

**STATEMENT OF  
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**BEFORE THE  
COMMITTEE ON GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE**

**HEARING ON LEGISLATIVE OPTIONS TO STRENGTHEN NATIONAL  
HOMELAND DEFENSE**

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Mr. Chairman, Senator Thompson, and Members of this distinguished Committee:

Thank you for the invitation to testify today on legislative options to strengthen national homeland defense. It is a great honor to be able to contribute to this discussion of an issue of importance to all of us.

I am a Washington, DC, attorney. My practice relates to the capacity of public institutions to deliver services effectively, with specialties relating to government organization and design, implementation of federal programs, federal credit and benefits programs, and regulatory oversight. I am also a Fellow of the Center for the Study of American Government at the Johns Hopkins University and teach on the law of public institutions. I am a former member of the federal Senior Executive Service and serve as Chair of the Standing Panel on Executive Organization and Management of the National Academy of Public Administration. My comments today represent my own personal views, and not necessarily those of the National Academy. However, a number of other Academy Fellows, with extensive experience in the field of federal organization, have contributed to this testimony.<sup>1</sup>

## **Summary and Overview**

The Committee's letter of invitation requests that witnesses address two bills. One bill, S. 1449, to Establish a National Office for Combating Terrorism, would create a statutory basis for the current Office of National Homeland Security and would strengthen its powers and role in coordinating the activities of federal, state, and local agencies whose activities contribute to homeland security. The second bill, currently in discussion draft form, would create a Department of National Homeland Security by consolidating the activities of four major organizations, the Federal Emergency Management Agency (FEMA), the Customs Service, the Border Patrol, and the Coast Guard, into one cabinet department.

In my testimony today, I would like to make five points about these and similar proposals:

1. The President's creation in the Executive Office of the President of an Office of National Homeland Security represents an important first step in promoting the coordination of federal, state, and local activities that is essential in the current emergency.
2. The enactment of legislation along the lines of S. 1449 would help to strengthen the authority of the Director and the Office. The ability to review the budgets of federal agencies that relate to functions of the office

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<sup>1</sup> NAPA Fellows Murray Comarow, Alan Dean, Mortimer Downey, Matthew Holden, Dwight Ink, Herbert Jasper, Bernard Martin, Ronald Moe, and Harold Seidman have contributed to the Standing Panel's deliberations on organizational options relating to national homeland security. However, time did not permit the Standing Panel to review and adopt this testimony. Therefore, all responsibility for these comments is solely mine.

is likely to be especially useful, provided that the role of the office vis-à-vis the Office of Management and Budget (OMB) is clarified.

3. It is important to avoid mixing the goals of these two bills. In particular, care is required to assure that the same person does not gain authority both to carry out coordinating functions and also to implement direct operational responsibilities as a department secretary. Combining an interagency coordinating role with the role of leader of a major department inevitably will raise concern that the head of the department is using the coordinating role to further the interests of his or her own organization. This will tend to undermine the position by fostering perceptions of partiality.
4. The complex issues surrounding national homeland security need to be carefully assessed before enacting a far-reaching organizational change such as is envisaged by the discussion draft of the bill to create a Department of National Homeland Security. Transferring operating functions from four existing agencies to a new department could well create more problems than it solves. It will likely take some time before all of us fully understand and can debate the implications of a major restructuring so that such a response might be devised. Because of the urgency of the problem, the approach of S. 1449 would provide much more rapid action and provide time to determine whether more structural steps are necessary, and if so, what they might be.

Merging of disparate organizations such as the Federal Emergency Management Agency, Customs, the Border Patrol, and the Coast Guard, will increase the priority that national security is given in these organizations. On the other hand, each of these agencies has important functions that do not relate to national security that must be considered in any reorganization proposal. Moreover, many other agencies that are critical to national homeland security would not be included in a merger such as is contemplated by the draft bill.

5. If this committee ultimately does decide to seek an organizational consolidation such as is envisaged by the draft bill to create a Department of National Homeland Security, then it would be beneficial to use the vehicle of a reorganization act to propose to the President that he submit legislation to make such a change. The Executive Branch has access to the detailed information needed to make careful tradeoffs that attempt to maximize the benefits of a particular reorganization and minimize the costs.

This committee is in a position to enact a reorganization act along these lines because of your traditional jurisdiction over general reorganization matters. A copy of a tentative general reorganization bill, drafted by

several members of the NAPA Standing Panel on Executive Organization and Management, is appended to this testimony for your consideration. This language is intended to replace the current reorganization authority that was affected by the *Chadha* decision of the Supreme Court.

### **Comments on S. 1449**

Let me now supplement these points concerning the two bills before the Committee. S. 1449, the bill to create a statutory basis for the current Office of National Homeland Security, addresses one of the major issues that cannot be addressed in the discussion draft bill to create a new Department. Many of the agencies most concerned with homeland security – and the FBI and the Bureau of Consular Affairs of the State Department come to mind here as examples – are not included in the proposal to create a new Department. By contrast, the coordination function authorized by S. 1449 will include all agencies, federal, state, and local, that must cooperate on the issue of terrorism prevention and response.

S. 1449 is an improvement over the present Office of Homeland Security that the President has created by Executive Order. The bill would give statutory basis to the office and thereby would help to strengthen the hand of the Director in attempting to coordinate the activities of many different departments and agencies. Perhaps most beneficial, the bill would provide the office with the statutory responsibility to coordinate the development of a comprehensive annual budget for the programs and activities that are a part of the national strategy that the office will develop. This too will strengthen the hand of the Director in his coordination activities, although the relative roles of this Office and OMB need to be clarified. OMB needs to remain the President's primary budget arm. To have two co-equal budget coordinators would give rise to enormous problems of confusion and internal strife.

### **Comments on the Discussion Draft Bill**

In organizational design, the key is to fit appropriate organization form to the desired outcome. Although the exercise is not always easy, it is important to define the problem with care before reaching for an organizational solution. This is an essential task because of the risk that some organizational answers can complicate rather than solve the fundamental problems that beset an agency or program. Harold Seidman, the nation's leading authority on government organization, points out that there is no organization that cannot be made worse through a poor reorganization.

Organizational solutions may be appropriate to help address specific types of problem, such as the need (1) to combine disparate governmental units to provide an organizational focus and accountability for carrying out high-priority public purposes, (2) to help assure that information flows to the proper level of government for consideration and possible action, and (3) to assure that resources are more properly allocated to support high-priority activities.

Here, the deliberations of the United States Commission on National Security/21<sup>st</sup> Century are helpful in understanding the considerations behind the draft bill to create a Department of National Homeland Security. The Commission proposed the creation of a National Homeland Security Agency and identified the following requirements:

- A single person, accountable to the President, should be responsible for coordinating and overseeing US government activities related to homeland security;
- Selected homeland security activities, related to securing the borders of the United States, should be consolidated, to improve their coherence and effectiveness;
- Planning mechanisms should be established to define clearly specific responses to specific types of threats; and
- Appropriate resources and capabilities must be available.<sup>2</sup>

After analyzing these needs, the commission argued that a new agency was required that would combine (1) FEMA's capacity to respond to crises and emergency planning scenarios, and (2) the border security responsibilities of the Border Patrol, Customs, and the Coast Guard. In particular, the commission pointed out, "the three organizations on the front line of border security are spread across three different cabinet departments...In each case, the border defense agency is far from the mainstream of its parent department's agenda and consequently receives limited attention from the department's senior officials."<sup>3</sup>

A threshold problem is one of composition. On the one hand, the new agency would not include many agencies whose activities are essential to effective homeland security. On the other hand, the commission did not explore the consequences for non-security functions if the proposed reorganization took place. The Coast Guard, for example, has many responsibilities – for safety, search and rescue, maritime pollution, high seas fishing, and oceanographic research, for example – that have little overlap with enforcement of the security of the nation's borders. According to one rough estimate only perhaps one-fifth of Coast Guard functions may relate directly to homeland security. By contrast to the commission's recommended consolidation of agencies, S. 1449 retains flexibility for policymakers to include or exclude agencies and functions as the definition of the problem of assuring homeland security continues to evolve.

Another issue involves the role of field offices and the commission's sense that the new Homeland Security Office should somehow try to integrate the activities of each of the constituent agencies – FEMA, the Border Patrol, Customs, and the Coast Guard. The reorganization could be quite disruptive if it included an attempt to integrate these agencies in any fundamental way. As Harold Seidman points out, "[M]easurable and

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<sup>2</sup> United States Commission on National Security/21<sup>st</sup> Century, *Road Map for National Security: Imperative for Change*, February 15, 2001, pp. 14-15.

<sup>3</sup> *Ibid.*, p. 15.

immeasurable costs may be substantial because reorganizations are disruptive and often require transfers and geographical relocation of personnel, facilities, and records”<sup>4</sup>

It is not clear that the United States could afford to wait in the current war because of the disruption caused by any major reorganization. On the other hand, if the four major agencies were retained within the new department largely in their present autonomous structures, then the benefits of reorganization in fostering interagency cooperation would be limited.

Finally, the commission did not extensively analyze whether less rigid organizational solutions, such as are suggested in S. 1449, could alleviate most of the identified problems, for example of resource constraints. To its credit, the commission published its report before September 11 and therefore could not have known how border security would become an urgent national priority, even without consolidation of four agencies into a new office.

Clearly, such considerations call for analysis, judgment and balance, and the commission’s reorganization recommendation is instructive in this regard as well. The commission did not simply call for the Congress to enact legislation to authorize and direct the desired reorganization. Instead, the commission called upon the President to propose such legislation. I would like to echo this emphasis on the responsibility of the Executive to generate a reorganization plan and would urge that any such plan be based upon careful analysis of the detailed information needed to make careful tradeoffs that maximize the benefits of a particular reorganization and minimize the costs.

The draft general reorganization bill attached to this testimony would create a formal statutory context for inviting the President to submit legislation to create a new Department or Agency of National Homeland Security. Under this draft reorganization bill, the President’s proposed reorganization plan would be considered under expedited procedures and with an up-or-down vote in each house, without amendment. Negotiations undoubtedly would take place that would give stakeholders an opportunity to affect the plan before it was actually submitted for congressional consideration.

Mr. Chairman and members of this Committee let me again thank you for holding these hearings and for the opportunity to contribute to the discussion of these issues that are of such critical importance to our country.

Attachment

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<sup>4</sup> Harold Seidman, *Politics, Position and Power: The Dynamics of Federal Organization*, fifth edition, New York, NY, Oxford University Press, 1998, p. 12.

## **PROPOSED EXECUTIVE REORGANIZATION STATUTE**

### **Title 5 – Government Organization and Employees**

#### **Part 1 – The Agencies Generally**

#### **Chapter 9 – Executive Reorganization**

##### **Sec. 901. Purpose**

- (a) The Congress declares that it is the policy of the United States
- (1) to promote the better execution of the laws, the more effective management of the executive branch and of its agencies and functions, and the expeditious administration of the public business;
  - (2) to reduce expenditures and promote economy to the fullest extent consistent with the efficient operation of the Government;
  - (3) to increase the effectiveness of the operations of the Government to the fullest extent practicable;
  - (4) to group, coordinate, and consolidate agencies and functions of the Government, as nearly as may be, according to major purposes;
  - (5) to reduce the number of agencies by consolidating those having similar functions under a single head, and to abolish such agencies or functions thereof as may not be necessary for the efficient conduct of the Government; and
  - (6) to eliminate overlapping and duplication of effort.
- (b) Congress declares that the public interest demands the carrying out of the purposes of subsection (a) of this section and that the purposes may be accomplished in great measure by proceeding under this chapter, and can be accomplished more speedily thereby than by the enactment of specific legislation.
- (c) It is the intent of Congress that the President should provide appropriate means for broad citizen advice and participation in restructuring and reorganizing the executive branch.
- (d) The President shall from time to time examine the organization of all agencies and shall determine what changes in such organization are necessary to carry out any policy set forth in subsection (a) of this section.

##### **Sec. 902. Definitions**

For the purpose of this chapter -

- (1) "agency" means -
- (A) an Executive agency or part thereof; and
  - (B) an office or officer in the executive branch; but does not include the General Accounting Office or the Comptroller General of the United States;
- (2) "reorganization" means a transfer, consolidation, coordination, authorization, or abolition, referred to in section 903 of this title; and

(3) "officer" is not limited by section 2104 of this title.

### **Sec. 903. Reorganization plans**

(a) Whenever the President, after investigation, finds that changes in the organization of agencies are necessary to carry out any policy set forth in section 901(a) of this title, he shall prepare a reorganization plan specifying the reorganizations he finds are necessary. Any plan may provide for -

- (1) the transfer of the whole or a part of an agency, or of the whole or a part of the functions thereof, to the jurisdiction and control of another agency;
- (2) the consolidation or coordination of the whole or a part of an agency, or of the whole or a part of the functions thereof, with the whole or a part of another agency or the functions thereof;
- (3) the consolidation or coordination of part of an agency or the functions thereof with another part of the same agency or the functions thereof;
- (4) the authorization of an officer to delegate any of his functions; or
- (5) the abolition of the whole or a part of an agency which agency or part does not have, or on the taking effect of the reorganization plan will not have, any functions. The President shall transmit the plan (bearing an identification number) to the Congress together with a declaration that, with respect to each reorganization included in the plan, he has found that the reorganization is necessary to carry out any policy set forth in section 901(a) of this title.

(b) The President shall have a reorganization plan delivered to both Houses on the same day and to each House while it is in session, except that no more than three plans may be pending before the Congress at one time. In his message transmitting a reorganization plan, the President shall describe any improvements in management, delivery of Federal services, execution of the laws, and increases in effectiveness of Government operations, which it is expected will be realized as a result of the reorganizations included in the plan. The President shall also submit such further background or other information as the Congress may require for its consideration of the plan.

(c) Any time during the period of 60 calendar days of continuous session of Congress after the date on which the plan is transmitted to it, but before any resolution described in section 909 has been ordered reported in either House, the President may make amendments or modifications to the plan, consistent with sections 903-905 of this title, which modifications or revisions shall thereafter be treated as a part of the reorganization plan originally transmitted and shall not affect in any way the time limits otherwise provided for in this chapter. The President may withdraw the plan any time prior to the conclusion of 90 calendar days of continuous session of Congress following the date on which the plan is submitted to Congress.

### **Sec. 904. Additional contents of reorganization plan**

A reorganization plan transmitted by the President under section 903 of this title -

- (1) may, subject to section 905, change, in such cases as the President considers necessary, the name of an agency affected by a reorganization and the title of its

head, and shall designate the name of an agency resulting from a reorganization and the title of its head;

(2) may provide for the appointment and pay of the head and one or more officers of any agency (including an agency resulting from a consolidation or other type of reorganization) if the President finds, and in his message transmitting the plan declares, that by reason of a reorganization made by the plan the provisions are necessary;

(3) shall provide for the transfer or other disposition of the records, property, and personnel affected by a reorganization;

(4) shall provide for the transfer of such unexpended balances of appropriations, and of other funds, available for use in connection with a function or agency affected by a reorganization, as the President considers necessary by reason of the reorganization for use in connection with the functions affected by the reorganization, or for the use of the agency which shall have the functions after the reorganization plan is effective; and

(5) shall provide for terminating the affairs of an agency abolished. A reorganization plan transmitted by the President containing provisions authorized by paragraph (2) of this section may provide that the head of an agency be an individual or a commission or board with more than one member. In the case of an appointment of the head of such an agency, the term of office may not be fixed at more than four years, the pay may not be at a rate in excess of that found by the President to be applicable to comparable officers in the executive branch, and if the appointment is not to a position in the competitive service, it shall be by the President, by and with the advice and consent of the Senate. Any reorganization plan transmitted by the President containing provisions required by paragraph (4) of this section shall provide for the transfer of unexpended balances only if such balances are used for the purposes for which the appropriation was originally made.

### **Sec. 905. Limitation on powers**

(a) A reorganization plan may not provide for, and a reorganization under this chapter may not have the effect of -

(1) continuing an agency beyond the period authorized by law for its existence or beyond the time when it would have terminated if the reorganization had not been made;

(2) continuing a function beyond the period authorized by law for its exercise or beyond the time when it would have terminated if the reorganization had not been made;

(3) authorizing an agency to exercise a function which is not expressly authorized by law at the time the plan is transmitted to Congress; or

(4) increasing the term of an office beyond that provided by law for the office.

(b) A provision contained in a reorganization plan may take effect only if the plan is transmitted to Congress (in accordance with section 903(b)) on or before December 31, 2006.

### **Sec. 906. Effective date and publication of reorganization plans**

(a) Except as provided under subsection (c) of this section, a reorganization plan shall be effective upon approval by the President of a resolution (as defined in section 909) with respect to such plan, if such resolution is passed by the House of Representatives and the Senate, within the first period of 90 calendar days of continuous session of Congress after the date on which the plan is transmitted to Congress. Failure of either House to act upon such resolution by the end of such period shall be the same as disapproval of the resolution.

(b) For the purpose of this chapter -

(1) continuity of session is broken only by an adjournment of Congress sine die; and

(2) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of any period of time in which Congress is in continuous session.

(c) Under provisions contained in a reorganization plan, any provision thereof may be effective at a time later than the date on which the plan otherwise is effective.

(d) A reorganization plan which is effective shall be printed (1) in the Statutes at Large in the same volume as the public laws and (2) in the Federal Register.

### **Sec. 907. Effect on other laws, pending legal proceedings, and unexpended appropriations**

(a) A statute enacted, and a regulation or other action made, prescribed, issued, granted, or performed in respect of or by an agency or function affected by a reorganization under this chapter, before the effective date of the reorganization, has, except to the extent rescinded, modified, superseded, or made inapplicable by or under authority of law or by the abolition of a function, the same effect as if the reorganization had not been made. However, if the statute, regulation, or other action has vested the functions in the agency from which it is removed under the reorganization plan, the function, insofar as it is to be exercised after the plan becomes effective, shall be deemed as vested in the agency under which the function is placed by the plan.

(b) For the purpose of subsection (a) of this section, "regulation or other action" means a regulation, rule, order, policy, determination, directive, authorization, permit, privilege, requirement, designation, or other action.

(c) A suit, action, or other proceeding lawfully commenced by or against the head of an agency or other officer of the United States, in his official capacity or in relation to the discharge of his official duties, does not abate by reason of the taking effect of a reorganization plan under this chapter. On motion or supplemental petition filed at any time within twelve months after the reorganization plan takes effect, showing a necessity

for a survival of the suit, action, or other proceeding to obtain a settlement of the questions involved, the court may allow the suit, action, or other proceeding to be maintained by or against the successor of the head or officer under the reorganization effected by the plan or, if there is no successor, against such agency or officer as the President designates.

(d) The appropriations or portions of appropriations unexpended by reason of the operation of the chapter may not be used for any purpose, but shall revert to the Treasury.

### **Sec. 908. Rules of Senate and House of Representatives on reorganization plans**

Sections 909 through 912 of this title are enacted by Congress -

as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of resolutions with respect to any reorganization plans transmitted to Congress; and they supersede other rules only to the extent that they are inconsistent therewith.

### **Sec. 909. Terms of resolution**

For the purpose of sections 908 through 912 of this title, "resolution" means only a joint resolution of the Congress, the matter after the resolving clause of which is as follows: "That the Congress approves the reorganization plan numbered transmitted to the Congress by the President on \_\_\_\_, 20\_\_.", and includes such modifications and revisions as are submitted by the President under section 903(c) of this chapter. The blank spaces therein are to be filled appropriately. The term does not include a resolution which specifies more than one reorganization plan.

### **Sec. 910. Introduction and reference of resolution**

(a) No later than the first day of session following the day on which a reorganization plan is transmitted to the House of Representatives and the Senate under section 903, a resolution, as defined in section 909, shall be introduced (by request) in the House by the chairman of the Government Reform Committee of the House, or by a Member or Members of the House designated by such chairman; and shall be introduced (by request) in the Senate by the chairman of the Governmental Affairs Committee of the Senate, or by a Member or Members of the Senate designated by such chairman.

(b) A resolution with respect to a reorganization plan shall be referred to the Committee on Governmental Affairs of the Senate and the Committee on Government Reform of the House (and all resolutions with respect to the same plan shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be. The committee shall make its recommendations to the House of Representatives or the Senate, respectively, within 75 calendar days of continuous session of Congress following the date of such resolution's introduction.

**Sec. 911. Discharge of committee considering resolution**

If the committee to which is referred a resolution introduced pursuant to subsection (a) of section 910 (or, in the absence of such a resolution, the first resolution introduced with respect to the same reorganization plan) has not reported such resolution or identical resolution at the end of 75 calendar days of continuous session of Congress after its introduction, such committee shall be deemed to be discharged from further consideration of such resolution and such resolution shall be placed on the appropriate calendar of the House involved.

**Sec. 912. Procedure after report or discharge of committee; debate; vote on final passage**

(a) When the committee has reported, or has been deemed to be discharged (under section 911) from further consideration of, a resolution with respect to a reorganization plan, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for any Member of the respective House to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. The motion shall not be subject to amendment, or to a motion to postpone, or a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the resolution is agreed to, the resolution shall remain the unfinished business of the respective House until disposed of.

(b) Debate on the resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than ten hours, which shall be divided equally between individuals favoring and individuals opposing the resolution. A motion further to limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the resolution is not in order. A motion to reconsider the vote by which the resolution is passed or rejected shall not be in order.

(c) Immediately following the conclusion of the debate on the resolution with respect to a reorganization plan, and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the appropriate House, the vote on final passage of the resolution shall occur.

(d) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to a reorganization plan shall be decided without debate.

(e) If, prior to the passage by one House of a resolution of that House, that House receives a resolution with respect to the same reorganization plan from the other House, then -

(1) the procedure in that House shall be the same as if no resolution had been received from the other House; but

(2) the vote on final passage shall be on the resolution of the other House.