

Background

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Congressional Oversight of Homeland Security in Dire Need of Overhaul

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Despite the 9/11 Commission's recommendation that Congress consolidate oversight of the Department of Homeland Security (DHS) into a single, principal point of oversight, Congress has done little to implement this recommendation.

Congress's commitment to the status quo threatens the DHS's ability to identify and respond effectively to security threats. The current oversight system is impractical, constitutionally deficient, and simply poor management. Congress should immediately take steps to streamline oversight of the DHS.

A State of Disarray

By providing for three co-equal branches of government that can check and balance each other, the Founders clearly intended that Congress would play a role in ensuring the constitutional execution of laws by the executive branch. This need for oversight has been consistently reiterated throughout statutory and case law as well as in congressional rules. The Legislative Reorganization Acts of 1946 and 1970 provide for congressional oversight.¹ In *McGrain v. Daugherty*, the U.S. Supreme Court explained that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."²

Historically, congressional oversight has been used to monitor abuses of power by the executive branch and to provide strategic oversight. For example, Congress was responsible for exposing problems in IRS operations in the 1990s.³

Talking Points

- Congressional oversight of the Department of Homeland Security is in disarray. The current approach is impractical, constitutionally deficient, and simply poor management.
- Congress should immediately take steps to streamline its oversight system in accordance with the 9/11 Commission's recommendation for creating a single, principal source of DHS oversight.
- Congress should also enact an authorization bill for homeland security and create committees in the House and Senate to ensure that senior leaders in homeland security go through an effective credentialing process.
- Congress should unshackle itself from the constraints of jurisdictional protectionism and political pandering that plague the current system, not just for efficiency or because doing so is less burdensome for the DHS, but also to help to ensure the safety and security of all Americans.

This paper, in its entirety, can be found at:
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Congress has also used oversight to work proactively with specific agencies to ensure effective and seamless policy implementation. A great example of this work is a series of hearings by the Senate Homeland Security and Governmental Affairs Committee (SHSGAC) in the summer of 2007 to address private-sector preparedness.⁴ These hearings were proactive, goal-driven, and part of an overall strategy to improve the long-term protection of critical infrastructure.

The creation of the DHS in 2002 involved bringing together 170,000 people from 22 federal entities.⁵ Since then, the DHS has made great strides in agency building. However, it remains a department afflicted with high turnover and low morale.⁶ Congress harps on these problems and routinely complains that the DHS has been ineffective in implementing congressional policy priorities.

For example, Congress has complained that the DHS has been slow in organizing its research and development programs.⁷ Yet the committee critical of DHS research and development was not one of the standing homeland security committees, but the House Science and Technology Committee,

which is not focused primarily on homeland security.⁸ Complaints by Congress that the DHS is not doing enough to implement policy priorities relate back to erratic congressional oversight and conflicting demands on DHS directorates.

The Right Stuff. Congress created the DHS not just to integrate the activities of more than two dozen agencies and programs, but also to lead a national effort by federal, state, and local government as well as nongovernmental organizations and the private sector.⁹ Today, however, few individuals in government have all of the skills needed to lead the homeland security enterprise. For example, the White House's after-action report on the national response to Hurricane Katrina highlighted the shortfalls in the government's ability to manage large-scale interagency homeland security operations.¹⁰ This skill-set problem further contributes to the breakdown of congressional oversight.

Mere Lip Service. The DHS currently answers to 86 different congressional committees and subcommittees. The 9/11 Commission recommended that Congress consolidate oversight of homeland security.¹¹ Both political parties gave lip service to implementing the commission's recommendation,

1. Frederick M. Kaiser, Walter J. Oleszek, T. J. Halstead, Morton Rosenberg, and Todd B. Tatelman, *Congressional Oversight Manual*, Congressional Research Service *Report for Congress*, updated May 1, 2007, pp. 1, 2, and 8, at <http://fas.org/sgp/crs/misc/RL30240.pdf> (June 27, 2008).
2. *Ibid.*, p. 6. See also *McGrain v. Daugherty*, 273 U.S. 135, 181–182 (1927).
3. Virginia Thomas, “Not More Laws—More Oversight,” Heritage Foundation *Commentary*, April 28, 1999, p. 1, at <http://www.heritage.org/Press/Commentary/ed042899.cfm>.
4. Hearing, *Private Sector Preparedness, Part I: Defining the Problem and Proposing Solutions* and *Part II: Protecting Our Critical Infrastructure*, Committee on Homeland Security and Governmental Affairs, U.S. Senate, 110th Cong., 1st Sess., June 21 and July 12, 2007.
5. News release, “President Bush Signs Homeland Security Act,” The White House, November 25, 2002, at <http://www.whitehouse.gov/news/releases/2002/11/20021125-6.html> (June 27, 2008).
6. Norman J. Rabkin, Managing Director, Homeland Security and Justice, U.S. Government Accountability Office, “Overview of Department of Homeland Security Management Challenges,” testimony before the Subcommittee on Management, Integration, and Oversight, Committee on Homeland Security, U.S. House of Representatives, April 20, 2006, at <http://www.gao.gov/new.items/d05573t.pdf> (June 27, 2008).
7. Winter Casey, “Lawmaker Unhappy with Homeland Security Research Agency,” GovernmentExecutive.com, March 8, 2007, at <http://www.govexec.com/dailyfed/0307/030807tdpm1.htm> (June 27, 2008).
8. *Ibid.*
9. James Jay Carafano, “Missing Pieces in Homeland Security: Interagency Education, Assignments, and Professional Accreditation,” Heritage Foundation *Executive Memorandum* No. 1013, October 16, 2006, p. 1, at <http://www.heritage.org/Research/HomelandSecurity/em1013.cfm>.
10. *Ibid.*

but the various attempts have produced relatively minor gains.

In 2005, Congress did create two standing committees—the House Homeland Security Committee and the Senate Homeland Security and Governmental Affairs Committee (formerly the Senate Committee on Governmental Affairs)—to handle homeland security issues. However, the Senate committee still splits jurisdiction between homeland security and governmental affairs, lessening the attention given to homeland security, and the DHS is still subject to the whims of all 84 other committees.

Too Many Chiefs. Expecting the DHS to respond effectively to the concerns of the vast numbers of committees with jurisdiction over its operations is unnecessarily burdensome and impractical. Not only is the DHS the subject of multiple hearings and reporting requirements, but many of these requests and hearings are duplicative. Committees with oversight often ask the same questions, but each hopes to receive a different answer.¹²

For example, Members of Congress have criticized Immigration and Customs Enforcement (ICE) for not adequately enforcing immigration laws in the workplace. Yet immediately after ICE began to refocus on workplace enforcement, Representative David Price (D-NC), chairman of the Homeland Security Appropriations Subcommittee, criticized the DHS for this move, insisting that workplace enforcement is the wrong focus and that ICE should instead focus on deporting criminal aliens under 287(g) legislation.¹³

Expecting the DHS to perform efficiently under the current level of oversight is simply unrealistic. The Department of Defense (DOD), which is much larger than the DHS, answers to only 36 committees, with six of these committees handling 80 percent of the oversight.¹⁴ It is highly unlikely that DOD would tolerate a DHS-equivalent level of oversight. Both the DHS and the DOD are tasked with clear missions of protecting the homeland, both in the United States and abroad. Demanding that the DHS submit to this level of oversight severely impedes its ability to carry out its mission.

West Wing Influences. The current oversight structure will not provide sufficiently stable support to the DHS during the transition between presidential Administrations.¹⁵ With no incumbent on the ballot, the upcoming presidential election will bring many changes in the department's nature and makeup. This will also be the first time that the DHS will experience a change in Administrations. Compounding the problem, the DHS has a disproportionate number of political appointees, and they will leave at the end of the Bush Administration.¹⁶

Absent streamlined congressional oversight, the DHS is vulnerable to the problems that stem from a major transition in leadership. There is a risk that the department might not be able to handle the transition, which would stymie policy implementation and further jeopardize homeland security.

Oversight is also important to ensure that the new President does not jeopardize constitutional tenets. New Presidents want to gain political points, often by issuing a plethora of executive orders and

11. Michael Chertoff, letter to Representative Peter King (R-NY), September 4, 2007, p. 1, at <http://www.dhs.gov/xlibrary/assets/secltr-chertoff-king-congressionaloversight-20070904.pdf> (June 27, 2008).

12. *Ibid.*

13. Chris Battle, "More Mandates, Less Funding; Tastes Great, Less Filling," Adfero Group *Security DeBrief*, June 24, 2008, at <http://securitydebrief.adfero.com/dhs-appropriations-funding> (June 27, 2008).

14. Task Force on Congressional Oversight of the Department of Homeland Security, "Untangling the Web: Congressional Oversight and the Department of Homeland Security," Center for Strategic and International Studies and Business Executives for National Security, December 10, 2004, p. 2, at http://www.csis.org/media/csis/events/041210_dhs_tf_whitepaper.pdf (June 27, 2008).

15. David Olive, "Congress Heal Thyself," *The Hill*, June 17, 2008, at <http://thehill.com/k-street-insiders/congress-heal-thyself-2008-06-17.html> (June 27, 2008).

16. Shane Harris, "Homeland Security Could Face Transition Problem," *National Journal*, June 1, 2007, at <http://www.govexec.com/dailyfed/0607/060107nj1.htm> (June 27, 2008).

other directives that have the potential to trample the rights of other branches and usurp powers reserved for the states.¹⁷ The DHS's ability to make a smooth transition from one Administration to the next will correlate directly with Congress's provision of stable, non-conflicting oversight throughout the entire process.

Both Necessary and Proper

The Necessary and Proper Clause of the Constitution clearly dictates that Congress can take actions that are "necessary and proper" to carry out the laws of the United States.¹⁸ It is completely within the power of Congress to consolidate oversight. The failure to consolidate oversight translates into a fundamental breakdown of two essential aspects of American government: separation of powers and federalism.

Separation of powers is the principle that one branch of government should not interfere with another branch's ability to carry out its constitutionally designated duties.¹⁹ The Constitution maintains separation of powers among the branches through the system of checks and balances.²⁰ When oversight fails to function and when the process of ensuring constitutional execution of laws by the executive breaks down, the process of checks and balances is compromised. If Congress does not fulfill its oversight function and allows the executive to fill the resulting power vacuum, the judiciary is too often willing to intervene by creating or changing law as opposed to simply reviewing a law's constitutionality. This further contributes to a breakdown of the three-branch structure of American government.

The second way in which oversight threatens constitutional principles is that the current system encourages overfederalization. The DHS, subject to

committees that rely more on political posturing than sound governance, is consistently lured into responding to congressional inquisitions with overfederalized initiatives.

Congress's reaction to the flawed federal response to Hurricane Katrina is a classic example of this problem. The DHS was hauled before committee after committee and questioned about the federal response to Katrina, and each committee had its own score to settle. For example, Congress held five different hearings on the specific issue of Katrina housing.²¹ The subjects of these hearings, including "Federal Housing Response to Hurricane Katrina" and "Beyond Trailers, Part I: Creating a More Flexible, Efficient, and Cost Effective Federal Disaster Housing Program," demonstrate the Congress's almost pathological commitment to a federal response.²²

As a result, the DHS has become incredibly panicky and almost instinctively overfederalizes initiatives in an effort to avoid a public relations or political nightmare. In the process, states, local principalities, and private entities are stripped of their ability to provide for constituents on a localized and individualized level.

Deeply Flawed Congressional Oversight

Good management recognizes the strengths and weaknesses of an entity and capitalizes on the identified strengths. In congressional oversight of the DHS, one thing is clear: The current system is not based on sound management principles. Instead, it imposes confusing and burdensome priorities and directives to the point that congressional oversight threatens the DHS mission.

For example, Congress recently insisted on 100 percent screening of all cargo entering the U.S.²³ This mandate is based on unrealistic expectations,

17. Hearing, *Executive Orders and Presidential Directives*, Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives, 107th Cong., 1st Sess., March 22, 2001.

18. U.S. Constitution, Art. 1, § 8, clause 18.

19. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

20. James Madison, "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments," *Federalist* No. 51, February 8, 1788, at <http://www.foundingfathers.info/federalistpapers/fed51.htm> (June 27, 2008).

21. Chertoff, letter to Representative King, p. 4.

22. *Ibid.*

poor data, and political pandering by Members of Congress. Screening 100 percent of the cargo entering the United States is not practical. Furthermore, pretending that this measure will make the country safer creates a false sense of security against terrorist attacks. Finally, this measure fails to take into account available resources, requirements, and other equally important congressional mandates.

Although the cargo initiative is the result of poor legislation by Congress, it is the offspring of poor congressional oversight. Poor and reactive oversight of homeland security spawns overreactive legislative measures. In the cargo security initiative, Congress is waiting for the DHS to fail to meet container goals so that it can provide even more ineffective and highly politicized oversight, perpetuating the deeply flawed process. However, this instance of poor congressional management is more than just another case of complicated government bureaucracy: When the DHS fails, lives and property are lost.

This flawed congressional oversight has three prominent features:

1. Committees other than the standing committees are not adequately focused on homeland security issues, and their members lack the knowledge of homeland security and the strategic outlook needed to determine the best course for DHS policy. Instead of strengthening homeland security, they engage in a game of jurisdictional protectionism in which they fight to retain jurisdiction over homeland security for fear of diminishing their political power.
2. Non-standing committees with jurisdiction over homeland security issues, such as the House Energy and Commerce Committee, are not organizationally geared toward homeland security. Their designated focuses are entirely separate from the DHS. As a result, oversight over homeland security issues in these committees often conflicts with major committee priorities. When this occurs, these committees will inevitably choose the best course for their main priorities, which is not necessarily what is best for the DHS.
3. Members of Congress often treat the DHS as a convenient and powerless punching bag to advance their political interests. Members of a committee with homeland security oversight can receive large political payoffs by returning to their districts and framing themselves as champions of homeland security. As a result, they tend to turn DHS oversight into a three-ring circus where they grandstand at the expense of effective oversight.

The oversight problem is self-reinforcing: The more Congress fails to provide consistent and clear oversight, the more the DHS has problems meeting the goals set by Congress. Congress seems content to enact legislation and then expects the DHS to implement its mandates swiftly and efficiently. President Woodrow Wilson put it best when he emphasized that “quite as important as legislation is vigilant oversight of administration.”²⁴ To solve the DHS’s internal problems, Congress must look inside itself for the solutions.

Jeopardizing Homeland Security. The erratic, confusing, and protectionist approach to oversight is a clear threat to the Department of Homeland Security’s ability to protect America from attack. By hindering the DHS’s ability to spend the necessary time and resources on implementing effective policy and by providing oversight that simply politicizes the legislative process, Congress effectively stands in the way of homeland security efforts. In effect, Congress is placing politics over safety, power over sound policies.

What Congress Should Do

Congress should immediately take specific steps to streamline and reform its oversight of homeland security.

Consolidating Oversight. Congress should consolidate oversight and limit jurisdiction over homeland security to four committees: the House and Senate Appropriations Committees and the House and Senate authorization committees. This approach would allow the designated oversight

23. James Jay Carafano, “Scanning for Common Sense: Congressional Committee Security Mandate,” Heritage Foundation WebMemo No. 1955, June 13, 2008, pp. 1–2, at http://www.heritage.org/Research/HomelandSecurity/upload/wm_1955.pdf.

24. Kaiser et al., *Congressional Oversight Manual*, p. 4.

committees to develop the special relationships needed to work together with the DHS as opposed to micromanaging the process to score political points. It also would ensure that the committees with oversight over the DHS are well-informed in matters of homeland security.

Enacting an Authorization Bill. Congress should quickly enact a DHS authorization bill. The House of Representatives has drafted an authorization bill every year since the DHS's inception, but the Senate has consistently failed to take up the measure.²⁵

An authorization bill would provide the authority for the DHS to exist and delineate a policy structure. It should include a structure for key personnel programs, critical missions, major research programs, and investments in information technology.²⁶

An authorization bill would provide:

- **More statutory guidance and supervision.** It would set the playing field for the DHS so that it understands what Congress expects prior to policy execution. This, in turn, would reduce the need for a reactionary approach to oversight.
- **Legislative stability and predictability.** It would provide continuity between Congresses and Administrations.
- **Improved congressional oversight.** It would require Congress to set clear priorities and think for the long term.

Reshaping the Nature of Oversight. Congress needs to be a partner, not an adversary, and proactive rather than reactive. Oversight must be strategic, focused on defining where homeland security should go and how the government should get there.

Strategic oversight is more than just a long list of policy initiatives. It requires both short-term and long-term planning. For the DHS, the right kind of

oversight would recognize that the DHS cannot prevent all threats, but that it can be structured in a way that both aims to prevent threats and works to develop resiliency—the capacity to maintain continuity of activities even in the face of adversity, threats, disaster, and attacks.²⁷

Non-standing committees with oversight of the DHS seem eager to wait until the next scandal or disaster to haul in DHS officials for oversight. This is not the course that Congress should set for oversight. After-the-fact investigations of DHS activities have certainly provided political boons to those who are fixated on exploiting DHS shortcomings, but this approach is incredibly shortsighted and fails to recognize the adverse consequences of ineffective oversight.

Establishing House and Senate Committees on Interagency Education, Assignment, and Accreditation. Homeland security needs the foundation of a professional development system that will provide the cadre of leaders required to meet the demands of the 21st century. Although oversight of the DHS should be streamlined, Congress should establish a committee in each house to oversee interagency education, assignment, and accreditation programs.²⁸

Creation of these committees would ensure that federal officials are adequately trained in the core competency of homeland security. The professionals that lead the effort must have three essential skills:

- **Familiarity** with a number of diverse security-related disciplines (e.g., health care, law enforcement, immigration, and trade) and practice in interagency operations, working with different government agencies, the private sector, and international partners;
- **Competence** in crisis action and long-term strategic planning; and

25. *Ibid.* An authorization bill did recently come before the Senate, but it is not expected to move out of committee.

26. James Jay Carafano, "The Homeland Security Authorization Bill: Streamlining the Budget Process," Heritage Foundation Executive Memorandum No. 923, April 15, 2005, p. 1, at <http://www.heritage.org/Research/HomelandSecurity/em923.cfm>.

27. James Jay Carafano, "Resiliency and Public-Private Partnerships to Enhance Homeland Security," Heritage Foundation Background No. 2150, June 24, 2008, at <http://www.heritage.org/Research/HomelandDefense/bg2150.cfm>.

28. Carafano, "Missing Pieces in Homeland Security."

- A sound understanding of federalism, the free-market economy, constitutional rights, and international relations.²⁹

Senior leaders in homeland security who have few to no credentials specific to homeland security will likely not understand the unique nature of homeland security issues. All individuals who seek leadership positions in homeland security should be required to go through a credentialing and training process. These standards should be instituted on an interagency basis, and Congress should be tasked with determining the guidelines for such programs.

The role of these committees would be to provide this structure and ensure effective implementation across the federal government. In addition, this legislation, coupled with consolidated oversight organization, would provide both homeland security leaders and Congress with the means to create and implement effective policies.

Conclusion

Congress needs to take the next step by fully embracing the 9/11 Commission's recommendation to consolidate oversight of the Department of Homeland Security. This would allow Congress to fulfill its role in the fundamental process of checks and balances and reinforce the principle of federalism embedded in the Constitution.

Congress should unshackle itself from the constraints of jurisdictional protectionism and political pandering that plague the current system, not just for efficiency or because doing so is less burdensome for the DHS, but also to help to ensure the safety and security of all Americans.

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29. *Ibid.*