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TESTIMONY BEFORE THE HOUSE COMMITTEE ON HOMELAND SECURITY

*Hearing on Securing the Homeland:
Reforming DHS to Meet Today's Threats*

BY

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I. Introduction

Chairman Thompson, Ranking Member Katko, and members of the committee, thank you for the opportunity to appear before you today on the important topic of reforming the Department of Homeland Security (DHS or the department). For the past two years, I have led a [project at the Center for a New American Security \(CNAS\)](#) focused on reforming DHS, with a specific emphasis on selected law enforcement, intelligence, and border security and immigration aspects of the department's work. I am grateful for the opportunity to share the insights developed through this project, and to work with this committee going forward in connection with its important oversight and legislative responsibilities.

Since this is my first appearance before this committee, I thought it might be useful to provide some additional information about my background and experience to give you a better sense of the perspective I bring to these issues. My grounding is as a 9/11-era operational counterterrorism and counterintelligence lawyer. I worked in the national security components of the Justice Department pre- and post-9/11 and was sent over to the FBI's Strategic Information Operations Center the morning of 9/11 after the second tower was struck, where I continued to work over the days, weeks, and months thereafter, supporting the Justice Department's national security operations. Most of my government experience from 2000–2010 was at the intersection of national security, foreign intelligence collection, and protecting civil liberties and privacy, including matters handled under the Foreign Intelligence Surveillance Act. As the first Justice Department National Security Division (NSD) detailee to the Office of General Counsel in the Office of the Director of National Intelligence from 2007–2009, I served as the primary legal advisor to the intelligence community's Civil Liberties Protection Officer, and routinely provided advice to intelligence community executive leaders on what we then referred to as the "domestic intelligence" or, domestic security and intelligence portfolio. I was integrally involved in developing guidelines and interagency oversight processes related to national security investigations. Upon returning to the NSD front office in 2009, I co-chaired an interagency task force focused on improving processes related to intelligence, surveillance, and compliance. Since leaving government service in 2010, I have taught graduate-level law seminars at Georgetown Law on intelligence community reform and cybersecurity law and policy. Accordingly, I approach national and homeland security legislative and policy issues with the eye of both a practitioner and an academic.

As a result of these formative professional experiences, I have zero interest in going backward, and undoing nearly 20 years of changes to the laws and institutions that kept the country safe from an act of international terrorism on the scale of September 11, 2001. However—and this is important—2021 is not 2001. The threats to security and safety the country faces today are not the same. While some threats of the past have receded, they have not disappeared. Instead, threats to American security, safety, and health appear to have compounded. And our national and homeland security institutions which are designed to protect Americans from the threats they actually face need to keep pace. In short, I don't just want us to develop a DHS that can meet today's threats, I want to see a DHS that has the legislative framework, organizational capability, and trained, resourced, and expert workforce that is ready to meet tomorrow's threats.

II. Recent Homeland Security Challenges

There are indications that our institutions are not keeping up with the current and emerging threat landscape, and DHS is, unfortunately, an example. Although there were advance warnings by experts and planning by prior administrations, by orders of magnitude, our nation was unprepared to respond to the global pandemic that has killed over 600,000 Americans and four million souls worldwide. As someone who had a front row view to the prompt, decisive, bipartisan action Congress and the federal government took to respond to the 9/11 attack, the insufficiency of the federal government's response to the greatest public safety threat as it emerged in early 2020 is impossible to ignore. DHS, in particular, was created to protect the country from foreign threats. From an outside observer's perspective, however, it has appeared to have played no meaningful role in warning or protecting the country or mobilizing its response to the coronavirus pandemic in the early months of the virus' spread across the United States. As Secretary Alejandro Mayorkas [testified](#) before this Committee in March, that has since changed.

As another example of the insufficiency of our institutions to protect our democracy, it was not foreign terrorists but domestic terrorists and insurgents who threatened the constitutional order and the personal safety of members and staff of the U.S. Congress on January 6, 2021. Although I do not subscribe to the view that January 6 was an intelligence failure, our homeland security apparatus should have been mobilized to do more to protect against the destruction and violence of that day. DHS—through the departmental component of the Secret Service—leads National Special Security Event (NSSE) operations. In my judgement, had January 6 been designated an NSSE and been subject to its rigorous planning and preparation protocols, the events we witnessed on that day would not have reached the level of severity that they did. DHS had both an intelligence warning and a protective coordination role that it could have leveraged in anticipation of that day's violence; instead, the protection of our constitutional system and the effective transfer of power was primarily thanks to the heroic actions of members of the Capitol Police and the District of Columbia's Metropolitan Police Department.

The political dynamics that motivated the violent insurgency of January 6, 2021, have not fully dissipated; continued work from intelligence, law enforcement, and physical security perspectives must continue. The administration's [National Strategy for Countering Domestic Terrorism](#), issued last month by the National Security Council, is a good start and outlines how various agencies, including DHS, can facilitate the sharing of information and development of programs that raise awareness about warning signs for domestic terrorism. Meanwhile, there remains important work to be done to improve the physical security of the Capitol and members of Congress, whether here in Washington, D.C., or at home in their districts, as well as that of other public officials like election officials and judges, in this continued environment of potential political violence. A review of those protective measures and recommendations for substantial improvement, will, I hope, be a significant component of the newly formed Select Committee, under the Chairman's leadership.

Meanwhile, malign foreign cyber aggression, additional manifestations of domestic terrorism, natural disasters prompted by a changing climate, and pervasive domestic violence facilitated by gun proliferation are affecting all Americans on a daily basis. DHS is a department that could be capable of better protecting our citizens from these types of threats. But in order to do so, DHS must adapt to current and emerging threats while improving its internal oversight and accountability. And it needs Congress' attention, engagement, and action to do so. I am heartened by this Committee's willingness to take on this important work.

III. Mission

As this Committee recognizes by virtue of holding this hearing, it is time to take a renewed look at the core mission of DHS. The department was created in 2002 to bring together capabilities of 22 different federal government entities with a wide array of functions, primarily to protect against a future international terrorist attack. From the outset, however, the nature of the day-to-day activities of the DHS components included aspects that could relate to counterterrorism, but that also covered a range of activities that had nothing to do with terrorism. Areas like immigration, border security, law enforcement, emergency management, and transportation security are all ones that are relevant to the counterterrorism mission, but are also functions that are far broader than just counterterrorism.

Accordingly, Congress should update Section 101 of the Homeland Security Act to reflect the activities that DHS engages in on a day-to-day basis, and to provide flexibility for the department to shift activities and priorities as the threat environment evolves. It's time to provide the statutory grounding to enable this department to move beyond the post-9/11 era. This is not to say the international terrorism threat does not exist. But the [modern threat environment](#) has evolved. DHS cannot do its best work under the current threat environment if its statutory mandate, organization, and funding is inextricably tied to an international terrorism threat of a prior era, while other threats present a growing menace to the United States' society, economy, and safety.

Congress could take two different approaches to modernizing the statutory mission. It could start from scratch and reimagine the department's mission. Alternatively, even a modest update to the text could provide much greater flexibility for the department to evolve in closer alignment with current, emerging, and future threats to the homeland. In my May 2020 report, [Reforming the Department of Homeland Security Through Enhanced Oversight & Accountability](#), I included proposed text that provides a modest revision to the statutory mission and would welcome the opportunity to work with this Committee on refining it further.

Updating the statutory mission might also contribute to rectifying the persistent and dismal morale issues at the department. As members of this Committee are likely aware in the [Partnership for Public Service's 2020 rankings of the best places in the federal government to work](#), DHS ranks dead last for large agencies. DHS is a department where many employees work on issues that are unconnected or have only theoretical connections to the counterterrorism mission. One way to not only improve the performance and functioning of the department, but also the morale of its valuable workforce, is to ensure that each and every DHS employee is invested in the department's mission. Based on my experience in public service, I know that mission is what motivates public servants. If we want to motivate the DHS workforce to feel pride in their work, we need to do a better job of making sure that they see their efforts reflected in the department's mission.

IV. Improving Oversight & Accountability for Law Enforcement Functions

DHS currently houses the largest federal law enforcement officer capacity of any department in the federal government. There are law enforcement components and activities spread across a wide range of the department's agencies and sub-components. DHS was not created, however, to serve as a federal police force, a function reserved for states and localities. Nor is it an internal security service or a domestic intelligence service, concepts that were roundly rejected, even after the 9/11 attacks.

While the administration, as a practical matter, needs to focus on the day-to-day management of the department, solving problems, and improving operational competency and morale, Congress needs to seriously think about and take steps to [future-proof this department against inappropriate political pressure or outright abuse of law enforcement authority and power](#). From the implementation of the [travel ban](#), to the enactment of the [family separation policy](#), to the aggressive deployment of tactical units to [Portland, Oregon](#), DHS has, unfortunately, revealed itself as an institution that is not capable of withstanding inappropriate political pressure. This state of affairs is neither fair to the workforce of DHS or the people it serves and interacts with in the course of performing its legitimate and lawful functions.

The risks of not reforming the law enforcement functions are substantial. First, the aggressive deployment of law enforcement personnel into situations for which they are neither trained nor prepared for places both officers and civilians at risk. Second, to the extent DHS may deploy its law enforcement personnel beyond their intended purposes, activities may be conducted outside the bounds of laws, proper procedures, and each component's mission. These actions harm public confidence in not just the department, but law enforcement nationwide. Today's environment is a difficult one for law enforcement officers and police who do follow the law and serve the public interest to the best of their abilities; heavy-handed local law enforcement activity by DHS is not helpful to the efforts at the state and local level to build public confidence in law enforcement personnel. Third, DHS is a highly operational department: its officers and employees interact with the public—both U.S. citizens and foreign persons—daily, routinely, and at a high volume. Clear guidelines, sophisticated and up-to-date training, and robust oversight structures are essential to ensure that DHS law enforcement officers carry out their responsibilities in accordance with the Constitution, laws, and rules, especially those related to the protection of civil liberties and privacy.

V. DHS Reform Act of 2021

The DHS Reform Act of 2021 is a positive step toward providing greater oversight and accountability for the department. In all, the proposed legislation provides appropriate and needed reforms that will pave the way for a better DHS. As you work to move it out of this Committee, I hope that there will be constructive efforts to build bipartisan support for it. While I will not comment on each provision of the proposed legislation in this written statement, I do wish to highlight and offer constructive comments on certain aspects of the proposed legislation:

- I strongly support the proposal to create an Associate Secretary to bolster the leadership capacity of the department in Section 102 of the bill. This proposal was a key recommendation of my May 2020 report, and was also recommended by the other independent reviews conducted since then. Given the particular expertise needed to oversee law enforcement activities, the portfolio designated in the bill makes sense and will ensure that the Secretary has the needed space to give sufficient attention to all aspects of the department's work, and not be unduly focused on immigration and border security, which are important, but do not represent the full scope of the department's functions and responsibilities.
- In order to ensure that the department's leadership has the needed flexibility to address not just today's homeland security threats but tomorrow's, I would urge Congress not to limit the organization of certain internal aspects of the department too narrowly. For example, Section 308 of the bill designates "no more than five Assistant Secretaries within the Office of Strategy, Policy, and Plans with divided responsibility" for areas that the proposed legislation then defines roughly as

counterterrorism, border security and immigration, cybersecurity and infrastructure security, law enforcement, and trade and economic security. In the current environment, for example, natural disaster emergency management or public health emergency response might be areas that would benefit from this designation. In another decade or two, other areas might benefit from this policy leadership focus. Congress may wish to allow a future Secretary or Under Secretary slightly more flexibility in designating the functions of assistant secretaries as the threat environment and the needs of the department change over time.

- One area that I also urge the Committee to consider including in future debate or amendments is a requirement for the promulgation of modernized operational guidelines for law enforcement activities across the department. While the bill at Section 890c does provide for “policies and guidelines” to better train on “accountability, [and] standards for professional and ethical conduct,” given the substantial law enforcement—including complex investigative activities—the department engages in, the department should have operational guidelines that establish the constitutional floor for operational activities and provide clear guidance for the scope and conduct of those activities. Given the breadth of the department’s law enforcement responsibilities and the nature of its complex investigations, the guidelines should be developed in consultation with the Attorney General, and should be made publicly available, consistent with national security.
- The bill proposes valuable provisions to bolster the work of the Chief Privacy Officer in Section 301 and Officer for Civil Rights and Civil Liberties in Sections 306, and requires coordination with both those officials in Section 511 for programs that affect their areas of expertise. I would go a step further and create an undersecretary for privacy, civil liberties and transparency, as discussed in my May 2020 report. Joining these offices under one high level official and adding transparency as an additional highlighted function would provide a stronger voice and capability to coordinate these important functions department-wide.

VI. Summary of Recommendations

Over the past two years, I, along with colleagues internal and external to CNAS, have made a variety of recommendations to modernize the DHS mission and improve the department’s operations, oversight, and accountability, particularly related to selected law enforcement, intelligence, and border security and immigration functions. Launched in 2019, the CNAS [project on DHS oversight and accountability](#) has played a leading role in bringing greater policy community attention to DHS and the need for modernizing and reforming the organization to meet the threats of today and tomorrow. Research under this project has drawn on a wide range of experts with operational, policy, and legal expertise, including input and advice from prior DHS senior leaders who have served in every administration since the department’s creation.

For ease of reference, a selected set of recommendations—several of which are reflected in the [DHS Reform Act of 2021](#)—made as part of this ongoing project is provided below. These recommendations are drawn from the following reports, policy briefs, and articles published in connection with CNAS’ umbrella project on DHS oversight and accountability:

- Carrie F. Cordero, Heidi Li Feldman, and Chimène Keitner, “[The Law Against Family Separation](#),” *Columbia Human Rights Law Review*, 51 no. 2 (2020).

- Carrie Cordero, “[Reforming the Department of Homeland Security Through Enhanced Oversight & Accountability](#),” (Center for a New American Security, May 2020), *with photographs by Ivan Pierre Aguirre*.
- Carrie Cordero and Katrina Mulligan, “[Modernizing the Department of Homeland Security](#),” Lawfare, December 9, 2020.
- Carrie Cordero and Katie Galgano, “[The Department of Homeland Security: Priorities for Reform](#),” (Center for a New American Security, March 11, 2021).
- Christian Beckner, “[Reassessing Homeland Security Intelligence: A Review of the DHS Office of Intelligence and Analysis](#),” (Center for a New American Security, May 25, 2021).
- Carrie Cordero and Katie Galgano, “From Mardi Gras to the Philippines: A Review of DHS Homeland Security Investigations,” (Center for a New American Security, forthcoming July/August 2021).

Mission

- Congress should update the department’s statutory mission at Section 101 of the Homeland Security Act to reflect current and emerging threats and facilitate the department’s ability to adapt to tomorrow’s threats.
- The administration should recalibrate the department’s focus on security and safety issues that most threaten Americans today, and enable the department to pivot to the threat environment of tomorrow.
- The administration should align the use of law enforcement powers with intended purpose and prioritization, including limiting the use and deployment of Border Patrol personnel for border security purposes only.

Organization

- Congress should create the position of Associate Secretary to provide more robust leadership capacity across the department’s extraordinarily wide range of responsibilities and activities.
- Congress should create the position of Under Secretary for Privacy, Civil Liberties, and Transparency, to ensure better coordination across the department of these important portfolios at a higher profile leadership level.
- The Secretary should direct the Office of Strategy, Policy, and Plans to develop policies and procedures to better coordinate oversight and compliance across the department.
- The administration should create a joint duty program across DHS components and at DHS headquarters, and include joint duty as a path to career advancement.

- The administration and Congress should work together to place the Office of Intelligence and Analysis (I&A) on stronger, forward-looking footing, by either “going big” and broadening the scope of I&A’s authority and functions, or “going small” and focusing I&A’s work on a tighter, more discrete set of core issues that better serves departmental leaders and focuses on high-quality products with a tailored utility and audience.
- The administration and Congress should work together to focus the operations, eliminate redundancies with other federal investigative law enforcement agencies, and improve oversight over DHS Homeland Security Investigations (HSI), including considering removing HSI from Immigration and Customs Enforcement (ICE) and creating a Senate-confirmed component head.
- The administration should create a Department Leadership Council, consisting of the component and agency heads to meet regularly with the Secretary and Deputy Secretary.
- The administration should create a departmental Oversight and Accountability Council, which would bring together the compliance and oversight personnel across the department responsible for legal, civil liberties, and privacy protection.

Oversight

- The Secretary should direct a review of law enforcement operational guidelines across the components of the department, as well as a review of operational procedures and guidelines governing detention practices.
- Congress should mandate the development and issuance of modernized law enforcement operational guidelines, in consultation with the Attorney General.
- Congress should direct the public release of newly developed law enforcement operational guidelines, consistent with the protection of national security.
- Congress should conduct or direct the execution of an oversight review of the number and function of political appointees across the department at non-leadership levels and identify opportunities to recalibrate the balance of political and career officials at non-leadership levels.
- Congress should continue to enhance the authority of the homeland security committees of Congress to serve as the primary vehicles for conducting oversight of DHS.
- With respect to family separation in the immigration context, Congress should legislate requirements for the reunification of families separated under the 2018 policy, mandate an adequate government tracking system for children who enter the border security and immigration system, and legislate adequate representation for children in immigration proceedings.

Thank you for the opportunity to participate today. I look forward to your questions and continuing to work with this Committee.

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Ms. Cordero spent the first part of her career in public service, including as Counsel to the Assistant Attorney General for National Security; Senior Associate General Counsel at the Office of the Director of National Intelligence; and Attorney Advisor at the U.S. Department of Justice, during which time she handled critical counterterrorism and counterintelligence investigations and appeared frequently before the Foreign Intelligence Surveillance Court. At the U.S. Department of Justice and the Office of the Director of National Intelligence, she worked extensively on developing policies, procedures, and processes relating to oversight, compliance, and protection of privacy and civil liberties in the context of government national security investigations and intelligence activities. She also served as a Special Assistant United States Attorney. After leaving government service, Ms. Cordero was the Director of National Security Studies at Georgetown Law, and was in private practice, handling matters related to surveillance, law enforcement response, security, and privacy. She has previously testified before the United States Congress on surveillance reform and foreign influence on democratic institutions.

Ms. Cordero earned her JD, cum laude, from Washington College of Law, American University, and her BA, magna cum laude, from Barnard College, Columbia University.

