

July 12, 2002



The Honorable Richard Armey
Chairman
House Select Committee on Homeland Security
H226 Capitol Building
Washington, DC 20515

The Honorable Nancy Pelosi
Ranking Member
House Select Committee on Homeland Security
H226 Capitol Building
Washington, DC 20515

Dear Chairman Armey and Ranking Member Pelosi,

Pursuant to H. Res. 449, we are pleased to transmit to the Select Committee on Homeland Security the Committee on the Judiciary's views and recommendations concerning H.R. 5005, the "Homeland Security Act of 2002." The recommendations represent the Judiciary Committee's bipartisan support for the creation of a Department of Homeland Security and reflect the Committee's judgment that H.R. 5005 can be further refined to ensure that this Department fulfills its fundamental purpose to prevent terrorist attacks on American soil.

On June 26, 2002, the Committee on the Judiciary received testimony from Homeland Security Director Tom Ridge concerning H.R. 5005. In addition, the Judiciary Committee Subcommittees on Crime, Terrorism, and Homeland Security, Immigration Border Security, and Claims, and Commercial and Administrative Law conducted separate hearings which examined this proposed legislation. The Committee recommendations reflect the views received at these hearings as well as extensive consultation with Administration officials, outside experts, and the conclusions of several congressionally-chartered antiterrorism commissions.

The proposed Department's central, predominate purpose is to assess, prevent, and respond to terrorism and other threats affecting America's internal security. The Judiciary Committee has a special responsibility to help effectuate this goal. As it has done repeatedly since September 11, 2001, the Committee has responded to the President's call to action by diligently and expeditiously discharging its responsibility to ensure the security of all Americans. Given the Committee's jurisdiction over subversive activities affecting the internal security of the United States, the nation's immigration and naturalization laws, federal civil and criminal procedure, and federal administrative practice and procedure, the Committee is uniquely positioned to assist the creation of a focused and effective Department of Homeland Security.

The amendments to H.R. 5005 discussed in this letter were favorably reported by the Judiciary Committee on July 10, 2002. Most of these changes were contained in a Manager's Amendment which we jointly introduced. We have included a summary of these recommendations

and additional views presented by the members of the Judiciary Committee for your review. While consistent with the articulated mission of the Department of Homeland Security, the proposed amendments recommend important structural changes which would strengthen the Department's ability to effectively assess, deter, and respond to terrorist threats. Of no less importance, the Committee makes critical recommendations to help safeguard the civil liberties and freedoms cherished by all Americans.

The Judiciary Committee strongly supports the establishment of a federal Department primarily dedicated to homeland security. Our recommendations help advance this goal and should provide valuable guidance to the Select Committee as it completes the critical task of shaping the Department of Homeland Security.

Sincerely,

F. JAMES SENSENBRENNER, JR.
Chairman
Committee on the Judiciary

JOHN CONYERS, JR.
Ranking Member
Committee on the Judiciary

COMMITTEE ON THE JUDICIARY U.S. HOUSE OF REPRESENTATIVES

VIEWS AND RECOMMENDATIONS ON H.R. 5005

THE “HOMELAND SECURITY ACT OF 2002”

TO

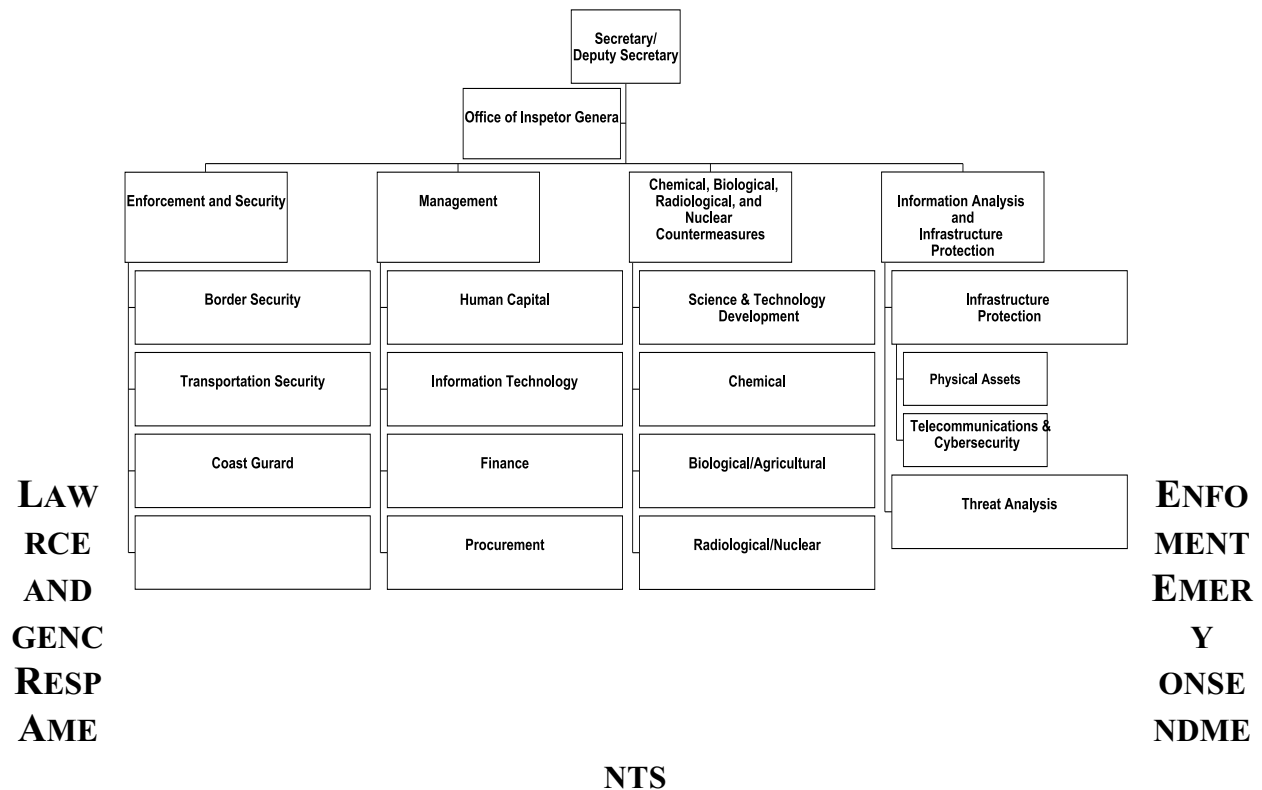
THE SELECT COMMITTEE ON HOMELAND SECURITY

July 12, 2002

PRINCIPAL PROVISIONS OF JUDICIARY COMMITTEE AMENDMENTS TO H.R. 5005

The Committee amendments to H.R. 5005 are fully consistent with the articulated mission of the proposed Department of Homeland Security (DHS). Reported amendments merely streamline the structure and focus the mission of the Department to help ensure its success. The Committee recommends modifying the mission statement of the Department to stress that its core mission should be the prevention, detection, disruption, and effective response to terrorist threats and activities. The Manager’s Amendment to H.R. 5005 would enhance the effectiveness of the new Department and reduce bureaucracy by: (1) limiting the number of Under Secretaries to four; (2) transferring only a small component of the Federal Emergency Management Agency to the new Department; (3) transferring the Secret Service to the Department of Justice; and (4) ensuring that immigration services remain at the Department of Justice. The amendments also make important

recommendations to reduce potential abuses by the new Department, including the addition of a privacy officer, the creation of deputy Inspector General for civil rights and civil liberties, and the inclusion of strengthened whistleblower protection provisions. The following chart reflects the revised organizational structure the Committee recommends for the proposed Department.



Clarification of Key Terms

The Committee recommends the statutory definition of terms which are critical to the effective functioning of the proposed Department. Accordingly, “critical infrastructure” and “terrorism” are clearly defined. The definition of critical infrastructures is based up Presidential Decision Directive 63. The definition of terrorism is derived from 18 U.S.C. § 2331 as amended by the PATRIOT Act of 2001. The Committee recommends clarification of these terms in order to provide definitional guidance and consistency to the Department. It also important to define these terms because the new Department will have authority to share and analyze intelligence information relating to terrorist threats. Providing a clear definition of terrorism will ensure that DHS will not obtain or misuse unrelated personal information.

Crisis Management and Consequence Management

As introduced, H.R. 5005 would make consequence management, not crisis management, the primary mission of the new Department. The Committee amendments clarify that crisis management is a central function of the proposed Department. The Committee amendment defines crisis management and consequence management to better delineate the functions of the new Department. “Crisis management” includes measures to identify, acquire and plan the use of resources needed to anticipate, prevent, or resolve a threat or act of terrorism. In contrast, “consequence management” is primarily concerned with the response and coordination of relief activities after an attack occurs. There is a clear and vital distinction between crisis and consequence management and this distinction must not be lost in the creation of the new Department.

Preservation of FEMA as an Independent Agency

The amendments reported by the Committee recommend modifying the provisions of H.R. 5005 that would transfer all of functions of the Federal Emergency Management Agency (FEMA) to the new Department. This is because FEMA’s main mission as a consequence management agency is to respond to natural disasters. In most fiscal years, 75 to 95 percent of FEMA’s budget is directed towards disaster relief assistance. Transferring FEMA in its entirety to DHS would detract from the agency’s core mission. A terrorist attack is a federal crime and a crisis event, which requires a response different from that of a natural disaster. In addition, transferring all of FEMA to the new Department would divert FEMA from its vital and highly effective disaster relief role.

The Judiciary Committee’s recommendation to maintain FEMA as a separate federal agency obviates the need for an Under Secretary for Emergency Preparedness and Response. Thus, the Committee’s amendment eliminates the Under Secretary for Emergency Preparedness and Response, and transfers remaining functions to the Undersecretary for Border and Transportation Security. To reflect the centrality of law enforcement to this component, the Judiciary Committee amendment also changes the title of the Undersecretary for Border and Transportation Security to the Under Secretary for Enforcement and Security. This change properly reflects the comprehensive enforcement and security functions of this division, while acknowledging the primacy of other law enforcement functions and responsibilities which would be transferred. For example, the Coast Guard, Customs Service, and Border Patrol are charged with enforcing federal laws pertaining to drug interdiction,

child pornography, intellectual property, and illegal immigration.

In addition, FEMA does not belong at DHS because directors of this agency have explicitly refused to provide first responders with training and assistance in crisis management functions. For example, in a March 13, 2002, letter to Chairman Sensenbrenner, the Director of FEMA stated that FEMA would not handle crisis management or law enforcement training, technical assistance, exercises, and equipment. The Director asserted that: “While FEMA will coordinate grants and assistance to first responders, it will not assume any law enforcement functions, nor will FEMA provide law enforcement training – training or investigative techniques, evidence collection techniques . . .”. State and local emergency responders must receive crisis management training as it is an essential component of an effective, coordinated homeland security strategy.

DHS must serve *all* first responders through training and assistance in both consequence and crisis management to be adequately prepared for today’s terrorist threat. As reported by the Judiciary Committee, H.R. 5005 would make the Under Secretary for Enforcement and Security responsible for training and coordinating state and local emergency responders in both crisis and consequence management. It must be stressed that investing the Under Secretary for Enforcement and Security with these responsibilities in no way detracts from the Federal Bureau of Investigation’s lead role in investigating terrorist threats or events; nor does it undermine the role of FEMA, which would remain an independent agency charged with consequence management in the event of a natural disaster.

Transfer of FEMA’s Office of National Preparedness to DHS

The Committee’s amendment recommends the transfer of a small component of FEMA, the Office of National Preparedness (ONP), to the new Department. ONP’s primary focus is to provide training and technical assistance for first responders in consequence management following a terrorist attack. Transferring ONP from FEMA would augment other training and emergency assistance functions transferred to DHS from other agencies. These include the Office for Domestic Preparedness (ODP) within the Department of Justice as well as offices within the Department of Health and Human Services which provide grants, technical assistance and equipment to first responders. The selective transfer of ONP from FEMA to DHS would strengthen the Department’s ability to respond to terrorist events while averting the imposition of extraneous and burdensome responsibilities which would detract from the Department’s central homeland security mission. This would help guarantee a centralized crisis and consequence management function at the new Department.

Transfer of the Secret Service to the Department Of Justice

As introduced, H.R. 5005 would transfer the Secret Service to DHS while preserving the Service as a “distinct entity.” The Committee recommends streamlining and focusing the proposed Department by transferring Secret Service to the Department of Justice rather than DHS. The Judiciary Committee is the authorizing Committee for the Secret Service and has concluded that the Service does not properly belong at DHS. Crime prevention and law enforcement are central to the mission of the Secret Service. The Secret Service is charged with enforcing several federal statutes

relating to counterfeiting, threats against governments officials such as the President and Vice President, credit card fraud, computer crimes, and fraud against financial institutions. Furthermore, unlike nearly all of the law enforcement agencies H.R. 5005 would transfer to DHS, the Service is not a border or transportation security agency. Finally, while the Service coordinates with federal and state agencies when providing security for national events, these activities comprise a fraction of its overall responsibilities.

Transfer of the Federal Law Enforcement Training Center to the Department of Justice

The Committee further recommends transferring the Federal Law Enforcement Training Center (FLETC) from the Treasury Department to the Justice Department. FLETC was established in 1970 to provide an interagency law enforcement training program to train federal, state, local, and foreign law enforcement entities. FLETC's training curriculum closely resembles that provided by the Federal Bureau of Investigation. Its basic training course provides instruction in criminal investigation to uniformed law enforcement officers who possess authority to carry firearms and effect arrests. FLETC's transfer to the Department of Justice assures a greater level of consistency and coordination of federal law enforcement training procedures under the direction of the nation's chief law enforcement officer, the Attorney General. The rationale for shifting FLETC to the Department of Justice is even more pronounced given the fact that H.R. 5005's transfer of the Customs Service from the Treasury Department to DHS would leave Treasury with a greatly diminished law enforcement mission.

IMMIGRATION ENFORCEMENT AND SERVICES AMENDMENTS

Steps To Ensure The Effective Operation And Integration Of Certain Immigration Functions Within DHS

The Committee recommends the incorporation of many of the immigration-related structural reform provisions contained in H.R. 3231, the "Barbara Jordan Immigration Reform and Accountability Act," which passed the House by a vote of 405-9. Like H.R. 3231, the Committee recommends the abolition of the Immigration and Naturalization Service (INS). In addition, the amendment retains H.R. 3231's requirements concerning: the Ombudsman; the Citizenship Office; the requirement to utilize Internet-based technology to promote administrative efficiency; pilot initiatives for reduce administrative backlogs; voluntary separation incentive payments; the authority to conduct a demonstration project relating to disciplinary action of immigration officers; the managerial rotation program; a reporting requirement on interior checkpoints; and an assessment of shifting demands presented by fluctuating immigration needs.

Separation of Immigration Enforcement from Immigration Services

The Committee recommends establishing the Bureau of Immigration Enforcement within the Department of Homeland Security's office of Border and Transportation Security (renamed the

division of Enforcement and Security), while establishing the Bureau of Citizenship and Immigration Services in the Department of Justice. The Bureau of Immigration Enforcement recommended by the amendment would be nearly identical to the enforcement bureau created by H.R. 3231. The Bureau of Citizenship and Immigration Services, is also very similar to the services bureau contained H.R. 3231. Finally, the Committee amendment would create an Assistant Attorney General for Citizenship and Immigration Services who would report to the Deputy Attorney General.

These organizational reforms will help address widely-recognized, systemic “mission overload” problems within the INS, while helping to ensure that immigration services will receive the resources necessary to professionally respond to the needs of legal immigrants. By separating immigration enforcement from immigration services and elevating the status of immigration services within the Justice Department, the amendment gives legal immigration services the focus and attention they deserve. Maintaining immigration services in the Justice Department would also promote a closer examination of the financial needs of the service bureau to improve immigration services than if the component resided in the Department of Homeland Security. If the services bureau were transferred to DHS, appropriating funds for these services would be an afterthought.

Retaining responsibility for immigration services at the Department of Justice, which is responsible for administering immigration benefits, would also ensure the legitimate needs of legal immigrants are not subsumed by the massive size and scope of a Department which would be primarily dedicated to homeland security. It would affirm America’s commitment to welcome legal immigrants to the United States in a timely and professional manner by personnel who will not assume that all legal immigrants present a security threat.

With respect to immigration enforcement, the Committee recognizes that several enforcement functions of the INS, such as inspections and the Border Patrol, naturally fit together with Customs and other border components. These units should be consolidated as a border security unit, which is an integral part of the Department of Homeland Security. Therefore, the Committee recommends that the immigration enforcement be transferred to DHS and established as the Bureau of Immigration Enforcement within the Border and Transportation Security division (renamed the division of Enforcement and Security).

With the proposed transfer of immigration enforcement and services functions to two separate Departments, it is essential that the enforcement and service bureaus communicate effectively with one another. Many aliens must interact with both immigration services and enforcement officers; this overlap is unavoidable. Accordingly, the Committee Amendment would create a liaison in each bureau to communicate with the other bureau. To ensure that the two bureaus share information and coordinate their efforts, each liaison would be required to create a common access system to information technology, databases, records, files, and other administrative resources. Currently, the INS has systemic administrative and organizational problems, often misplacing or losing applications and other paperwork. Sending and receiving paper files between the two Departments would only compound the problem. The Committee Amendment, like H.R. 3231, would thus require the Attorney General to establish an Internet-based system so that aliens may apply for benefits and check the status of their applications online. The INS must move away from its antiquated paper filing system. Dividing the INS between DHS and the Justice Department

would facilitate movement toward an electronic filing system so that both the service and enforcement bureaus can easily access and maintain the integrity of alien files. Most importantly, these changes would ensure that fewer files are lost.

Office of Children's Affairs

With respect to the Office of Children's Affairs, the Committee amendment would transfer the same functions created in H.R. 3231 to the Director of the Office of Refugee Resettlement within the Department of Health and Human Services. These functions include "unaccompanied alien childrens" care and placement that were exercised by the INS Commissioner prior to the effective date of the bill; coordinating and implementing the law and policy for unaccompanied alien children who come into federal custody; making placement determinations for all unaccompanied alien children in federal custody; identifying and overseeing the infrastructure and personnel of facilities that house unaccompanied alien children; annually publishing a state-by-state list of professionals or other entities qualified to provide guardian and attorney services; maintaining statistics on unaccompanied alien children; and reuniting unaccompanied alien children with a parent abroad, where appropriate.

The Committee amendment also gives the Director of the Bureau of Immigration Enforcement the responsibility for collecting information relating to nonimmigrant foreign students and other exchange program participants, including the Student and Exchange Visitor Information System, and using such information to carry out the enforcement functions of the bureau.

PROTECTIONS AGAINST POTENTIAL ABUSES BY THE DEPARTMENT

Safeguards To Protect Individual Privacy

The amendments to H.R. 5005 add important provisions to protect against the unauthorized use or disclosure of private information. The amendment requires the appointment of a privacy officer to ensure the Department's compliance with the Privacy Act of 1974, and permits congressional oversight of such compliance. In addition to information technologies, the privacy officer would be responsible for assuring that all forms of technologies, are not employed by DHS to erode citizens' privacy protections.

The privacy officer will report to Congress on privacy violations and conduct privacy impact assessments of proposed rules when deemed appropriate by the Secretary. The Committee recommends that the DHS Secretary establish procedures ensuring the confidentiality and accuracy of personally identifiable information. These procedures would require the DHS Secretary to: (1) limit the dissemination of personally identifiable information (such as Social Security numbers) to ensure that it is not used for an unauthorized purpose; (2) ensure the security and confidentiality of such information; (3) protect the constitutional and statutory rights of any individuals who are subjects of such information; and (4) provide data integrity through the timely removal and destruction of obsolete or erroneous names and information. The text of this provision is substantively identical to H.R. 4598, the "Homeland Security Information Sharing Act." In addition, the amendment contains a clear mandate that nothing in H.R. 5005 be construed to authorize the

development of a national identification card or system. Finally, the amendment would require the Secretary of DHS to appoint a task force to harmonize the administrative procedures and adjudicative processes of the new Department.

Inspector General Amendments to H.R. 5005

As introduced, section 710(a) and (b) of H.R. 5005 would allow the Secretary to restrict the activities of the Inspector General (IG) when those activities involve certain information, generally related to national security. Specifically, H.R. 5005 would permit the Secretary to exercise control over the Inspector General's authority to conduct audits or investigations or to issue subpoenas if these activities would require access to information concerning: (1) intelligence, counterintelligence, or counterterrorism matters; (2) ongoing criminal investigations or proceedings; (3) undercover operations; (4) the identity of confidential sources, including protected witnesses; (5) other matters the disclosure of which would, in the Secretary's judgment, constitute a serious threat to the protection of certain persons or property; and (5) other matters that, in the Secretary's judgment, would constitute a serious threat to national security. Section 710(c) requires the Secretary to notify the President of the Senate and the Speaker of the House within 30 days of the exercise of that authority.

The proposed amendment conforms the Secretary's authority and responsibilities more closely to the corresponding provisions relating to the authority and responsibilities of other department heads at the Departments of Defense, Justice, and Treasury and the Central Intelligence Agency. First, the language would amend subsection 710(a) to allow the Secretary to restrict the IG's authority when access to "sensitive" information – not just any information – concerning the specified matters is involved. Provisions governing other inspectors general specifically refer to "sensitive" information, not just any information. Second, the amendment alters and expands the reporting requirement in subsection 701(c) to require: (1) the Secretary to notify the IG and provide reasons for the exercise of the authority; (2) the IG to forward the Secretary's notification and reasons to the President of the Senate, the Speaker of the House, and appropriate committees and subcommittees of Congress; and (3) the IG to report to Congress whether he or she disagrees with the Secretary. If there is a disagreement, the amendment requires the IG to explain the reason for the disagreement in his report to Congress.

Establishment of a Deputy IG for Civil Rights and Civil Liberties

The amendment would also require the Inspector General to appoint a Deputy Inspector General to examine allegations of civil rights abuses, including allegations of racial or ethnic profiling, by employees of the Department of Homeland Security. The Deputy Inspector General must advertise his or her responsibilities and report to Congress on a semi-annual basis regarding his responsibilities.

Enhanced Whistleblower Protections

The Manager's Amendment contains a sense of the Committee that employees transferred to DHS continue to receive existing whistleblower protections provided that sensitive intelligence

or law enforcement information is not compromised. The general whistleblower statute broadly applies to federal employees. However, federal personnel are not protected by this statute if they work in an “excepted service” or are excluded from coverage by the President “based on a determination that [it] is necessary and warranted by conditions of good administration . . .”. This statute specifically does *not* apply to the Federal Bureau of Investigation, Central Intelligence Agency, and other foreign intelligence or counterintelligence agencies. Federal employees who handle sensitive and classified law enforcement and counter-intelligence information have been extended whistleblower protections, but are subject to special treatment because of the sensitive nature of the information that may be involved in any investigation or complaint brought forward by an employee.

The Committee’s language seeks to ensure that when regulations are implemented by the Department they should reflect the procedures that have been adopted in other agencies to protect such information. Section 730 of the bill as introduced appeared to permit the Secretary to eliminate those protections. In response to Members questions, Governor Ridge testified that the bill was not intended to strip whistleblower protections from employees by moving them to the Department of Homeland Security. The amendment expresses the sense of the Committee that the protections should be continued in the new Department, but that sensitive law enforcement information and intelligence need to continue to be protected as they are under current law in other agencies.

ADDITIONAL AMENDMENTS

Harmonization and Rationalization of Department Compensation

DHS would incorporate law enforcement personnel from a number of existing agencies. Disparate pay scales and retirement policies among similarly situated law enforcement personnel threatens to erode employee morale and jeopardize the success of the new Department’s law enforcement mission. The Committee expresses concern that pay and benefit disparities among law enforcement agencies have resulted in substantial defections from agencies where the pay and benefit package appears to be low to agencies where the pay and benefit packages are perceived to be high. The amendment requires the Secretary of Homeland Security, in consultation with the Director of the Office of Personnel Management, to submit a plan (within 90 days of the establishment of the Department) to the President and Congress to ensure, to the maximum extent practicable, the elimination of disparities in pay and benefits among employees (especially among law enforcement personnel) of the new Department. The Committee is particularly concerned that increased compensation provided to employees of the Transportation Security Administration (TSA) is causing qualified law enforcement personnel from the Secret Service, Capitol Hill Police, and Park Service to migrate to the TSA.

ADDITIONAL CONCERNS

Executive Office for Immigration Review

The Executive Office for Immigration Review (EOIR), located in the Justice Department, houses the immigration courts and the Board of Immigration Appeals. These units adjudicate the deportability of aliens and aliens' applications for relief from deportation in immigration proceedings. Although the Committee Amendment did not address EOIR, the Committee believes that it should remain in the Justice Department.

Impact on Civil Service Employees

The Committee is also concerned about the impact the bill has on civil service protections which currently exist for federal employees that would be transferred to DHS. Section 804(e)(2) notes only that current employment terms (pay, civil service protections) would remain in place until a new human resources management system is established by DHS. The Committee recommends that the Select Committee and other committees of jurisdiction address concerns regarding the potential loss of civil service protections by employees affected by the bill.

The Federal Advisory Committee Act and the Freedom of Information Act

The Committee recognizes that the new Department will have a significant need to establish and use the services of advisory committees with respect to highly confidential and sensitive national security matters. In its current form, H.R. 5005 would exempt from the requirements of the Federal Advisory Committee Act (FACA) any advisory committees established by the Secretary of DHS. Although FACA currently exempts the Central Intelligence Agency and the Federal Reserve Board from its requirements, the Committee is concerned that such an exemption may substantially diminish the openness and public-access goals of the FACA. The bill also creates an exemption to the Freedom of Information Act (FOIA) for information that companies and individuals voluntarily provide that "relates to" infrastructure vulnerabilities and related matters. Because the FOIA is so important to preserving openness and accountability in government, the breadth of this new exemption also raises serious concerns.

The Committee recognizes, however, that public access to this information may have two unintended effects: (1) companies will be deterred from providing that information to the new Department; and (2) potential terrorists will have access to that information. It is worth noting that FOIA currently contains exemptions restricting the disclosure of national security information (*see* 5 U.S.C. 552(b)(1)), sensitive law enforcement information (*see* 5 U.S.C. 552(b)(7)) or confidential business information (*see* 5 U.S.C. 552 (b)(4)). That being the case, any additional exemption from FOIA must be demonstrably necessary and should be extremely narrow. The Committee recommends that the possibility of narrowing the scope of this provision be considered to make clear that material that would be exempt from disclosure may be segregated, to the extent feasible, from non-exempt, releasable material. Any exception to current FACA and FOIA requirements should be carefully considered with a view toward maintaining the sunshine safeguards needed to preserve an open and accountable governmental, while providing the Department with the needed flexibility to carry out its mission. The Committee recommends that the Select Committee and the other committees of jurisdiction address these concerns.