS are logically, if not functionally, interrelated—border security does not stop at the border—and this represents a serious security gap in the Committee's jurisdiction. The detention and removal of criminal and illegal immigrants are a key part of keeping the borders of the United States secure,²³⁰ and an artificial distinction should no longer exist between border security and interior enforcement. This change would allow the Committee on the Judiciary to retain its jurisdiction over immigration

225. See, e.g., Visa Waiver Program Improvement Act of 2014, H.R. 5470, 113th Cong. (2014), which was referred primarily to the Committee on the Judiciary but also to the Committee on Homeland Security. *H.R. 5470—Visa Waiver Program Improvement Act of 2014*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/5470> (last visited Dec. 3, 2014).

226. See *Frequently Asked Questions About the Visa Waiver Program (VWP) and the Electronic System for Travel Authorization (ESTA)*, U.S. CUSTOMS & BORDER PROT., <http://www.cbp.gov/travel/international-visitors/frequently-asked-questions-about-visa-waiver-program-vwp-and-electronic-system-travel> (last visited Dec. 22, 2014).

227. See *U.S., Foreign Fighters in Syria Pose "Very Serious Threat" to U.S.*, REUTERS CANADA (Aug. 31, 2014, 2:30 PM), <http://ca.reuters.com/article/topNews/idCAKBN0GV0KR20140831>.

228. U.S. CUSTOMS & BORDER PROT., *supra* note 226.

229. RULES OF THE HOUSE OF REPRESENTATIVES, R. X, cl. 1(1)(9) H.R. DOC NO. 112-161, at 460.

230. See *Immigration Enforcement*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/detention-management> (last visited Dec. 22, 2014).

policy, the immigration and naturalization process, and the number of immigrants allowed in the country, their classifications, and the length of allowable stays; but detention, removals, and the visa security issues mentioned above would lie within the jurisdiction of the Committee on Homeland Security.

7. *Customs (except customs revenue)*

Customs revenue is under the oversight of the Committee on Ways and Means,²³¹ and would remain under their purview. The Committee on Homeland Security would retain jurisdiction over the Customs security functions of the Customs and Border Protection and the Immigration and Customs Enforcement agencies.

8. *Scientific research and development in support of terrorism prevention and homeland security related missions*

Research and development functions of DHS are in the jurisdiction of the Committee on Homeland Security and the Committee on Science, Space, and Technology.²³² It is important that the Committee on Homeland Security retain this jurisdiction since it is arguably in the best position among congressional committees to determine the direction of future research and development projects at the Directorate of Science and Technology at DHS. The Committee can ensure that DHS and other federal research entities properly execute long- and short-term strategies based on real-world threats, develop new technologies and make prudent use of existing technologies, properly acquire and allocate resources, and ensure proper stakeholder involvement. By overseeing the programs and activities of the components, the Committee is in a position to ensure that the Science and Technology Directorate and other governmental research and development activities address security voids, prevent duplication of efforts, and use private sector developments.

9. *Transportation security*

The Committee on Homeland Security already possesses jurisdiction over the Transportation Security Administration and transportation security generally.²³³ Removing the limitation that applies only to

231. H.R. Doc No. 112-161, at 480 (clause 1(t)(1) of Rule X of the Rules of the House of Representatives).

232. *Id.* at 456, 473 (clauses 1(j)(3)(E) & 1(p)(14) of Rule X of the Rules of the House of Representatives).

233. *Id.* at 456 (clause 1(j)(3)(F) of Rule X of the Rules of the House of Representatives).

functions of DHS would therefore have no effect on the current jurisdiction of the Committee.

10. *Critical infrastructure protection*

The Committee on Homeland Security has jurisdiction over the security of all critical infrastructure sectors, but not the security of particular sectors that are already in the jurisdiction of another committee.²³⁴ For example, legislation that directs the Department to protect critical infrastructure from physical terrorist attacks would likely be in the jurisdiction of the Committee on Homeland Security. However, legislation that directs the Department to protect agricultural infrastructure from physical terrorist attacks would be shared with the Committee on Agriculture. The fact remains, though, that DHS is responsible for protecting *all* critical infrastructure.²³⁵ DHS has provided support for integrated, secure, and resilient critical infrastructure across sixteen critical infrastructure sectors.²³⁶ DHS produced the National Infrastructure Protection Plan, outlining how government and private sector participants work together to manage risks and achieve security and resilience.²³⁷ It is inefficient and costly, and places unnecessary security risks on critical infrastructure to divide jurisdiction between dozens of committees based on subject matter, especially when those committees lack security expertise. Critical infrastructure protection standards should not change based on whether the subject matter is telecommunications, food and agriculture, or financial services. The Department is responsible for ensuring that each of the sixteen critical infrastructure sectors have a basic, uniform level of security and resilience,²³⁸ and Congress must streamline DHS's jurisdiction and oversight to confirm that the Department is fulfilling that responsibility. To split that responsibility between committees that have jurisdiction over the non-security-related functions of that sector invites a disparate level of readiness across all sectors and provides

234. 151 CONG. REC. H25 (daily ed. Jan. 4, 2005) (submission by Rep. Dreier of legislative history to accompany changes to Rule X).

235. 6 U.S.C. § 121 (2012).

236. See Directive on Critical Infrastructure Security and Resilience, 2013 DAILY COM. PRES. DOC 92 (Feb. 12, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil>.

237. DEP'T OF HOMELAND SEC., NIPP 2013: PARTNERING FOR CRITICAL INFRASTRUCTURE SECURITY AND RESILIENCE (2013), available at <http://www.dhs.gov/sites/default/files/publications/National-Infrastructure-Protection-Plan-2013-508.pdf>.

238. See Directive on Critical Infrastructure Security and Resilience, *supra* note 236.

conflicting guidance to the Department whose job it is to protect each sector.

Ideally, jurisdiction over critical infrastructure would be divided between *safety* and *security*. Currently, the Committee on Transportation and Infrastructure has jurisdiction over aviation safety, while the Committee on Homeland Security has jurisdiction over aviation security.²³⁹ By contrast, this separation is not typical of any other sector: The Committee on Energy and Commerce has jurisdiction over chemical safety and security,²⁴⁰ the Committee on Agriculture has jurisdiction over food safety and security,²⁴¹ and the Committee on Transportation and Infrastructure has jurisdiction over dam safety and security.²⁴² It is important that such a distinction is created so that committees with expertise can oversee safety regulations while oversight regarding security responsibilities can be conducted by the Committee on Homeland Security.

11. *Cybersecurity efforts of the Department of Homeland Security*

Cybersecurity has emerged as a major national security issue in recent years. Former Director of the Federal Bureau of Investigation Robert Mueller stated, “Terrorism does remain the FBI’s top priority, but in the not too-distant-future we anticipate that the cyberthreat will pose the greatest threat to our country,”²⁴³ and former Secretary of Defense Leon Panetta warned, “Cyberspace is the new frontier, full of possibilities to advance security and prosperity in the [twenty-first] century A cyber attack could be as destructive as the terrorist attack on 9/11. Such a destructive cyber terrorist attack could virtually

239. See 151 CONG. REC. H25 (“The Committee on Homeland Security shall have jurisdiction over the functions of the Department of Homeland Security relating to transportation security, while the Committee on Transportation and Infrastructure shall retain its jurisdiction over transportation safety.”).

240. See RULES OF THE HOUSE OF REPRESENTATIVES, R. X, cl. 1(f)(2), H.R. DOC. NO. 112-161, AT 445 (2013) (listing “consumer affairs and consumer protection,” as well as “health and health facilities” and “public health” as within the jurisdiction of the Committee on Energy and Commerce).

241. See *id.* at 435 (clause 1(a)(2) of Rule X of the Rules of the House of Representatives, (listing the broad category of “agriculture generally” as within the jurisdiction of the Committee on Agriculture).

242. See *id.* at 476 (clause 1(r)(17) of Rule X of the Rules of the House of Representatives).

243. Stacey Cowley, *FBI Director: Cybercrime Will Eclipse Terrorism*, CNN MONEY (March 2, 2012, 7:56 AM), http://money.cnn.com/2012/03/02/technology/fbi_cybersecurity/index.htm (quoting Robert Mueller).

paralyze the nation.”²⁴⁴ Despite this, committee jurisdiction over cybersecurity is not addressed in Rule X.²⁴⁵

For the last decade, Homeland Security Presidential Directive 7 established the national policy for federal departments and agencies to identify and prioritize critical infrastructure and key resources in the United States and protect them from terrorist attacks.²⁴⁶ The Secretary of Homeland Security was given the responsibility “for coordinating the overall national effort to enhance the protection of the critical infrastructure,” whether owned and operated by the public or private sector.²⁴⁷ In February 2013, the Obama Administration issued Executive Order 13,636, the purpose of which was to enhance the protection and resilience of the nation’s critical infrastructure and maintain a cyber environment that encourages efficiency, innovation, and economic prosperity while promoting safety, security, business confidentiality, privacy, and civil liberties.²⁴⁸ Many responsibilities for cybersecurity outlined in the executive order fall within the purview of the Secretary of Homeland Security.²⁴⁹ In addition, the Office of Management and Budget has delegated its authority over operational federal cybersecurity efforts and the protection of federal information systems to DHS.²⁵⁰

DHS collaborates with federal government stakeholders—including civilian agencies, law enforcement, the military, the intelligence community, and state and local governments—and private sector stakeholders to conduct risk assessments and mitigate vulnerabilities and threats to civilian government and private sector critical infrastructure.²⁵¹ It also provides cyberthreat and vulnerability analysis, early warning, and incident response assistance for public and private sector partners.²⁵² The centerpiece of DHS’s cybersecurity mission is

244. Leon Panetta, Remarks on Cybersecurity to the Business Executives for National Security (Oct. 11, 2012), *available at* <http://www.defensenews.com/article/20121012/DEFREG02/310120001/Text-Speech-by-Defense-U-S-Secretary-Leon-Panetta>.

245. See H.R. Doc No. 112-161, at 432–83 (clause 1 of Rule X of the Rules of the House of Representatives).

246. Homeland Security Presidential Directive/HSPD-7: Critical Infrastructure Identification, Prioritization, and Protection, 2 PUB. PAPERS 1739 (Dec. 17, 2003).

247. *Id.* at 1740–41.

248. Exec. Order No. 13,636, *supra* note 123.

249. See Exec. Order No. 13,636, *supra* note 123.

250. Memorandum from Peter Orszag, Dir. of Office of Mgmt. & Budget to the Heads of Executive Departments and Agencies (July 6, 2010).

251. See *About the National Cybersecurity and Communications Integration Center*, DEP’T OF HOMELAND SEC., <http://www.dhs.gov/about-national-cybersecurity-communications-integration-center> (last visited Nov. 23, 2014).

252. See *id.*

the National Cybersecurity and Communications Integration Center (NCCIC).²⁵³ The NCCIC serves as a centralized location for the sharing of cyber threat information to coordinate the protection, prevention, mitigation, and recovery activities for significant cyber incidents.²⁵⁴ DHS serves as the primary civilian interface for coordinating and disseminating information in partnership with other agencies.²⁵⁵ As the threat of cyberattacks increases, and the role of DHS becomes more defined, it is essential to have a principal point of oversight to ensure proper authorities and resources are provided, civil liberties are protected, and information is properly disseminated to necessary stakeholders.

CONCLUSION

In summary, our proposed changes to clause 1(j) of Rule X of the Rules of the House of Representatives would ensure that the House Committee on Homeland Security would receive legislative referrals regarding, and exercise jurisdiction over, the following subject areas:

- (1) Overall homeland security and domestic counterterrorism policy
- (2) The Department of Homeland Security and its components generally
- (3) General management of the Department of Homeland Security including the pay, promotion, retirement, and other benefits and privileges of personnel.
- (4) Efforts of the Department of Homeland Security to prevent, prepare for, and respond to domestic acts of terrorism.
- (5) Intelligence, information sharing, and related activities of the Department of Homeland Security
- (6) Federal management of emergencies and disasters
- (7) Security of the United States border and ports of entry, including the Department of Homeland Security's responsibilities related to visas and other forms of permission to enter the United States.
- (8) Non-border enforcement of Federal immigration laws
- (9) Customs (except customs revenue)
- (10) Scientific research and development in support of terrorism prevention and homeland security related missions
- (11) Transportation security

253. *See id.*

254. *Id.*

255. *Id.*

- (12) Critical infrastructure protection
- (13) Cybersecurity efforts of the Department of Homeland Security

The oversight committees of Congress should follow in the footsteps of the appropriations committees. Following DHS's creation, the Committees on Appropriations in both the House and Senate reorganized the existing subcommittees, consolidated homeland security and activities of the Department, and created a new subcommittee on Homeland Security to fund these activities. This restructuring required sitting subcommittee chairmen to transfer control over existing functions and agencies to the newly created Department. If these changes had not been made, DHS would receive its appropriated funds through more than twenty subcommittees.²⁵⁶ The Appropriations Committees saw the wisdom in consolidating jurisdiction in two subcommittees, one in each chamber, to provide clear guidance to DHS.²⁵⁷

These suggestions are meant to consolidate jurisdiction over the third largest federal department in order to ensure that proper oversight and guidance can be given; programs are authorized, efficient, and effective; and resources are not wasted responding to duplicative requests and wading into congressional turf battles. While our recommendations address jurisdiction in the House of Representatives, it is expected that if the House were to restructure itself regarding homeland security jurisdiction, the Senate would be pressured to follow suit and begin consolidating homeland security jurisdiction within the Senate Homeland Security and Government Affairs Committee. In any event, DHS's main priority should be protecting the United States, not wasting time determining who their friends and enemies are on Capitol Hill this week.

256. JESSICA TOLLER, CONG. RESEARCH SERV., RL31572, APPROPRIATIONS SUBCOMMITTEE STRUCTURE: MAJOR CHANGES FROM 1920 TO 2013, at 9–12 (2013).

257. *Id.* at 10–11.