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Martin J. Alperen



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FOUNDATIONS OF HOMELAND SECURITY

Law and Policy

2nd Edition

MARTIN J. ALPEREN, Esq.

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FOUNDATIONS OF HOMELAND SECURITY

WILEY SERIES IN HOMELAND AND DEFENSE SECURITY

Series Editor

TED G. LEWIS Professor, Naval Postgraduate School

Foundations of Homeland Security: Law and Policy/Martin J. Alperen, Esq.

Comparative Homeland Security: Global Lessons/Nadav Morag

Foundations of Homeland Security: Law and Policy, Second Edition/Martin J. Alperen, Esq.

EPIGRAPH

The United States has long championed freedom because doing so reflects our values and advances our interests. It reflects our values because we believe the desire for freedom lives in every human heart and the imperative of human dignity transcends all nations and cultures.

Championing freedom advances our interests because the survival of liberty at home increasingly depends on the success of liberty abroad. Governments that honor their citizens' dignity and desire for freedom tend to uphold responsible conduct toward other nations, while governments that brutalize their people also threaten the peace and stability of other nations. Because democracies are the most responsible members of the international system, promoting democracy is the most effective long-term measure for strengthening international stability; reducing regional conflicts; countering terrorism and terror-supporting extremism; and extending peace and prosperity.

To protect our Nation and honor our values, the United States seeks to extend freedom across the globe by leading an international effort to end tyranny and to promote effective democracy.

– National Security Strategy of the United States of America,
March 2006, § II(C)

The only thing necessary for evil to prevail is for good men to do nothing.

– Edmund Burke

Those who have the privilege to know have the duty to act.

– Albert Einstein

I try to make my sojourn here a useful interlude.

– J. Antonio Jarvis

This book is dedicated to the memory of Alva A. Swan, Attorney General of the United States Virgin Islands (VI).

Attorney Swan cared deeply about the People and Territory of the VI.

He supported the development of the VI's preparedness as well as homeland security education.

He was liked and respected by all who had the privilege to have worked with him.

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Also deserving of thanks are the countless unknown men and women who comprise the homeland security enterprise. Some of them work for intelligence agencies. Some work for the military. Some work for the FBI, or DHS, or law enforcement. Included here are fire and EMS who are ready to risk their lives for you. Some are civilians who saw something and said something. Hospitals and their staffs are part of the enterprise. It includes interpreters, transcriptionists, IT and cyber professionals. Even ham radio (amateur radio) operators, who practice relaying information in case the main communications systems fail. It includes the folks who drafted the statutes and policy documents you will see in this book. It also includes you, because you chose to learn about the subject. This brings us to your teachers, who had to learn new material; to the school administrators who approved the course; and to those who authored books that are used in the courses. The homeland security enterprise is truly vast and I thank all of you.

ABOUT THE COMPANION WEBSITE

This book is accompanied by a companion website:



www.wiley.com/go/alperen/homeland_security_law

The website includes:

Instructor's Manual

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INTRODUCTION – OVERVIEW – BACKGROUND

“We Have Some Planes”¹

No book about homeland security is complete without mention of 9/11 and reference to *The 9/11 Commission Report*² and other factual reporting about the attack. There is then a discussion of what homeland security is. There are sections on what homeland security looks like from the outside and from the inside, and a discussion about the development of homeland security law since 9/11. Next are definitions of terrorism, a list of goals or learning objectives for the reader, and then a little about this text.

9/11

Understanding what happened and how September 11, 2001, affected America and the world is important for understanding homeland security law and policy, but is beyond the scope of this book. I recommend readers familiarize themselves with the documented history and background. The 9/11 Commission Report, the result of an intensive government-sponsored investigation, is the official version of the events. Columbia University’s *The World Trade Center Attack: The Official Documents*,³ and City University of New York/George Mason University’s *The September 11th Digital Archives*⁴ both have a wealth of information.

This book and what you are learning about is not just an academic exercise. For a reminder of 9/11, see this poignant video of the burning towers, the people, scene, etc., set to music by Enya.⁵

Up From Zero, a one-hour video from the U.S. Department of Labor, is an uplifting profile of the tradespeople who removed what was left of the World Trade Center after 9/11/2001. A remarkable story in itself, made even more so because some of the same workers also helped to build it years earlier.⁶

The Boston Marathon bombing on April 15, 2013, is the topic of a remarkable 14-minute video by Chris Bellavita and the CHDS media team. *Lilacs out of the Dead Land: 9 Lessons to be Learned from Last Week*, introduces many of the issues relevant to understanding homeland security.⁷

WHAT IS HOMELAND SECURITY?

Vision of Homeland Security

According to the Homeland Security Council in 2007, “the United States, through a concerted national effort that galvanizes the strengths and capabilities of Federal, State, local, and Tribal governments; the private and non-profit sectors; and regions, communities, and individual citizens – along with our partners in the international community – will work to achieve a secure Homeland that sustains our way of life as a free, prosperous, and welcoming America.”⁸

More recently, the 2014 Quadrennial Homeland Security Review described the Homeland Security Vision as “A homeland that is safe, secure, and resilient against terrorism and other hazards, where American interests, aspirations, and way of life can thrive.”⁹

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Mission Statement

The Department of Homeland Security lists five missions:

- (1) Prevent terrorism and enhancing security;
- (2) Secure and manage our borders;
- (3) Enforce and administer our immigration laws;
- (4) Safeguard and secure cyberspace;
- (5) Ensure resilience to disasters.¹⁰

Homeland Security Distinguished from Homeland Defense

Homeland security and homeland defense are complementary components of the National Security Strategy. Homeland defense is the protection of US sovereignty, territory, domestic population, and critical defense infrastructure against external threats and aggression, or other threats... Missions are defined as homeland defense if the nation is under a concerted attack. The Department of Defense (DOD) leads homeland defense and is supported by the other federal agencies. In turn, the DOD supports the nation's homeland security effort, which is led by the Department of Homeland Security (DHS).¹¹

Definition of Homeland Security

Homeland Security is defined 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

No Consensus

Despite the definition, mission statement, and vision, there is no consensus among practitioners and the public as to what the term Homeland Security actually means. Different groups view it differently.¹³ The extremes of opinion are represented, for the narrow view, by those who feel homeland security is only about terrorism. They believe focusing on anything additional dilutes, distracts, and weakens the homeland security mission.

Others say its focus is terrorism and natural disasters. Still others claim homeland security is about “all hazards” (terrorism, man-made disasters, and natural disasters). To some, homeland security is focused on “jurisdictional hazards” (i.e. homeland security means different things to different jurisdictions depending upon that jurisdiction’s particular hazards, risks, and level of preparedness). Examples of some of the jurisdictional hazards include hurricanes, tornadoes, flooding, and earthquakes.

At the other extreme, the broad view of homeland security advocates that homeland security is about everything – that it implicates almost every sector of our lives and there is very little which does not relate to it in some way.

Under this view, the arts (painting, poetry, music, dance, theater, food) have homeland security implications. Known to break down barriers and overcome cultural differences, sometimes the arts are the only connection between otherwise hostile/unfriendly countries.¹⁴ “We must never forget that art is not a form of propaganda; it is a form of truth.”¹⁵ Even food counts. “It’s often said that the closest interaction many Americans have with other countries’ cultures is through food. That kind of culinary diplomacy is particularly common in Washington, D.C., where immigrants from all over the world have cooked up a diverse food scene....”¹⁶

One practitioner uses the term “generational hazards.” These are hazards created by the present generation that “take many decades to metastasize before finally reaching a disastrous end-state that impacts future generations.”¹⁷ Global warming is one example.

For those who think homeland security must also include global and ideological issues such as freedom, self-determination, democracy, sustainable growth and consumption, overpopulation, environmental degradation, inadequate health care, extreme poverty, intolerance, social injustice, etc., homeland security is synonymous with “One World Security.”¹⁸ We can plan to prevent, prepare for, and recover from a terrorist attack. We can also take the broader and longer-term view and work to make the world a better place where there will be fewer terrorists.

A Different Name – A Different Focus

The titles we used and the focus of what we now call homeland security have changed over the years¹⁹. During the Cold War, we called it “Civil Defense,” focused on nuclear war with the Soviets. When the Cold War ended, the focus moved to natural hazards. After 9/11, we called it homeland security, focused on terrorism. Homeland security is now focused on “all hazards” (terrorism + natural disasters + man-made disasters). Within this list of terms should also be “public safety.”

Views of Emergency Management

Further insight into what is homeland security can be gained by examining different models of emergency management. Michael D. Selves²⁰ describes two philosophically different views of emergency management – the “emergency services” model and the “public administration” model.

The “emergency services [model is] primarily concerned with the coordination of emergency services.” Among other things, Selves points out that under the emergency services model

Organizational interactions tend to be primarily with emergency services agencies. Managers operating under the E-S model may be reluctant to interact with non-emergency

services agencies and especially with senior, elected officials. Often emergency management functions are embedded within an emergency service agency. This has the effect of isolating them further from the policy making functions of the jurisdiction. Access to local executives and elected officials is often indirect and limited by the organizational structure. Interaction with policy level officials is also often characterized by an attitude that the “politicians” are a nuisance during response operations and should be “kept somewhere so they don’t get in the way”.

The public administration model is much broader.

The P-A model is based on a philosophy which views emergency management as an element of the overall administration of government. It sees emergency management as that aspect of public administration which deals with the operation of government during crisis. Because of this, there is an interest in the political, social and psychological factors that are involved in crisis management. The concern is focused on not just the emergency services response, but on the impact of the disaster/emergency in terms of larger jurisdictional issues...

Practitioners operating under the P-A model tend to approach emergency management as a discipline, subject to academic research and debate with the results ... being used as tools in implementing a local program...

The “emergency services” model is narrow, restricted, and limited. The “public administration” model is, by comparison, broad, full, and robust. The public administration model must address the full range of issues while the emergency services model just makes sure the fire is out.

Furthering the broad view of homeland security, President Obama stated there is no distinction between homeland security and national security.²¹ He “described the nation’s energy challenges as both a matter of national security and environmental protection.”²² The U.S. Commission on National Security wrote, “We have taken a broad view of national security. In the new era, sharp distinctions between “foreign” and “domestic” no longer apply...”²³ The Director of National Intelligence said growing worldwide energy demand, global warming, food and water shortages, and increasing population are national security issues.²⁴ The Department of Defense, National Defense Strategy reflects this same sentiment.²⁵ The 2010 National Security Strategy states that “the danger from climate change is real, urgent, and severe.”

Additional examples of the broad view of homeland security include, “The capacity of America’s educational system to create a 21st century workforce second to none in the world...”²⁶ and “America’s heavy dependence on a global petroleum market that is unpredictable, to say the least.”²⁷ Former president Jimmy Carter said in May 2009, “our inseparable energy and environmental decisions will determine

how well we can maintain a vibrant society, protect our strategic interests, regain worldwide political and economic leadership, meet relatively new competitive challenges, and deal with less fortunate nations. Collectively, nothing could be more important.”²⁸

INDIVIDUAL RESPONSIBILITY AND FAITH-BASED ASSISTANCE

Hurricane Katrina will be examined thoroughly in the FEMA chapter of this volume (Ch. 8) and blame for the poor response can be debated and assigned to several management-level individuals, entities, and levels of government. It does not, however, fall on them alone. There must be some “individual responsibility.” The question, is just how much?

Many of the people who perished and suffered were very poor, ill, frail, and/or disenfranchised. Is it good governance to expect a person who can barely feed themselves to, on their own, relocate to another city, or go to a hotel for a few days? Which level of government and which individuals were in the best position to know the existing infrastructure weaknesses, the severity of the coming storm, and the constituents?

Although taking “individual responsibility” is admired in our society, the term is not a focus in the homeland security literature. That said, America has a long history of religious organizations taking responsibility for those less fortunate. “The White House Office of Faith-based and Neighborhood Partnerships works to build bridges between the federal government and nonprofit organizations, both secular and faith-based, to better serve Americans in need.”²⁹ There is the DHS Center for Faith-based & Neighborhood Partnerships³⁰ and FEMA’s Voluntary, Faith-Based, & Community-Based Organizations.³¹

WHAT DOES HOMELAND SECURITY LOOK LIKE FROM THE OUTSIDE?

Using an Office of Homeland Security/Emergency Management (HSEM)³² as an example, homeland security looks like or reflects the breadth-of-homeland-security view of its leaders. For those with an ‘emergency services’ orientation we would expect to see major involvement by emergency services providers only (police, fire, EMS, etc.). This system might have the best equipment and respond with military precision, yet if these are the only participants, then the job is done as soon as the scene is safe.

An HSEM office with a “public administration” focus would have a vastly broader area of responsibility. This HSEM would involve not just a city’s first responders but also all subsequent responders; those represented in part by the city agencies that will have a role in recovery. These include public works, parks and recreation, public health,

education, animal control, building inspection, child support, city engineer, information technology, environment, housing, mayor or administrator, medical examiner or coroner, power, planning, port authority, zoo, and the finance and tax people. Every city agency would be involved with the HSEM. After surviving a disaster, when the first responders are done, these subsequent responders will make a city resilient.

At the very least, a broad-minded HSEM office will have all of its agencies working as soon after a disaster as possible. Ideally, all of the agencies have practiced working together in alternative locations and with limited communications capabilities. All agencies should have ways to obtain essential equipment, supplies, and other vital resources even without a fully functional city government. For example, the public health department procures latex gloves from the local pharmacy when the traditional supplier is unavailable. In addition, all of this should be practiced and coordinated with federal, state, and tribal governments, the private and non-profit sectors, and regions, communities, and individual citizens. For more on this, see the chapters on preparedness and resilience in this volume (chapters 22 and 23).

WHAT DOES HOMELAND SECURITY LOOK LIKE FROM THE INSIDE?

America faces an “evolving landscape of homeland security threats and hazards. The Deepwater Horizon oil spill in 2010, Hurricane Sandy in 2012, and the Boston Marathon bombing in 2013 illustrate these evolving threats and hazards. We must constantly learn from them and adapt.”³³

Homeland security is not static, absolute, or permanent. It is continuous and adaptive. It is dynamic. On every level, homeland security requires cooperation, joint operations, and collaboration. It is integrated, interrelated, and interagency. “The challenges to national security today defy traditional categories. National security now involves a wide array of issues that can be addressed only with a broader set of highly integrated and carefully calibrated capabilities.”³⁴ “The evolution of the terrorist threat demands a well-informed, highly agile, and well-networked group of partners and stakeholders...”³⁵

Emergency services agencies (first responders) all over the country have a grand history of cooperating with each other. Thus homeland security has horizontal integration. Almost every statute and policy document related to homeland security requires that a certain plan or action be coordinated with federal, state, county, city, town, tribal, and regional governments, and with the private sector. There is also, at least in theory, vertical integration.

The 9/11 Commission Report called the attacks a failure of imagination.³⁶ How we think about the subject, or don't think about it, can be as important as any other aspect of

homeland security. “We can't solve problems by using the same kind of thinking we used when we created them.”³⁷ “Truly successful decision making... demands more than just a picture of the world as it is. It demands in addition a picture of the world as it will (or at least may) be.”³⁸

Homeland security requires that new ways of thinking about or looking at a problem, and new vision, be nourished and encouraged. There must always be room at the table for them. (See chapter 2, *Metacognition and Errors in Judgment Related to Decision Making in Homeland Security*.)

EVERYONE IS A COMPONENT. EVERYTHING IS IMPORTANT

Homeland security has many components and they are all critical. For example, no matter what type of incident, whether it is a storm, earthquake, flood, tornado, man-made disaster such as a train wreck with deadly chemicals aboard, or terrorism, without *communications*, intelligence cannot reach decision-makers and direction cannot be conveyed to the people in the position to take action. Without good *intelligence*, those in charge will not know the best actions to take, regardless of whether they can communicate. Without *trained, prepared, and properly equipped responders* to take action, communication and intelligence are meaningless.

This is a more important point than it might appear to be at first glance because “everyone” is a lot. It includes not just the decision-makers, intelligence officials, and first responders mentioned in the preceding paragraph. “Everyone is a component” means the entire community. For example, if there is a major catastrophe and if members of the community know basic first aid, that will free up overwhelmed first responders to deal with major injuries. FEMA's CERT (Community Emergency Response Team, sometimes it goes by other names) training is an excellent resource that increases the number of people who can contribute. Please see chapters 22 and 23 on preparedness and resilience.

WHAT IS HOMELAND SECURITY LAW?

One definition of homeland security is that it is “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.”³⁹ Adding the Department of Homeland Security's all hazards approach, it follows logically, then, that Homeland Security Laws are those statutes enacted to prevent, mitigate, respond to, and recover from man-made or natural disasters, catastrophic accidents, or terrorist attacks.⁴⁰

Homeland Security Law had its official beginning on September 11, 2001. Prior to then, our nation “lacked a unifying vision, a cohesive strategic approach, and the necessary institutions within government to secure the Homeland

against terrorism....[That day] transformed our thinking.”⁴¹ Six weeks later, October 26, 2001, Congress passed the USA Patriot Act.⁴² On November 25, 2002, it passed the Homeland Security Act⁴³ establishing the Department of Homeland Security (DHS).⁴⁴

Documents called National Strategies, produced by the Executive Branch of government, enunciate the nation’s overriding homeland security strategies. For example, there is the National Security Strategy, the National Strategy for the Physical Protection of Critical Infrastructures and Key Assets, and the National Strategy for Combatting Terrorism. A complete list of these and other related documents can be found in the Homeland Security Digital Library.⁴⁵ We will discuss some of these later in the book.

Presidential Directives are much shorter than the strategies. Each one is focused on a specific subject area. Some of them are public, and some classified. The administration of President George W. Bush called them “Homeland Security Presidential Directives” (HSPDs). HSPD 7 relates to critical infrastructure identification, prioritization, and protection. HSPD 8 deals with national preparedness. HSPD 9 is entitled “Defense of United States Agriculture and Food.”

In President Barack Obama’s administration, they are called “Presidential Policy Directives” (PPDs). PPD 2 is about Implementation of the National Strategy for Countering Biological Threats. PPD 20, about U.S. Cyber Operations Policy, is classified and only a fact sheet is available, not the full text. PPD 21 is entitled “Critical Infrastructure Security and Resilience.” PPD 28 is about signals intelligence. We will study some of these.

The Disaster Relief Act of 1974 established the procedures for presidential disaster declarations. The Federal Emergency Management Agency (FEMA), created during the administration of President Jimmy Carter in 1979, consolidated under one agency the disaster management functions that previously were scattered among several independent agencies. The Robert T. Stafford Disaster Relief and Emergency Assistance Act⁴⁶ (1988) amended and incorporated the provisions of the 1974 Disaster Relief Act. “The Stafford Act,” as it is called, sets forth the procedures for declaring a disaster and requesting federal assistance, and then guides the subsequent emergency response through ultimate recovery.

After a clearly inadequate response to hurricane Katrina, the Post-Katrina Emergency Management Reform Act⁴⁷ (PKEMRA), made significant changes to FEMA and DHS, and helped to clarify the State and Federal Government’s roles, including FEMA’s and DHS’s roles, for responding to large-scale events.

The national strategies, HSPDs, PPDs, and statutes such as the Patriot Act, the Homeland Security Act, the Stafford Act, PKEMRA, and others, executive orders, plus portions of related statutes, comprise homeland security law and policy and are the homeland security framework and are what

this book is about. The Department of Homeland Security itself and all homeland security actions it takes exist only in compliance with these foundational documents.

THE DEVELOPMENT OF HOMELAND SECURITY LAW

It is impossible to understand the complexity, scope, and depth of the Patriot Act without reading the statute, thus significant portions are reproduced here. The Patriot Act was extremely controversial and invoked public protests claiming it violated rights to privacy. One of its most controversial provisions involved increasing the availability of surveillance without the need for a judicially approved warrant. Supporters of the Patriot Act claim it was sharply focused to achieve its goal and to decisively correct some of the country’s security weaknesses.⁴⁸

Regardless of whether one approved of the Patriot Act or not, it was an intellectual accomplishment representing a tremendous effort in a very short time period. It involved understanding many complex and interrelated statutes covering many areas of existing law, and it created new law.

Although the Homeland Security Act was not written in the same short time period as the Patriot Act, and not under the immediate shock of 9/11, it too was a remarkable document. Even though many disagree with some of its provisions, organizational structure, or the inclusion of FEMA as an agency within DHS, in creating DHS the Act accomplished the largest reorganization of government in more than fifty years. (See chapter 7 about DHS and chapter 8 about FEMA.)

The Homeland Security Act created DHS, brought FEMA under DHS control, and “transferred more than two-dozen federal entities – some in their entirety, some only in part – and 180,000 employees to the new department.”⁴⁹

From its inception, homeland security included an important focus on science and technology. Homeland security relies on technology for many purposes, including situational awareness, early detection and monitoring of weapons of mass destruction, and communication. DHS promotes the expedited development, acquisition, and introduction of new technology.

The Homeland Security Act mandated:

... that [DHS] agencies’ databases be compatible with one another and with other federal agencies.

It

established within the Department of Justice an Office of Science and Technology ... to serve as the national focal point for work on law enforcement technology; and ... to carry out programs that, through the provision of equipment,