



**Homeland  
Security**

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Administrative Conference of the United States  
Committee on Collaborative Governance

Chair Nisbet and Committee Members:

Thank you for the opportunity to comment on the draft report, *Improving Agency Coordination through Joint Rulemaking and Other Mechanisms*. We agree with the paper's authors that this topic is both timely and important; meaningful and regular interagency coordination is a *sine qua non* of efficient, effective, and accountable government. We also appreciate that the Conference is dedicated to improving the administrative process and federal agency procedures.

At the Department of Homeland Security (DHS)—which Congress created to enhance coordination throughout the homeland security enterprise—we fully recognize and acknowledge the essential role that interagency coordination plays. Indeed, the importance of robust interagency coordination is not the issue. Rather, the key challenge is to identify the most efficient and effective measures to achieve such coordination and then to find ways to implement those measures. To that end, we believe the way for the Administrative Conference of the United States (ACUS) to truly contribute to this area is to identify concrete, specific steps that agencies can take to further the universally acknowledged goal of improving agency coordination.

With this background in mind, DHS offers the following comments to the draft report. We provide comment on the related draft recommendation in a separate letter.

1. **The draft report does not adequately acknowledge certain potential resource implications of interagency coordination.** Although the final pages of the draft report discuss agency resources, we believe that in today's budgetary climate, it seems unlikely that any agency would be successful in obtaining additional resources for participating in interagency processes. We therefore recommend that the draft report take more careful

account of the following factors:

- a. Cumulative delays in the rulemaking process from unnecessary multiple interagency reviews—reviews that rules must undergo regardless of subject matter or prior working-level coordination—and the quantifiable and unquantifiable costs to the agency and the public as a result of such delays.
  - i. Specifically, the draft report should highlight best practices for each type of coordination tool, to ensure that agencies that invest resources in coordination up-front incur minimal cost. For instance, the draft report and recommendations could provide a more robust analysis of ways to leverage interagency resources (e.g., adopting another agency’s technical analysis).
  - ii. Specifically, we recommend that any discussion of increased coordination consider not only whether multiple agencies might have an interest in the rule, but also whether the issue is sufficiently important to warrant coordination, and what type of external input is appropriate.
- b. Lack of clarity, particularly in joint rulemaking, as to the specific agency or agencies responsible for implementing and enforcing of individual provisions of the rule. This often makes it difficult for agency personnel, Congress, and the public to ascertain agency responsibility for a rule.

Here, we recommend that the report include additional background information on best practices for joint rulemaking and MOU-drafting.<sup>1</sup> For instance, we note that although the draft report contains some information on the kind of guidance that agencies should include in their coordination policies,<sup>2</sup> the report does not give factual background or policy input on the potential substantive provisions of such guidance.<sup>3</sup>

- c. Challenges to agency leadership authority in instituting policy choices by passing the document to other actors who make changes based on their own interests during the coordination process. (For example, the report might address whether a staff-level employee at another agency should suggest policy changes to a rule

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<sup>1</sup> See Draft Report at 68-69 for a handful of suggestions regarding best practices in joint rulemaking.

<sup>2</sup> See *id.* at 68.

<sup>3</sup> This observation is closely related to our objections to Draft Recommendation 1, which we outline in the separate letter referenced *supra*.

already cleared by a Cabinet Secretary, given the potential for employees at the original agency to accept changes due to comment fatigue.)

- i. In this connection, we recommend, first, that the draft authors solicit specific feedback from agencies regarding the effectiveness and efficiency of the various coordination tools described in the report.
- ii. Second, we recommend that the report include agency views on when and how it is appropriate to share working-level documents, and how the OMB process tends to differ from internal agency (and other) commenting processes. Such an inquiry would include an analysis of which kinds of comments agencies find most helpful.

**2. The draft report does not adequately acknowledge existing mechanisms for centralized control.**

We note that in the regulatory context, the Office of Information and Regulatory Affairs (OIRA) already provides a strong incentive for agencies to collaborate early and often. OIRA should continue to ask agencies about coordination with other agencies whenever agencies submit a new rule with cross-cutting implications. Agencies anticipate that OIRA will ask such questions, and therefore build such coordination into their processes, if for no other reason than to avoid embarrassment at the EOP level.

Additionally, we note that the Unified Agenda of Regulatory and Deregulatory Actions (UA) already provides one tool for an agency to observe other agencies' planned actions and seek out early coordination efforts. The draft report seems to ignore this existing tool for possible early interagency coordination, or potential reforms or updates to this tool to make it more useful for these purposes (e.g., providing agency access to a list of planned and upcoming regulatory actions before such actions are published in UA).

**3. The draft report overstates the relative prominence of multiagency consolidation in the management toolset.** The draft report characterizes its thesis as follows:

As the opening quote of this Report indicates, Presidents have often decried fragmented and overlapping delegations, and have consistently targeted them in proposals for [executive] branch reorganization. This Report provides a more comprehensive picture of overlapping and fragmented delegations, and makes some practical suggestions for addressing the coordination problems they create.<sup>4</sup>

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<sup>4</sup> *Id.* at 5.

Contrary to the passage’s strong implication, executive branch reorganization has never been the predominant—or even a primary—tool for inter-agency coordination. As the authors acknowledge later in the draft report, agencies coordinate their activities using regular working-level communication, formal memoranda of understanding, joint policymaking vehicles, and a variety of other tools. And as noted by the draft report, the Executive Office of the President also plays a major coordinating role in a variety of ways, including (but by no means limited to) regulatory review. Although the draft report acknowledges that federal agencies currently use these tools to coordinate activities, the report offers no empirical basis for concluding that organizational consolidation is a significant option for dealing with most instances of regulatory overlap.

4. **The draft report makes unnecessary and overbroad arguments against multiagency consolidation.** The draft report presents a series of sweeping arguments against multiagency consolidation, reasoning that at times, consolidation may be (a) ineffective, (b) politically unrealistic, or (c) beyond the President’s legal authority to implement unilaterally.<sup>5</sup> As an initial matter, we note that neither the effectiveness, practicability, nor legality of multiagency consolidation has any logical bearing on the draft report’s thesis and recommendations; *whether or not some agencies ought to be consolidated is a separate question from how all government agencies ought to coordinate with one another.*

Below, we address specific aspects of each of these arguments in turn, focusing primarily on the claim that consolidation may be ineffective:

- a. **Effectiveness of consolidation.** The draft report makes a number of unnecessary, overbroad, and unsupported observations about the relative virtues of consolidation in general, and the Department’s consolidation in particular. First, as noted *supra*, we note that the success or failure of multiagency consolidation is irrelevant to the effectiveness of the interagency coordination tools outlined in the report. Moreover:
  - i. The draft report states that the value of merging numerous security-oriented federal agencies into a single, integrated entity “is highly debatable.”<sup>6</sup> In support of this broad assertion, the draft report cites a single source: the introduction to a 2005 book on intelligence reform, which itself cites to a handful of magazine and newspaper articles from

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<sup>5</sup> *Id.* at 15-19.

<sup>6</sup> *Id.* at 17. Below, we note that the above-referenced statement also characterizes DHS incorrectly as a consolidation of “over forty agencies.” See *infra* text accompanying notes 19-21.

2004.<sup>7</sup> ***This source is plainly insufficient to support the draft report’s claim***, which apparently encompasses not only the two-year-old Department referenced in the source material, but the organization as it stands today. From coordinated management practices, such as acquisition processes and IT, to information sharing and coordination of common policies and operations, DHS has implemented changes that have yielded significant benefits to the security of our nation. Nine years after the Department’s creation, it is clear that DHS is a more effective and integrated Department that has helped strengthen the homeland security enterprise and build a more secure America better equipped to confront the range of evolving threats we face. Because the broad assertion included in the draft report rests on offhand observations that are nearly as old as the Department itself, we recommend that the authors strike this broad, unsupported language.

- ii. Similarly, the draft report states that the Department’s organic statute “created a number of agencies while merging some existing ones, but it did not eliminate overlapping and potentially conflicting functions in the new organizational structure.”<sup>8</sup> Setting aside whether a general citation to a 187-page public law is sufficient to support so broad a claim, ***the statement itself—which relates to a version of the Department that existed, if at all, only briefly—is irrelevant to the drafters’ arguments regarding the effectiveness of the Department specifically, or consolidation generally.***<sup>9</sup> We therefore recommend that the authors strike this broad, unsupported assertion.
- iii. The draft report states that due to jurisdictional disputes between drug trafficking and immigration control agencies, “GAO has concluded that ***current arrangements*** create the potential not only for duplicating investigative efforts but also for compromising officer safety.”<sup>10</sup> ***Yet the situation described by GAO is over three years old***, and DHS and the Department of Justice have since enhanced coordination in numerous

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<sup>7</sup> *Id.* at 17 (citing Richard A Posner, *Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11* 10 (2005)).

<sup>8</sup> *Id.* at 17-18 (citing generally to the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135).

<sup>9</sup> Moreover, as the draft report makes clear with respect to the separate issue of coordination, *id.* at 47-56, there are many potential virtues of consolidation aside from the de-duplication of jurisdictional assignments. In this case, such virtues include (1) more effective governance through increased concentration of expertise and (2) enhanced accountability for the government’s homeland security activities.

<sup>10</sup> *Id.* at 18 (citing GAO, *Drug Control: Better Coordination with DHS and an Updated Accountability Framework Can Further Enhance DEA’s Efforts to Meet Post-9/11 Responsibilities* 7, 29 (Mar. 2009)).

ways.<sup>11</sup> Because GAO’s report does not describe current arrangements, and because the draft report provides no other support for the above-referenced assertions, we recommend that the authors strike the assertion.

- iv. The draft report states that proposals to consolidate agencies “would convert an *interagency* coordination problem into an *intra-agency* problem. Thus the choice of organizational form—a single regulator versus multiple regulators—may be less important for effectiveness than are coordination and information sharing.”<sup>12</sup> ***We believe that this formulation ignores significant differences between interagency and intra-agency coordination, and therefore recommend that the authors strike this passage.*** In our experience, it is much easier to share information and coordinate policy development within a single chain of command, where the relevant personnel share, *inter alia*, political leadership, business practices, core missions, and information technology resources.<sup>13</sup> Indeed, we have found that as a practical matter, the Secretary of a Department-level agency will often have coordination powers vis-à-vis her personnel that rival, and in some ways exceed, the executive branch coordination authorities outlined at pages 38 to 47 of the draft report.

For instance, the draft report highlights the Department of Justice’s Office of Legal Counsel (OLC) as a tool for interagency coordination. The draft report states that OLC “reactive[ly] . . . coordinates” the resolution of interagency conflicts by providing legal opinions to federal agencies upon request. Our own General Counsel, as chief legal officer of the Department,<sup>14</sup> regularly resolves jurisdictional and other legal disputes between DHS components. And because the DHS Office of General Counsel (OGC) employs attorneys throughout the Department, regularly rotates attorneys through both component- and headquarters-level counsel offices, and provides myriad opportunities for formal and informal consultation among attorneys across components, the Department has worked to develop coordinated and consistent legal views on a wide range of matters.

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<sup>11</sup> See, e.g., Press Release, DOJ, ICE and DOJ Sign Agreements to Share Information on Drug Trafficking and Organized Crime (Aug. 10, 2009) (emphasis added), <http://www.justice.gov/opa/pr/2009/August/09-crm-784.html>.

<sup>12</sup> Draft Report at 18 (citing Eric J. Pan, *Structural Reform of Financial Regulation*, 19 *Transnat’l L. & Contemp. Probs.* 796, 819 (2011)).

<sup>13</sup> This conclusion is consistent by the draft report’s own source material on this point. The article referenced at footnote 74 flatly concludes that “[t]he single regulator does not have to share or coordinate actions with another regulator, eliminating any possibility that issues of concern will fall between the jurisdictional cracks of separate regulators or be the subject of ‘turf battles’ between agencies.” Pan, *supra* note 12, at 819.

<sup>14</sup> 6 U.S.C. § 113(a)(10).

Similarly, DHS components regularly form inter-component working groups to draft regulations that cut across jurisdictional lines.<sup>15</sup> Once a DHS component submits a regulatory action for approval, the Office of the General Counsel oversees and mediates a Department-wide clearance process that requires resolution of all intra-Departmental concerns. In short, the Department “lower[s] net transaction costs over time by enabling agencies to deal early on with problems that could later become more costly or intractable, including conflicting interpretations of legal requirements, vaguely specified program elements, and incompatible compliance requirements.”<sup>16</sup>

These examples demonstrate the significant influence that multiagency consolidation has had on operational, legal, and regulatory coordination at DHS. Although we agree that multiagency consolidation is not a necessary precondition to engaging in regular and meaningful interagency coordination, there is no doubt that the Department’s consolidated structure continues to foster a strong culture of inter-component (and interagency) coordination.<sup>17</sup>

- v. The draft report states that coordination initiatives “seek to draw on the specialized knowledge of different agencies to produce net gains, rather than to combine the agencies in a way that would destroy their unique capabilities.”<sup>18</sup> We believe that although it is conceivable that some multiagency consolidation plans might “destroy . . . unique capabilities,” this is by no means inevitable or even likely. Moreover, the implication that consolidation reduces expertise is inconsistent with the draft report’s statement, noted above, that multiagency consolidation simply “convert[s]

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<sup>15</sup> See, e.g., Secure Flight Program, 73 Fed. Reg. 64,018, 64,018 (Oct. 28, 2008) (“After the compliance date of this Secure Flight final rule, aircraft operators will submit passenger information to DHS through a single DHS portal for both the Secure Flight and APIS programs. This will allow DHS to integrate the watch list matching component of APIS into Secure Flight, resulting in one DHS system responsible for watch list matching for aviation passengers.”); Transportation Worker Identification Credential (TWIC) Implementation in the Maritime Sector; Hazardous Materials Endorsement for a Commercial Driver’s License, 72 Fed. Reg. 3492 (Jan. 25, 2007). The Department engages in similar coordination efforts for non-regulatory programs and initiatives as well.

<sup>16</sup> Draft Report at 48.

<sup>17</sup> See, e.g., Press Release, DHS, TSA PreCheck Pilot to Expand to Busiest US Airports (Feb. 8, 2012), <http://www.dhs.gov/ynews/releases/20120208-tsa-precheck-pilot-expands.shtm> (“Eligible participants include certain frequent flyers from participating airlines as well as members of Customs and Border Protection’s (CBP) Trusted Traveler programs (Global Entry, SENTRI, and NEXUS) who are U.S. citizens and fly on a participating airline.”); Press Release, DHS, Secretary Napolitano Issues Directive to Strengthen the Sharing of Classified Information with State, Local, Tribal, and Private Sector Partners (Mar. 9, 2012), <http://www.dhs.gov/ynews/releases/20120309-napolitano-strengthen-sharing-classified-information.shtm> (“The directive was coordinated extensively with agencies to include representatives of the Department of State, Central Intelligence Agency, Federal Bureau of Investigation, as well as with representatives of the Information Security Oversight Office, Office of the Director of National Intelligence, Office of the Secretary of Defense and Department of Justice. In addition, the directive was coordinated with various state, local, tribal, and private sector partners.”).

<sup>18</sup> Draft Report at 50-51.

an *interagency* coordination problem into an *intra*-agency problem.” We therefore recommend that the authors identify empirical support for this assertion, or strike it from the report.

vi. Finally, the draft report states incorrectly that “DHS now comprises what were previously over forty agencies.”<sup>19</sup> This statement apparently stems from a misunderstanding of the following passage in the cited source: “Before the establishment of the Department of Homeland Security, homeland security activities were spread across more than 40 federal agencies.”<sup>20</sup> In fact, Congress created DHS by integrating “all or part of 22 different federal departments and agencies into a unified, integrated Department.”<sup>21</sup>

- b. **Political barriers to consolidation.** We agree that political barriers to consolidation exist, but reiterate that the effectiveness, practicability, and legality of consolidation are irrelevant to the draft report’s thesis.
- c. **Legal barriers to consolidation.** We note that the final argument against consolidation—that the President “cannot accomplish large-scale bureaucratic reorganization on his own”—remains largely unsupported by the surrounding text and footnotes.<sup>22</sup>

5. **The draft report casts too wide a net in its search for coordination problems.** To the extent that the draft report identifies examples of failed coordination, it frequently does so without considering whether (1) the specific example is best described as a coordination problem, and (2) the proper “solution” to the problem is identified in the draft report and recommendation. We note two related and prominent examples:

- a. **Hurricane Katrina.** The draft report identifies “the Bush Administration’s lackluster performance in the aftermath of Hurricane Katrina” as having “drawn scholarly and public criticism for a lack of coordination among federal agencies.”<sup>23</sup> In support of this assertion, the draft report cites source material that describes coordination challenges that emerged during Hurricane Katrina. *The source document faults the government’s response to Katrina not for a lack of coordination generally, but for a lack of effective coordination in the emergency*

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<sup>19</sup> *Id.* at 17.

<sup>20</sup> DHS, Brief Document History of the Department of Homeland Security: 2001-2008, at 3 (2008).

<sup>21</sup> DHS, Who Became Part of the Department?, [http://www.dhs.gov/xabout/history/editorial\\_0133.shtm](http://www.dhs.gov/xabout/history/editorial_0133.shtm).

<sup>22</sup> See Draft Report at 16-17.

<sup>23</sup> *Id.* at 4 (citing Frances Fragos Townsend et al., The Federal Response to Hurricane Katrina: Lessons Learned (Feb. 2006)).

*response context.*<sup>24</sup> To the extent that enhanced coordination efforts might avoid such a result in the future, such efforts would likely be unrelated to any recommendations made by the report.

- b. **Significant interagency coordination occurred as part of the government response to Deepwater Horizon.** The draft report cites “the Obama Administration’s uneven response to the oil spill in the Gulf of Mexico in 2010” for similar deficiencies,<sup>25</sup> but cites to an article that focuses primarily on substantive policy decisions—not a lack of attention to coordination *per se*.<sup>26</sup> ***In fact, the Coast Guard and EPA successfully and quickly issued a joint rule to directly assist in the urgently needed immediate relocation of nationwide oil spill response resources to the Gulf of Mexico to aid in the response to the Deepwater Horizon oil spill.***<sup>27</sup> This is an example not only of successful interagency collaboration, but of collaboration during an emergency situation under tight deadlines. It is also an example of successful joint rulemaking that was completed without either agency having articulated policies on joint rulemaking. We are glad to provide additional clarification on these coordination efforts, if the Committee or authors so desire.

Additionally, although there may have been some instances in which agencies appeared to take inconsistent policy decisions, this is likely due to the agencies’ different statutory responsibilities, rather than a lack of interagency coordination. We recommend that the authors strike this reference to the Deepwater Horizon response from the draft report.

- c. **Border MOU.** One of the Homeland Security Act’s most notable coordination successes was the creation of a single, unified presence at the border. U.S. Customs and Border Protection (CBP), the U.S. Coast Guard, U.S. Immigration and Customs Enforcement (ICE), and the Transportation Security Administration

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<sup>24</sup> See, e.g., Townsend Report, *supra* note 23, at 52 (“The Secretary of Homeland Security, is the President’s principal Federal official for domestic incident management, but he had difficulty coordinating the disparate activities of Federal departments and agencies. The Secretary lacked real-time, accurate situational awareness of both the facts from the disaster area as well as the on-going response activities of the Federal, State, and local players.”)

<sup>25</sup> Draft Report at 4 (citing Michael N. Widener, *Bridging the Gulf: Using Mediated, Consensus-Based Regulation to Reconcile Competing Public Policy Agendas in Disaster Mitigation*, 74 Alb. L. Rev. 587, 598-99 (2011)).

<sup>26</sup> See Widener, *supra* note 25, at 598 (arguing that the federal government (1) “failed to familiarize key federal officials” with the relevant response plan; (2) “failed to require specific data being extracted by BP . . . to be shared”; (3) “failed to promptly accept offers of aid from other nations . . .”; (4) “failed to demand more aggressive recovery tactics than those contained in the BP Plan”; and (5) “neglected to assure the American people that a comprehensive recovery strategy was underway within a reasonable period after the magnitude of the spill caused furor and panic among residents of the Gulf Coast states.”).

<sup>27</sup> 75 Fed. Reg. 37,712 (June 30, 2010).

collaborate regularly at all levels to secure our borders in an efficient, effective, and consistent manner.<sup>28</sup> Accordingly, we were struck by the draft report’s broad assertion that “responsibility for border patrol is divided among several agencies, including . . . the Bureau of Land Management . . . Bureau of Indian Affairs, National Park Service . . . the Fish and Wildlife Service” and ICE and CBP.<sup>29</sup> As the source material cited by the draft report makes clear, although other agencies’ work or priorities may be affected by border enforcement activities, *it is unquestionable that primary responsibility for border security lies with DHS.*

Moreover, we request that the Committee strike its references to the 2004 GAO report as it relates to the proposition that “an MOU [dealing with border security] is outdated.”<sup>30</sup> We note that the 2004 GAO report does not refer to an outdated MOU. Moreover, since GAO published the 2004 report, DHS and the Departments of the Interior and Agriculture have executed multiple memoranda of understanding on border security issues.<sup>31</sup> Finally, we note that in 2010, GAO issued a new report outlining coordination successes in the border security context, and recommended increased coordination between the agencies. *GAO did not, however, state that an MOU was outdated, or recommend a new MOU.*<sup>32</sup>

Because the existing memoranda of agreement are not outdated, and the draft report offers no support to the contrary, we recommend that the authors strike all references to border security memoranda of understanding from the report.

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<sup>28</sup> For instance, CBP, ICE, and the U.S. Coast Guard have established working-level relationships with federal, state, local, and foreign law enforcement agencies through its Border Enforcement Security Task Forces (BESTs). See H. Subcomm. on Border, Maritime & Global Counterterrorism, *Border Violence: An Examination of DHS Strategies and Resources*, 111<sup>th</sup> Cong. 22-23 (statement of ICE Deputy Director Kibble). For more information on BESTs, see ICE, *Fact Sheet: Border Enforcement Security Task Force (BEST)*, <http://www.ice.gov/news/library/factsheets/best.htm>.

<sup>29</sup> Draft Report at 12.

<sup>30</sup> Draft Report at 29, n.128 (citing GAO, GAO-04-590, *Border Security: Agencies Need to Better Coordinate Their Strategies and Operations on Federal Lands*, 4 (2004)). Notably, this assertion is repeated on page 5 of the draft recommendation.

<sup>31</sup> See GAO, GAO-11-177, *Border Security: Additional Actions Needed to Better Ensure a Coordinated Federal Response to Illegal Activity on Federal Lands*, 10 (2010) (referencing MOUs signed in 2006 and 2008, respectively). DHS has also engaged in other coordination efforts with the relevant sibling agencies, as outlined in the 2010 GAO report.

<sup>32</sup> See generally *id.*

Thank you again for the opportunity to comment on these important issues. We look forward to working together with you together in the future.

Sincerely,

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