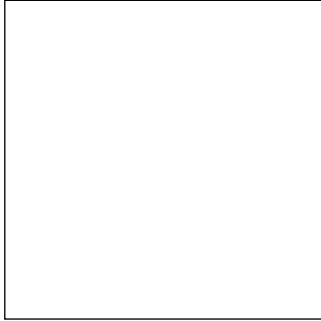


**HOMELAND
SECURITY LAW
AND POLICY**

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HOMELAND SECURITY LAW AND POLICY

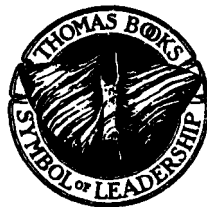
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who defend us on foreign soil and the emergency responders
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FOREWORD

The term “homeland security” was virtually unused in the United States before September 11, 2001, but the attacks of that day have forced all of us to rethink our relationships abroad, the missions of federal, state, and local governments here at home, and the best way to “provide for the common defense.” *Homeland Security Law and Policy* frames those discussions in a unique and incredibly helpful way, and its publication is extremely timely.

At the federal level, many changes have been made to address the nation’s vulnerabilities. Antiquated statutes have been rewritten so that law enforcement and intelligence investigators can better share critical information. We are well into the second year of operations for the third-largest federal agency, the Department of Homeland Security. This reorganization—the most ambitious attempt to redraw the federal bureaucracy in fifty years—is an attempt to merge together twenty-two formerly distinct agencies, an effort that has not yet entirely borne fruit. Congress is considering ways to reorganize itself to better fund and oversee our homeland security operations. Efforts to share intelligence and information among all levels of government and with the private sector are underway, yet those projects as well are not yet completed.

More explosive detection systems, advanced checkpoint X-ray devices, and explosive trace detection systems are at work in over 400 airports around the country. A biometric-based entry-exit program has been implemented at our borders. More cargo containers are being inspected. Radiation detectors have been installed in some areas to check for nuclear weapons or radioactive materials that can be used to make dirty bombs. Risk assessments at some chemical plants have been conducted, and billions of dollars have been appropriated to the country’s first responders.

However, many challenges remain. We inspect only a tiny fraction of all cargo containers entering the United States. Too few resources are directed toward securing our most vulnerable and critical infrastructures: rail lines, chemical plants, and surface transportation modes. The Coast Guard protects over 95,000 miles of shoreline with an aging fleet and workforce the size of a large city’s police department. The number of customs inspectors is unchanged since 9–11. The FBI is in the midst of a massive transformation, but it has not increased its overall number of special agents. Its information technology—so low-tech on 9–11 that the FBI resorted to overnight delivery services to obtain current photographs of al Qaeda suspects—remains woefully unsuited to a great investigative agency.

At the local level, too little has been done in the nearly four years since we were attacked. The number of uniformed local law enforcement personnel is dropping in many areas of the country. Commission after commission has reported on the problems facing our first responders: no routine access to critical intelligence, poor preparedness to deal with a chemical or biological attack, underequipped and underfunded agencies across the nation, and a lack of interoperable communications gear.

Our country long ago determined that federal expenditures for national defense are necessary and appropriate, but we have not yet had a national conversation on how to effectively fund the homeland security improvements experts tell us are necessary. Today, state and local governments are being asked to shoulder a fiscal burden that many believe ought to be a federal responsibility. Yet in important respects the federal government remains on the sidelines. The Department of Homeland Security has not yet issued a plan to protect our critical infrastructures, nor have standards been set to guide cities and states in their preparedness efforts.

As I write this, Congress is in the midst of rare August hearings to consider the recommendations of the 9-11 Commission to reform our intelligence agencies and wage a more effective war on terrorism. For these reforms to succeed, and in order to truly create a safer America, the public must be informed on homeland security policy. All levels of government will benefit from an engaged electorate so that tough decisions can be made on the homeland security and the war on terror. *Homeland Security Law and Policy* will help educate students on the choices facing the nation, and I compliment Professor Nicholson for his contribution to the debate.

Senator Joseph R. Biden, Jr.
Wilmington, Delaware
August 2004

INTRODUCTION

The United States of America faced a watershed moment on September 11, 2001. The terrorist attacks shocked our nation into the realization that a major hazard existed for which preparedness was insufficient. The overwhelming nature of the challenges involved in making our country safe from future terrorist attacks soon became apparent. The debate over what constitutes the challenges and how the country can best respond to them has been ongoing since the day of the attacks.

Homeland Security Law and Policy has as its goal the presentation of a broad range of legal and policy issues that face our country as we grapple with the new reality of terrorism. The subject matter is very extensive, encompassing the entire range of activities in the American economy and government. Complete coverage of all aspects of the matter is, therefore, not possible in a volume such as this. Rather than provide superficial treatment of every issue, therefore, in-depth consideration of an assortment of key topics was deemed to be the best approach. So, for example, all types of transportation policy are not included. Rather, mass transit and aviation policy issues provide a focus for the subject matter. Similarly, bioterrorism and “dirty bombs” supply the means to discuss issues related to Weapons of Mass Destruction.

The reader will note a number of thematic topics that recur at various points in the text. Some of the most controversial spring from challenges to traditional concepts of federalism as the national government assumes control of matters once the province of state and local governments. Decisions on funding and personnel priorities coming from Washington affect all emergency responders to a much greater extent than ever before. Multiple perspectives on important policy issues illuminate them in important ways.

The first test the nation faces is the basic one of defining what is meant by homeland security. The text opens with consideration of this issue, from the strictly legal and pedagogical perspectives. Subsequent chapters also address the issue as it applies directly to their subject matter.

The immediate response to the 9–11 attacks came from our existing structure of emergency responders and emergency managers. The roots of homeland security in the Federal Emergency Management Agency’s (FEMA’s) hazardous materials responsibilities provide a context for the subsequent development of the discipline. The changes in FEMA’s priorities after it became part of the new Department of Homeland Security (DHS) illustrate the new pressures that homeland security duties have put on the federal government, and highlight the difficult choices that must be made when needs outstrip resources. The internal debate over whether the “all-hazards”

approach or a strong terrorism concentration is the proper path captures an ongoing policy dispute. The process by which DHS is adopting the National Response Plan (NRP) and the National Incident Management System (NIMS) demonstrates the difficulties in creating truly national policies and getting buy-in from the affected stakeholders. The choice among different legal avenues for their adoption illustrates the intersection of law and policy options.

Homeland security decisions made in Washington, DC, have far-reaching impacts on state and local governments, who often find themselves saddled with unfunded mandates when the federal government decides that an issue must be tackled nationwide. The cascading effects of federal choices on other government partners show the far-reaching nature of these policy selections.

As new challenges arise, new or revised structures often come into place to allow a cooperative approach to common problems. The government, private sector, and higher education can create promising partnerships, as shown in the case study on that subject. From the federal side, the Department of Defense (DoD) possesses more assets that can be brought to bear in the event of a disaster than any other entity. Utilizing these advantages requires understanding a range of legal matters, as well as some institutional history.

In the immediate aftermath of the 9–11 attacks, the Congress enacted strong new statutes designed to more fully protect the nation from terrorist attacks. Many observers decried the effect of these laws on civil liberties, and campaigned for less intrusive alternatives. On the other side of the fence, supporters argued that even more steps were needed to fully protect us from potential terror attacks. Comparison of the attitudes of the two groups allows an interesting exploration of the underlying policy choices. Some parts of the new laws were less controversial: controlling money laundering and, thusly, preventing the financing of terrorist entities was a generally well-accepted step. While reporting requirements increased, strict limitations on sharing the information resulted in acceptance by the general public.

The transportation industry continues to be a potential target for terrorists, as it offers potential victims in concentrated numbers. Perhaps the most challenging aspect of transportation is mass transit, the vehicles that take people to and from work every day. Providing meaningful security for mass transit is very difficult, because the numbers of people using the system preclude detailed inspections of all passengers. The March 11, 2004, terrorist attacks on subways in Madrid, Spain, illustrate how devastating a strike on mass transit might be. Terrorists using passenger airliners as flying bombs carried out the 9–11 attacks. The airline industry therefore faces very close scrutiny as it undergoes extensive security reforms. The evolution of aviation security policy provides an interesting view of the changing nature of the terrorist threat.

Al Quaida leader Osama Bin Laden has said, “If it is true that I have acquired [chemical or nuclear] weapons, I thank God who has made it

possible. And if I seek to procure such weapons, it is a duty.” The reality of this threat makes the possible use of weapons of mass destruction (WMD) perhaps the most frightening aspect of terrorism. One thorny issue that confronts those considering proactive steps to address the enormous threat of WMD is how much to spend and where to spend it. The overwhelming nature of potential WMD effects and competing priorities means that there will literally never be sufficient resources to completely address the issue. Many bioterrorism preparedness steps, for example, will increase readiness for a variety of public health hazards. Others, however, are specific to WMD and have limited or nonexistent application to other risks. Sometimes, the best preparedness steps must take place before the event occurs, as with administration of medication to lessen the effect of radiation poisoning. Unfortunately, the widespread availability of radioactive elements to enhance the effect of conventional explosives, turning them into “dirty bombs,” means that a possible detonation could occur anywhere and anytime.

In the immediate aftermath of the September 11, 2001, attacks, the nations of the world were virtually unanimous in their support of the United States and the war on Al Quaida, the group that masterminded the blows. Following our invasion of Iraq, however, other nations around the world have been far less helpful. Understanding U.S. policy decisions that resulted in the Iraqi invasion and other nations’ attitudes toward that conflict sheds light on potential steps that may assist us in finding more allies in the war on terror. Domestically, some leaders have rethought our commitment to Iraq and criticized the process that led the nation down that road. President Bush continues to pursue the war vigorously despite questions from critics. The decisions of policymakers regarding the war in Iraq, in all probability, will result in the war on terror’s most lasting international legacy.

Americans want to avoid any repeat of the 9–11 attacks. To that end, the 9–11 Commission investigated the precursor events in detail, with the goal of recommending steps to make our nation safer in the future. Their report contains significant proposals for reorganization of American intelligence assets. The Commission focuses on the need to unify all aspects of our intelligence efforts, from management to analysis. Response from the executive branch and Congress was quickly forthcoming, in the form of new executive orders and sweeping legislative proposals. The outcome of the policy discussions exemplified by these documents will determine the future of our intelligence agencies and, in large part, will dictate our vulnerability to future attacks.

The future of homeland security will involve both domestic and international aspects. Our nation is currently engaged in a war on terror with no readily apparent exit strategy. The commitment to Iraq appears to be a deep one, with all involved aware of the potential downsides of failure. Here in the United States, the high levels of funding over the past few years for terrorism preparedness reportedly will decline significantly in the next few years. The danger to our nation from terrorists as well as more mundane natural and

manmade hazards will continue. Homeland security law and policy issues will continue to be with us, but whether the current high level of attention to these matters will persist is uncertain. Understanding and debating these vital subjects will assist future leaders in making wise choices when their turn comes to decide the direction of our national strategy.

William C. Nicholson
Wilmington, Delaware
October 2004

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My greatest thanks and all my love go, as always, to my wife Nancy, who keeps my homeland happy and my heart secure.

W.C.N.

CONTENTS

	<i>Page</i>
<i>Foreword – Senator Joseph Biden</i>	xiii
<i>Introduction</i>	xv
<i>Acknowledgements</i>	xix
Section I Homeland Security and Emergency Management	3
Chapter 1 Part 1: Defining Homeland Security and Terrorism: Legal Enactments	5
<i>Keith Feigenbaum</i>	
I. Federal Definitions	5
II. State Responses	7
III. Conclusion	8
Part 2: Defining “Homeland Security:” Content and Context Grounded in the Curricula	10
<i>Robert W. Smith</i>	
I. Basis for the Analysis	10
II. Homeland Security as Defined in the Literature	11
III. Homeland Security in the Classroom	12
IV. Sampling the Syllabi	13
V. A Grounded Theory Approach: What the Courses Tell Us	15
VI. Cataloging the Courses	16
A. Homeland Security Courses	16
B. Emergency Management or Preparedness	17
C. Military-Oriented Courses	17
D. Terrorism and National Security Courses	17
E. Technical or Specialized Courses	17
VII. Sorting Through Definitions	18
VIII. Concluding Points	19
IX. Synthesizing a Definition	19
Chapter 2 FEMA’s Place in Policy, Law, and Management: A Hazardous Materials Perspective 1979–2003	23
<i>William R. Cumming and Richard T. Sylves</i>	
I. Overview	23

II.	Disasters Resulting from Intentional or Accidental Acts of Humans	24
	A. The Policy-Making Process	24
	B. Executive Orders	25
	C. Emergency Management's Roots	25
	D. Humanitarian Aid Versus Technical Prowess	26
	E. Prelude to Homeland Security	27
III.	Early FEMA and HAZMAT	27
	A. Generalists Versus Specialists	28
	B. FEMA Staffing, Powers, and Primary Accountability	29
	C. FEMA's Clientele	29
IV.	FEMA and Nuclear Power Emergencies	30
	A. Early History	30
	B. Meese Memorandum: National System for Emergency Coordination	31
	C. Risk Analysis and Nuclear Power Emergencies	31
	D. Reagan's Preemptive Ruling	31
	E. Clinton, Bush, and Nuclear Power Emergencies	32
V.	FEMA, Love Canal, Bhopal, and Chernobyl	32
VI.	FEMA and Hazardous Materials Emergencies from Reagan to Clinton	33
VII.	FEMA HAZMAT and Fire Jurisdiction: The United States Fire Administration	34
	A. USFA and the Reagan Era	35
	B. Hazardous Materials Transportation	35
	C. USFA in the Clinton and Bush Era	36
VIII.	FEMA and Nuclear Attack Emergencies	36
IX.	FEMA and the Chemical Weapons Disposal Program	37
X.	FEMA and Terrorism Consequence Management	39
XI.	FEMA and Major Oil Spills	40
XII.	FEMA HAZMAT in the Clinton-Witt and Bush-Allbaugh Eras	41
XIII.	Conclusion	42

Chapter 3	FEMA'S Changing Priorities since September 11, 2001	56
	<i>William C. Nicholson</i>	
I.	All Hazards	57
II.	Mitigation	57
III.	Responder Training	58
	A. FEMA Emergency Management Higher Education Project	59
	B. National Fire Academy	59
	C. Loss of the National Emergency Training Center	60
	D. Destruction of Key Infrastructure	60
IV.	Funding Decisions Point to the Future	61
V.	Conclusion	62
Chapter 4	The Shape of Emergency Response and Emergency Management in the Aftermath of the Homeland Security Act of 2002: Adopting the National Response Plan (NRP) and the National Incident Management System (NIMS)	68
	<i>William C. Nicholson</i>	
I.	Why the NRP and NIMS?	69
II.	Creating a National Response Plan and National Incident Management System	70
	A. Comprehensive Content	70
	B. Challenging Deadlines	70
	C. NRP 1 and NIMS 1	70
III.	Creation of the Initial National Response Plan	71
	A. State and Local Governments and Responders Weigh In	71
	B. The Initial National Response Plan	72
IV.	Subsequent NRP Versions: Ever More Comprehensive Plans	73
V.	NIMS 2 and the Adopted NIMS: More Detail for Responders and Emergency Managers	78
	A. Preparedness Issues	78
	B. The NIMS Integration Center and Responder Certification Issues	78
	C. NFPA 1600: Another Important Standard for Emergency Management	80
	1. Incorporating NFPA 1600: The Emergency Management Accreditation Program	81

- 2. NFPA 1600 and ICS 82
- 3. NIMS and NFPA 1600 Planning Standards 82
- D. Mutual Aid Concerns 83
- E. Implementing NIMS 84
- VI. NRP and NIMS as Rulemaking 85
- VII. Conclusion 87

Section II Local and Regional Perspectives 109

Chapter 5 Homeland Security from the Local Perspective 111

Frances L. Edwards

- I. Local Government Terrorism Preparedness Before 9-11 111
- II. The Warning: Mass Destruction 114
- III. Local Government’s Response to Terrorism After 9-11 117
- IV. Federal Legislation’s Impact on Local Government Homeland Security Systems 120
- V. All Hazards Emergency Management and the Move to DHS 123
- VI. Funding: Promises and Reality 126
- VII. Urban Area Security Initiative (UASI): The Federal/Local Connection—Reverting to a Process that Worked? 128
- VIII. The Future of Local Homeland Security Policy 129
- IX. Where Do We Go From Here? 132
- X. Conclusion 133

Chapter 6 Homeland Security Initiatives and Emergency Management in Metro Areas: The Pennsylvania Perspective 137

Louise K. Comfort

- I. Maintaining Security in Interdependent Systems .. 137
- II. Domestic Preparedness for Extreme Events 138
- III. Homeland Security Initiatives After September 11, 2001 139
 - A. Formation of the Pennsylvania Office of Homeland Security 139
 - B. Report of Governor’s Task Force on Security 139
 - C. Funding Issues and Budgetary Constraints ... 140

- D. Search for Workable Strategies Within Constraints 141
- E. Continuing Debate over Priorities for Action . . . 141
- IV. Obstacles, Dilemmas, and Opportunities for Enhancing Security 141
 - A. Obstacles 141
 - B. Dilemmas 141
 - C. Opportunities 142
- V. An Emerging Strategy for Homeland Security 142

Section III Partnering for Homeland Security 147

Chapter 7 New Partnerships for Homeland Security, Policy Development, and Application: Government, Private Sector, and Higher Education 149

Monica Teets Farris

- I. Shifts in Disaster Management Strategies 149
- II. Changes in Technology 151
- III. Partnerships with Universities 151
- IV. Partnering with Private Industry 152
- V. Case Study 153
- VI. Conclusion 155

Chapter 8 Partnering with the Department of Defense for Improved Homeland Security 159

Gregory M. Huckabee

- I. The Pecking Order 160
- II. When Does the Flag Go Up? 163
 - A. Immediate Response 163
 - B. Declaration of a National Disaster when Requested by a State 164
 - C. Unilateral Presidential Action 165
 - D. Emergencies Involving Federal Primary Responsibility 165
- III. How Does DoD Play Friendly? 165
 - A. The Organization: Why Me? 165
 - B. Command Structure: Who Is On First? 166
 - C. Train to Fight: DoD Loves the Lead Federal Agency (LFA) 167
 - D. The Battle: Bring on the Impossible 167
- IV. DoD Law Enforcement Actions: When a Sheriff is Needed 169
 - A. The Insurrection Act: When the Party Gets Out of Hand 169

- B. Chemical-Biological WMD: When Gas and Bugs Get Loose 170
- C. Transactions Involving Nuclear Materials: When Dr. Strangelove Visits 170
- D. Execution of Quarantine and Health Laws: The Unthinkable 170
- E. Emergency Authority: When All Else Fails 170
- F. Military Purpose Doctrine: Duty, Duty, Always Duty 171
- G. Indirect DoD Law Enforcement Support: Back-up 171
- V. Conclusion 172
- VI. Summary 172

Section IV Civil Rights Issues 177

Chapter 9 Insatiable Appetite: The Government’s Demand for New and Unnecessary Powers After September 11 179

An American Civil Liberties Union Report

- I. The Ever-Expanding Arsenal 180
 - A. The USA PATRIOT Act 181
 - B. Spying on Americans 183
 - C. Detention of Noncitizens 183
 - D. Detention of Citizens 184
 - E. Dagnet Questioning and Fingerprinting of Immigrants 185
 - F. Military Tribunals 185
 - G. Attorney-Client Privilege 186
 - H. New Secrecy Measures 186
- II. Additional Measures on the Horizon 188
 - A. Surveillance 188
 - B. State and Local Insatiable Appetites 189
- III. Challenges to American Values 189
 - A. The Threat to Patriotic Dissent 189
 - B. The Threat to Liberty 190
 - C. The Threat to Equality 191
 - D. The Threat to Constitutional Checks and Balances 192
 - E. The Threat to Open Government 192
 - F. The Threat to the Rule of Law 193
- IV. Conclusion 194

Chapter 10 Antiterrorism Investigations and the Fourth Amendment After September 11, 2001 197
Testimony of Paul Rosenzweig

- I. Fourth Amendment Principles 198
- II. Overarching Principles 198
- III. “Data Mining”—Total Information Awareness Today 200
 - A. Data Analysis 200
 - B. Data Collection: Structural Limitations 202
 - C. Data Collection: Legal Limitations 204
- IV. FBI Investigative Guidelines 206

Chapter 11 The USA Patriot Act, Money Laundering, and Suspicious Activity Reports from Financial Institutions 209
Kristin S. Nolan

- I. What Is Money Laundering? 209
- II. What Is Terrorism? 210
- III. How Are Money Laundering and Terrorism Related? 211
- IV. Regulatory Framework 212
- V. How Does Preventing Money Laundering Prevent Terrorism? 212
- VI. Preventing Both and Violations of the Right to Privacy: Suspicious Activity Reports 213
- VII. Conclusion 216

Section V Challenges for Transportation 223

Chapter 12 Mass Transit and Homeland Security: Policy Issues 225
Eva Lerner-Lam

- I. Why Is Public Transit Security a Challenge? 225
 - A. The “Open” Nature of Public Transit Makes It an Attractive Target 225
 - B. Multi-Jurisdictional Environments Require Aggressive Coordination, Cooperation, and Funding 225
 - C. Multimodal Interactions Can Increase Vulnerability and Consequences 226
- II. Types of Public Transit Security Threats 226

III.	Public Transit Security Policy	227
A.	A “Systems Approach”	227
B.	“Safety and Security First”	227
C.	Collaboration and Coordination	227
D.	Role of Technology	227
E.	Transit as a First Responder	228
IV.	Key Strategies	228
A.	Prepare	228
B.	Prevent	229
C.	Respond	229
D.	Recover	229
V.	Transit Initiatives	229
VI.	Challenges and Future Policy Directions	230
A.	Federal	230
B.	Regional and State	230
C.	Local	230
D.	Technology Interoperability Challenges	231
VII.	Conclusion	231
Chapter 13	Post-9-11 Challenges for Aviation Security	234
	<i>Frank J. Costello</i>	
I.	A Brief History of U.S. Aviation Security	234
II.	The Legal Framework	237
A.	The Authority of the Federal Government to Regulate Aviation Security	237
B.	The Federalized Screening Process	238
C.	The Security Responsibilities of Private Parties	238
D.	International Legal Obligations	240
E.	Privacy	241
III.	Conclusion	244
Section VI	Weapons of Mass Destruction	251
Chapter 14	Natural Disasters and Weapons of Mass Destruction: Policy Issues and Implications	253
	<i>Ann Strack Angelheart</i>	
I.	The Changing Dynamics of Disaster Response . . .	253
II.	Change in Disaster Impacts	254
A.	Politics and Media in American Disaster Recovery	254
B.	The American Military and Domestic Disaster Recovery	256

C. Who Pays? 256

III. When Terrorism Creates a Disaster 257

 A. Fear and Communication 258

 B. Preventing Terrorism and Protecting
 the Public 259

IV. Conclusion 259

Chapter 15 Bioterrorism Defense: Current Components and Continuing Challenges 262

Leslie Gielow Jacobs

I. The Context 262

II. The Components 263

III. The Continuing Challenges 264

 A. Detecting and Deterring Biological
 Weapons Development and Use 264

 B. Achieving Nonproliferation 266

 C. Preparing to Respond to a Bioterrorism
 Attack 267

 D. Risk Assessment and Resource Allocation 268

IV. Conclusion 268

Chapter 16 Understanding the “Dirty Bomb” and Its Policy Implications 275

Michael P. Donohue

I. The Dirty Bomb 275

 A. Nature of the Dirty Bomb 275

 B. Makings of a Dirty Bomb 276

II. Potential Effects of a “Dirty Bomb”
 Detonation 278

III. Response to a “Dirty Bomb” 278

 A. Governmental 278

 B. Cleanup 279

 C. Medical Treatment 280

IV. Conclusion 280

Section VII Foreign Policy Aspects of Homeland Security 287

Chapter 17 Two Years Later: World Opinion; Foreign Views of U.S. Darken since Sept. 11 289

Richard Bernstein

I. Bush as Salesman 290

II. Trying to Define “Threat” 291

III. A Residue of Goodwill 292

Chapter 18	GOP Congressman: War was a Mistake	294
	<i>Representative Doug Bereuter (R.-Nevada)</i>	
	I. Apparent Intelligence Failures	294
	II. Skewing of Intelligence to Justify the War?	295
	III. Preparations for War and the Aftermath	295
Chapter 19	President Bush Discusses Iraq	298
Section VIII	Future Challenges for Homeland Security	303
Chapter 20	Restructuring Management of National Security Intelligence	305
Part 1:	HOW To Do It? A Different Way of Organizing the Government	305
	I. Unity of Effort Across the Foreign-Domestic Divide	306
	A. Joint Action	306
	B. Combining Joint Intelligence and Joint Action	307
	II. Unity of Effort in the Intelligence Community	310
	A. The Need for a Change	310
	1. Members of the U.S. Intelligence Community	310
	2. Departmental Intelligence Agencies	310
	B. Combining Joint Work with Stronger Management	312
	C. Unity of Effort in Managing Intelligence	314
	III. Unity of Effort in Sharing Information	316
	IV. Unity of Effort in the Congress	318
	A. Strengthen Congressional Oversight of Intelligence and Homeland Security	318
	B. Improve the Transitions Between Administrations	319
	V. Organizing America's Defenses in the United States	320
	A. The Future Role of the FBI	320
	B. Creating a New Domestic Intelligence Agency Has Other Drawbacks	320
	C. Homeland Defense	322
Part 2:	Executive Orders Issued in Response to the 9-11 Commission Report	324
	Executive Order 13354 of August 27, 2004	324
	National Counterterrorism Center	324

Executive Order 13355 of August 27, 2004 327
 Strengthened Management of the Intelligence
 Community 327
 Executive Order 13356 of August 27, 2004 330
 Strengthening the Sharing of Terrorism Information to
 Protect Americans 330

Part 3: 9-11 Commission Report Implementation
Legislation 333

Chapter 21 The Future of Homeland Security 338
William C. Nicholson

Appendices

Appendix A Homeland Security-oriented Websites 343
 Appendix B List of Acronyms 349
 Appendix C Legal Authorities and References for the
 National Response Plan (NRP) 352
 Appendix D Overview of Initial Federal Involvement
 Under the *Stafford Act* 364
 Appendix E State Definitions of Terrorism 365
 Appendix F *Hamdi v. Rumsfeld*, ___ US ___, 2004 U.S.
 LEXIS 4761 (June 28, 2004).. 374
 Appendix G *Rumsfeld v. Padilla*, ___ US ___, 2004 U.S.
 LEXIS 4759 (June 28, 2004). 417
 Appendix H *Rasul v. Bush*, ___ US ___, 2004 U.S.
 LEXIS 4760 (June 28, 2004). 438



Natural hazards continue in a time of terrorism. ORANGE BEACH, AL—The vast fury of Hurricane Ivan’s 130 mph winds and 30-foot swells. Hurricane Ivan passed directly over Orange Beach. September 16, 2004. FEMA photo by Butch Kinerney.

Section I

**HOMELAND SECURITY
AND EMERGENCY MANAGEMENT**

Chapter 1

PART 1: DEFINING HOMELAND SECURITY AND TERRORISM: LEGAL ENACTMENTS

KEITH FEIGENBAUM

On November 25, 2002, President George W. Bush signed into law the Homeland Security Act of 2002,¹ thus moving various governmental agencies under one roof with one poorly defined goal: homeland security. A preliminary challenge was writing legally binding definitions of terrorism and homeland security.

Prior to September 11, 2001, only piecemeal definitions of terrorism existed in legislation. These related to the destruction of aircraft or aircraft facilities, violence at international airports, biological weapons, arson and bombings, hostage taking, and assassinations, among a variety of other serious offenses.² Meanwhile, what we now consider homeland security was better known as homeland defense prior to September 11.³ As of yet, there is no

consensus on the meanings of terrorism and homeland security, although legislation has been enacted with varying definitions of these expressions.

This part of the chapter examines the definitions that have been enacted into law or published with the goal of setting boundaries to these expansive terms. In his concurring opinion in *Jacobellis v. Ohio*, Supreme Court Justice Potter Stewart wrote on the term obscenity: “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description. . . . *But I know it when I see it.*”⁴ It is tempting to take a similar approach to defining terrorism and homeland security, yet elements of both the federal government and state governments have gone a few steps further.

I. FEDERAL DEFINITIONS

When we see people walk into cafeterias with bombs strapped to their bodies, that’s terrorism. When we see people fly airplanes into fully occupied buildings, that’s terrorism. When people in the name of revolution go and cut off the hands and arms of little children in a village to terrorize them, that’s terrorism. That’s what we need to stop. That’s what this campaign is about. If we can delegitimize those tactics for political purposes, we will have won our campaign against terrorism.⁵

—Ambassador F.X. Taylor, *U.S. Coordinator for Counterterrorism*

The notion of defending the homeland from outside threats and responding to catastrophes within our borders is nothing new. The U.S. Constitution gives Congress the power to “provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions.”⁶ Following the Revolutionary War, militias were formed to respond to real and perceived threats from Great Britain, Spain, and France, each of which retained territories in North America and maintained navies that preyed on U.S. merchant ships.⁷ The Army set out to defend the homeland

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from fortified positions near our harbors, while also protecting settlers and traders engaged in the country's westward expansion.⁸ Meanwhile, the Navy sought to control the sea lanes, thus projecting U.S. might overseas and protecting the country's economic interests.⁹

These early efforts at securing the homeland are best termed "homeland defense," an expression that gained new meaning following the Japanese attack on Pearl Harbor in 1941 (the first foreign assault on U.S. soil since the War of 1812). The United States responded to that attack on service members and civilians with renewed efforts by the Navy to patrol the seas, defending against enemy submarines with help from the Army Air Force.¹⁰ In following decades, the North American Air Defense Command was formed to respond to the Soviet nuclear threat. This threat spawned Americans to engage in civil defense efforts that, in part, consisted of building backyard bomb shelters and engaging in air raid drills in schools.¹¹

Today, homeland defense and civil defense have essentially merged, both in the way the country sets out to protect itself and in the country's lexicon. The President's *National Strategy for Homeland Security* defines homeland security as "a concerted national effort to prevent *terrorist* attacks within the United States, reduce America's vulnerability to *terrorism*, and minimize the damage and recover from attacks that do occur."¹² (Emphasis added.) The Homeland Security Act sets out the broader goals for a Department of Homeland Security, which include disparate agencies like the Federal Emergency Management Agency and the U.S. Customs Service (formerly part of the Department of the Treasury) that work toward common goals:

- Prevent terrorist attacks within the United States;
- Reduce the vulnerability of the United States to terrorism;
- Minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States;
- Carry out all functions of entities transferred to the Department, including by acting as a focal point regarding natural and manmade crises and emergency planning;
- Ensure that the functions of the agencies and subdivisions within the Department that are not

related directly to securing the homeland are not diminished or neglected except by a specific, explicit Act of Congress;

- Ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland; and
- Monitor connections between illegal drug trafficking and terrorism, coordinate efforts to sever such connections, and otherwise contribute to efforts to interdict illegal drug trafficking.¹³

The President's *National Strategy for Homeland Security*¹⁴ and the Homeland Security Act¹⁵ demonstrate that the overriding goal in homeland security is to prevent and respond to terrorism, without actually defining the term. The Federal Bureau of Investigation (FBI) defines terrorism as "the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."¹⁶ This definition, while helpful in focusing attention on the elements of terrorism, is not legally binding, as it has never been enacted into statute or regulation or adopted by court decision.

Even prior to September 11, the FBI separated terrorism into two types: domestic and international. The FBI defines domestic terrorism as involving "groups or individuals whose terrorist activities are directed at elements of our government or population without foreign direction."¹⁷ Examples of domestic terrorism include the 1995 bombing of the Murrah Federal Building in downtown Oklahoma City, OK, allegedly by U.S. citizens. Before September 11, the Oklahoma City bombing was the most deadly terrorist attack on U.S. soil, killing 169 men, women, and children.¹⁸

According to the FBI, international terrorism involves "groups or individuals whose terrorist activities are foreign-based and/or directed by countries or groups outside the United States or whose activities transcend national boundaries."¹⁹ The terrorist attacks of September 11 and the 2000 bombing of the Navy destroyer USS *Cole* in the Yemeni port of Aden are examples of international terrorism.²⁰ The FBI defines a "terrorist act" as an

attack against a single target (e.g., a building or physical structure, an aircraft, etc.), whereas the term “terrorist incident” is used to describe the overall concerted terrorist attack.²¹ A terrorist incident may consist of multiple terrorist acts.

The FBI definitions have since been augmented and codified in the U.S. Code. Now, the term “international terrorism” means activities that:

- (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
- (B) appear to be intended—
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;

The term “domestic terrorism” means activities that:

- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
- (B) appear to be intended—
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and
- (C) occur primarily within the territorial jurisdiction of the United States.²²

These definitions are reflected in parts of the USA PATRIOT Act,²³ the Homeland Security Act,²⁴ and the Department of the Treasury definitions of terrorism.²⁵ Each piece of legislation defines terrorism, in short, as a violent or dangerous act intended to intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking. The evolution of this language reveals that a consensus among federal agencies has come about only in recent years.

II. STATE RESPONSES

Some states encountered terrorism prior to September 11 and many, if not all, were home to state emergency management offices. Few, however, had sought to define homeland security or terrorism until after September 11. In the aftermath of the attacks, very few states created their own definitions of the term homeland security, although many have enacted legislation that adopted the federal definition (18 states) or their own meaning for terrorism.

Only two states have adopted definitions of homeland security: Alabama and Washington. The Alabama Homeland Security Act of 2003 defines homeland security as “the development,

coordination, and implementation of a state policy to secure the State of Alabama from terrorist threat or attack. The term includes efforts to detect, prepare for, prevent, protect against, share intelligence where applicable, respond to, and recover from terrorist attacks within the State of Alabama.”²⁶ In its Statewide Homeland Security Strategic Plan, Washington cites the *National Strategy for Homeland Security*²⁷ and adds its own spin on homeland security:

The preparation for, prevention of, deterrence of, pre-emption of, defense against, and response to threats and aggressions directed towards U.S. territory,

sovereignty, domestic populations, and infrastructure; as well as crisis management, consequence management, and other domestic civil support.²⁸

Alabama and Washington employ different terminology in their definitions, but there is consensus as to what homeland security involves: preparation for, prevention of, protection against, response to, and recovery from threats of terrorism and terrorist acts. While Alabama and Washington are the only states to have memorialized their notions of homeland security, all states have formally recognized the threat to the homeland, with each state creating a homeland security office or commission to address terrorism-related threats.²⁹

As stated earlier, eighteen states have adopted the federal definition of terrorism.³⁰ The remaining states have adopted some notion of terrorism as acts intended to intimidate, coerce, influence, and affect the civilian population or the government, as described in 18 U.S.C. § 2331.³¹ Some states, such as California, have gone no further in their definitions, favoring a broad definition. California defines terrorism as “any unlawful harm, attempted harm, or threat to do harm to, any state employee, state property, or the person or property of any person on the premises of any state-occupied building or other property leased or owned by the state.”³²

In contrast, Washington, D.C., takes a narrow approach, specifying those acts that “intimidate” or “coerce” civilians or the government. The broadness of the intimidation language is troubling. The nonviolent protests of the Civil Rights movement of the 1960s would fall within its ambit. Had this law been in effect during that period, our nation might conceivably still be bearing the burden of segregation and Jim Crow laws that limited the opportunities and contributions of many of our citizens. The District of Columbia also includes

murder in the first degree; placing obstructions upon or displacement of railroads; murder of law enforcement officer or public safety employee; murder in the second degree; manslaughter; kidnapping and conspiracy to kidnap; assault with intent to kill only; mayhem or maliciously disfiguring; arson; malicious burning, destruction, or injury of another’s property, if the property is valued at \$500,000 or more; or an attempt or conspiracy to commit any of the [above] offenses.³³

Illinois goes a step further in its definition of terrorism, including an act that “disables or destroys the usefulness or operation of any communications system . . . ,” or one that “disables or destroys the usefulness or operation of a computer network. . . .”³⁴ Other acts of terrorism defined in the Illinois statute include those intended to damage ground, air, or water transportation; the production or distribution of electricity, gas, oil, or other fuel; the treatment of sewage or the treatment or distribution of water; or controlling the flow of any body of water, among others.³⁵ Nebraska, like California, has taken a broader approach to its definition:

A person commits terroristic threats if he or she threatens to commit any crime of violence: (a) With the intent to terrorize another; (b) With the intent of causing the evacuation of a building, place of assembly, or facility of public transportation; or (c) In reckless disregard of the risk of causing such terror or evacuation.³⁶

What each state holds in common is its recognition that terrorism, however defined, is a threat for which the civilian populations and state governments must prepare. As stated in Washington’s Statewide Homeland Security Strategic Plan, “terrorist organizations remain committed to death and destruction within our borders. . . . Only by concerted action can we reduce our vulnerabilities and defend against further domestic attacks.”³⁷

III. CONCLUSION

At its essence, homeland security means protecting our way of life against those who threaten it, or wish to destroy it. While the United States is

a nation that has always fought to defend the homeland and preserve our way of life against such threats, the threat of terrorism is redefining

the environment in which we must respond. By defining homeland security and terrorism, we are taking steps to identify the threat and defeat it,

rather than allowing the terms to delineate themselves through further, perhaps ever more damaging, examples of killing and destruction of property.

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PART 2: DEFINING “HOMELAND SECURITY:” CONTENT AND CONTEXT GROUNDED IN THE CURRICULA

ROBERT W. SMITH

The purpose of this chapter is to develop a definition of homeland security based on the content and context of a purposeful sample of graduate and undergraduate courses ranging from emergency management, preparedness and planning, to terrorism and disaster response, to homeland security and national security at selected four-year colleges and universities in the United States.¹ The reasons for this exploratory study stem from definitional questions raised by both practitioners and academics about a) the variety of course descriptions and treatments of homeland

security; b) the quandary posed by this definitional imprecision; and c) possible implications of this ambiguity for the substantive curriculum in the respective disciplines.²

This chapter is not meant to be an exhaustive study that catalogs all courses on homeland security nor will it be an exhaustive synthesis of all syllabi in the field. Instead this chapter establishes a framework for guiding future research in the field by establishing a conceptual definition grounded by what is being taught in homeland security courses.

I. BASIS FOR THE ANALYSIS

To begin this type of grounded analysis, it is important to offer some a priori observations about the genre of courses that teach, treat, or evaluate homeland security:

1. There has been a widespread recognition of courses that treat homeland security as a major theme (many begun as a response to the terrorist events of September 11, 2001);
2. The content of these courses are only loosely coupled under the term homeland security; and
3. Many of these courses have either been newly added to the curriculum, or have long been

offered as part of a specialized knowledge base but without any substantive contribution to defining homeland security.

In some respects, even the articulation of these a priori observations may encourage practitioners and academicians to move beyond a rather instrumental definition and toward development of a fuller conceptual definition of homeland security. These a priori observations lead to a general research question posed in this chapter: What is homeland security?

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