NAVAL POSTGRADUATE SCHOOL

MONTEREY, CALIFORNIA

THESIS

THE DEVELOPMENT AND RECOGNITION OF HOMELAND SECURITY LAW

by

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March 2007

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REPORT DOCUMENTATION PAGE			Form Approved OMB No. 0704-0188

1. AGENCY USE ONLY *(Leave blank)*	2. REPORT DATE March 2007	3. REPORT TYPE AND DATES COVERED Master's Thesis

4. TITLE AND SUBTITLE The Development and Recognition of Homeland Security Law	5. FUNDING NUMBERS
6. AUTHOR(S) Michael C. McDaniel	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Naval Postgraduate School Monterey, CA 93943-5000	8. PERFORMING ORGANIZATION REPORT NUMBER
9. SPONSORING /MONITORING AGENCY NAME(S) AND ADDRESS(ES) Michigan Department of Military and Veterans Affairs 2500 S. Washington Ave., Lansing, MI 48913	10. SPONSORING/MONITORING AGENCY REPORT NUMBER

11. SUPPLEMENTARY NOTES The views expressed in this thesis are those of the author and do not reflect the official policy or position of the Department of Defense or the U.S. Government.

12a. DISTRIBUTION / AVAILABILITY STATEMENT Approved for public release: Distribution is unlimited	12b. DISTRIBUTION CODE A

13. ABSTRACT (maximum 200 words)

The thesis considers those laws created since 9/11 in direct response to that terrorist attack and intended to protect the American Homeland from further attack. Just as Congress passed thousands of pages of legislation in response to the events of 9/11, the Department of Homeland Security, created by one of those new laws, is churning out thousands of pages of federal regulations, and thousands of federal workers now seek to regulate and impose new legal standards, on U.S. citizens and businesses. After analyzing the congressional responses to 9/11, a survey was created and sent to those attorneys who hold themselves out as practicing or teaching "Homeland Security Law." The intent was to determine whether the legal profession should now recognize Homeland Security Law as a separate practice area, and if not, what steps are necessary before a practice area is recognized. A substantial majority in each survey, and in the interviews, found that anti-terrorism laws, emergency management and critical infrastructure resiliency and protection are included within the area of "Homeland Security Law." A working definition of Homeland Security Law then, is "those laws and regulations enacted or promulgated to ensure domestic security from man made or natural attack or disaster".

14. SUBJECT TERMS Homeland Security Law, Critical Infrastructure, USA PATRIOT Act, Anti-Terrorism, Homeland Security Act of 2002, Emergency Management	15. NUMBER OF PAGES 204
	16. PRICE CODE

17. SECURITY CLASSIFICATION OF REPORT	18. SECURITY CLASSIFICATION OF THIS PAGE	19. SECURITY CLASSIFICATION OF ABSTRACT	20. LIMITATION OF ABSTRACT
Unclassified	Unclassified	Unclassified	UL

NSN 7540-01-280-5500 Standard Form 298 (Rev. 2-89)
Prescribed by ANSI Std. 239-18

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THE DEVELOPMENT AND RECOGNITION OF HOMELAND SECURITY LAW

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MASTER OF ARTS IN SECURITY STUDIES
(HOMELAND SECURITY AND DEFENSE)

from the

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ABSTRACT

This thesis considers those laws created since September 11, 2001, in direct response to the terrorist attack, and intended to protect the American Homeland from further attacks. The paper discusses whether a practice area of Homeland Security Law has arisen commensurate with the growth of Homeland Security as a separate professional discipline. Just as Congress passed thousands of pages of legislation in response to the events of September 11, 2001, the Department of Homeland Security, created by one of those new laws, is churning out thousands of pages of federal regulations, and thousands of federal workers now seek to regulate and to impose new legal standards, on U.S. citizens and businesses. After reviewing the Congressional, Executive, and legal profession's responses to September 11, 2001, a survey was created and sent to those attorneys who hold themselves out as practicing or teaching "Homeland Security Law." The intent was to determine whether the legal profession should now recognize Homeland Security Law as a separate practice area, and if not, what steps are necessary before a practice area is recognized. Interviews were also conducted with representative experts in private and public practice and the Academy.

A substantial majority in each survey, and in the interviews, found that anti-terrorism laws, emergency management and critical infrastructure resiliency and protection are included within the area of "Homeland Security Law." A working definition of Homeland Security

Law then, is “those laws and regulations enacted or promulgated to ensure domestic security from man made or natural attack or disaster”.

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ACKNOWLEDGMENTS

The completion of this thesis would not have been possible without the substantial assistance of a number of individuals.

I would first like to thank my thesis advisor, Dr. Chris Bellavita, whose vast knowledge in a wide variety of fields exemplifies the multidisciplinary approach critical to Homeland Security and was critical in assuring the necessary perspective and the robustness of my work. His insight and guidance were vital in focusing the broad issues that my research attempted to tackle.

Secondly, I am extremely grateful for the assistance I received from my reader, Dr Mike Lawrence. His direction, contributions, and above all, his passion for the Law and for the constitutional and civil rights of U.S. and international citizens reflects a commitment above and beyond what is normally asked of a reader or even a law professor.

I need to also thank the great staff, both administrative and professional, at the Center for Homeland Defense and Security at the Naval Postgraduate School. In stressful times, which were many, the staff provided the mentorship, guidance and the technical skills necessary to keep me on track, always reminding me to strike a balance between work and school, and between education and family.

Additionally, my work would not have been nearly as successful if it were not for the help of my multidisciplinary classmates. Their professionalism, patriotism, willing teamwork, and constant encouragement

exemplifies the best this country, and the growing discipline of Homeland Security, has to offer.

The Homeland Security Team in Michigan, from Governor Jennifer M. Granholm on down, and particularly including The Adjutant General, Maj. Gen. Thomas M. Cutler, and my long-suffering assistants, Diane Erley and Cali Mortensen Ellis, has been unfailingly supportive and patient during my studies, and I owe them a continuing debt of gratitude.

Finally, and *most* importantly, I am eternally grateful to my wife, Annie; son, Jim; and daughter, Hilary. They, quite literally, made many sacrifices including family vacations, so that I would have sufficient time to complete my studies. Their patience and understanding were limitless. It would have been impossible for me to complete this program if it were not for the love and support that they have provided me over the last 18 months. Redundancy for emphasis: my wife has been my greatest supporter and the most wonderful friend that a husband could ask for. Her support and assistance can never be repaid.

I. INTRODUCTION

The terrorist attacks on the U.S. had such a compelling effect on the national economy and the national psyche that Congress quickly acted to restore balance and calm to the economy, to safeguard the nation's infrastructure against future attacks, to reorganize and mobilize the government to prevent future terror attacks, and to give the government new powers and authority, both domestic and foreign, to not only prevent but also actively fight, terror organizations. The resultant laws passed by Congress have created an entire new body of law, but thus far, one that has not been officially recognized by the American Bar Association as a distinct body of law or "practice area."

While there has been a significant increase in the number of new laws, both state and federal, as a direct result of the attacks of 9/11, there has been little organized academic study of these laws. Prior to 9/11, the study of academic fields that would eventually comprise the field of homeland security was largely handled by criminal justice or national security studies. Emergency management and law enforcement are examples of the former, anti terrorism of the latter.

Since September 11, 2001, over 100 universities now offer a degree or non-degree program on Homeland Security[1]. In academia, new majors, certificates and degrees in homeland security have been developed, albeit most very

[1] Robert W. Smith, "Defining 'Homeland Security:' Content and Context Grounded in the Curricula," in *Homeland Security Law and Policy*, ed. William C. Nicholson (Springfield, IL: Charles C. Thomas Publisher, Ltd., 2005): 10-22.

recently, in response to substantial demand from government, private industry and students themselves; however, legal education at the nation's American Bar Association accredited law schools has lagged behind.

Few law schools offer a course in Homeland Security Law, although Homeland Security has been included, in concept, if not by that term, in other courses, particularly National Security Law or the Law of Terrorism.[2] Many schools, recognizing the inherent issues of law contained within the Homeland Security discipline, have crafted courses in other disciplines that reflect that need.[3] In the aftermath of September 11, business, industry and consequently private law firms have been struggling to grasp the means to understand and respond to the enormity of the size of loss, the need for business continuity and threat assessment plans, and how business practices and insurance coverage have been impacted.

Further, the host of legislation passed since September 11, 2001, has had a direct substantial impact on business, and on every citizen. As will be discussed below, other attorneys rely on the existence of recognized practice areas to find attorneys whose specialty is needed, and potential buyers of legal services use designated practice areas to likewise find an attorney with the expertise in a particular area. The potential outcome of the research is to have identified the parameters of the

[2]Professor Banks, at Syracuse University School of Law, notes that over 100 U.S. law schools have offered a course in National Security law since the late 1980s. (Banks 2005)

[3] For example, the California University of Pennsylvania offers a "Master of Science in Legal Studies: Law & Public Policy – Homeland Security," which appears to offer additional courses for a Homeland Security certificate as an addition to its MS in Legal Studies: Law and Public Policy. See www.cup.edu/graduate/homeland [Accessed December 15, 2006].

Law of Homeland Security and thereby assist the legal community in the recognition of a separate practice area in Homeland Security law.

With the terror attacks of September 11, 2001, attorneys now realize that the laws passed by Congress in its aftermath will continue to affect the American legal system for the next several decades. Just as terror attacks were found to have cascading, tertiary effects on sectors of infrastructure not expressly targeted by the terrorists, so, too, legislation passed in response to those attacks has affected areas of business and business clients in unanticipated ways. Consider also how the Congress has aggregated enforcement and regulatory functions in a single, new agency. The purpose of creation of such a department is to assure the prevention of terror attacks upon industries, services, transport, commercial operations, government and public facilities.[4] The thousands of separate governmental decisions or actions that collectively comprise our governmental response to terror related issues will all affect the business and individuals in the U.S. Attorneys then must understand the interrelationships of the laws of Homeland Security, and to do so, must study and practice in those laws collectively.

Thus, there appears to be substantial compelling reasons for the recognition of a separate practice area in Homeland Security: (1) it will build the body of knowledge in this area of law; (2) it will assist corporate and other clients in locating the correct law firm for their Homeland Security issues; and (3) it may avoid potential professional ethical issues for lawyers.

[4] Venable LLP and James O'Reilly, eds. *Homeland Security Deskbook* (New York: Matthew Bender, 2004)

A. RATIONALE

1. Build a Body of Knowledge

Recognition of a separate body of law facilitates the growth and exploration of that area of law. It provides a forum for discussion of legal issues unique to that area; provides opportunities for legal education and discussion; improves the practice and ethical standards of legal services in the field; provides a forum for discussion of needed legislative change or judicial change through drafting amicus briefs on important issues; and thereby fosters and enhances the skills of lawyers practicing in this area, and thus, provides assurance to the public that the attorneys have special skills or training in this important area.

It is the belief of the author, but beyond the scope of this thesis, that the creation of a "community of practice[5]" through professional interest in a specific area of the law, whatever the individual motivation, signals the commencement of a process which will result in the creation of a recognized legal practice area. The concept of "practice areas" of law is widely accepted in the legal profession. Interestingly, one legal directory web site lists seventy different practice areas, from Aboriginal Peoples to Workers Compensation, but Law of Homeland Security is not included.[6] When the ABA formally recognizes

[5] "Communities of Practice" have been defined as "groups of people who share a passion for something that they know how to do, and who interact regularly in order to learn how to do it better." The concept began not in the field of law but of learning, more precisely Knowledge Management, where "knowledge is seen as being bound to people…embedded in practice." Etienne Wenger, "Communities of Practice: A Brief Introduction," http://www.ewenger.com/theory/ [Accessed March 7, 2007].

[6] Heiros Gamos Worldwide Legal Directories, "Areas of Practice," http://www.hg.org/practiceareas.html [Accessed May 15, 2006].

a practice area, it provides a means to aggregate training and professional development for lawyers around that subject. ABA resources include: advice on building and managing their law practice in that niche; access to publications and electronic information; continuing legal education (CLE) programs; and opportunities to network with other lawyers and legal experts specializing their practice in the same area.[7]

2. Marketing

Surveys show that corporations seeking counsel for assistance in a new area or for a new problem first use research over the Internet to identify potential law firms. A recent study indicates that 65% of corporate buyers of legal services used the Internet to locate potential outside counsel. Of those, 89% used a search engine to do so. When using search engines, 84% search by practice area.[8]

Therefore, to assist buyers of legal services in locating a law firm that has the skills and training to competently address their problem, a wide majority of potential buyers focus on the practice area. This is not a surprise, since a client in need of legal assistance wants to utilize the services of an attorney known to have expertise or special skills and training in that area. It should be noted that many law firms, from solo lawyers to large firms, attempt to create niche practices or "boutiques", to more easily gain recognition in the marketplace. Although a legal practice area may be created

[7] American Bar Association, "Lawyer Resources," http://www.abanet.org/lawyer.html [Accessed May 15, 2006].

[8] Touchpoint Metrics, "Legal Industry Homepage," www.tpmetrics.com [Accessed April 14, 2006].

as a niche for marketing, such as "The Pet Lawyer,"[9] the niche may evolve into a recognized practice area as attorneys increasingly realize the public's interest in that area. To continue that example, a dozen states have now recognized Animal Law as a separate practice and created a distinct committee within their state bar. Recognition of a practice area in Homeland Security will assist corporations and individuals with a Homeland Security - related issue with locating an attorney that has the requisite skills.

3. Professional Ethics

Attorneys, as a profession, are self-regulated, but scrupulously so. Every state certifies applicants to the state bar by requiring a 2-3 day bar exam, and a review of the character and fitness of the applicant. Membership in the bar must be renewed every year and is conditioned upon adherence to a strict code of conduct. Most states enforce their ethics provisions on a reactive basis. That is, violations are enforced because a competing lawyer brings a complaint. The other lawyer is usually someone who has to market services and does wish to do so at a competitive disadvantage with those firms who choose not to follow the ethics provisions. The rules are designed to protect consumers against overreaching by aggressive lawyers.

Although specific provisions of the rules governing the marketing of legal services vary from state to state, most rules follow the format of the ABA Model Rules of Professional Conduct (MRPC). A section of the MRPC contains five rules which cover the scope of marketing by lawyers or

[9] Law Offices of Molly Maguire Gaussa, P.C. "The Pet Lawyer." http://www.thepetlawyer.com/ [Accessed April 4, 2006].

law firms. The first rule governs all commercial communications and bars that which is false or misleading. The second provision addresses advertising; the third, solicitation; the fourth, specialization; and the fifth, law firm names.

The U.S. Supreme Court had overturned the ban on lawyer advertising[10] in 1977, so when the Internet was commercialized in 1992 it quickly became a popular vehicle for marketing legal services. By one account, only five law firms had home pages on the World Wide Web in November 1994. Seven months later, that figure was estimated at 500 law firms.[11] A law firm may believe that its home page is not advertising and therefore, there is no need to comply with the rules of conduct on advertising. While the intent of the firm's use of the Internet may be to further its business, it is the content that controls whether it is commercial speech, and therefore subject to the regulations. The Supreme Court has defined commercial speech as speech where the purpose is "to propose a commercial transaction." The Court has also looked at whether the speech "related solely to the economic interests of the speaker and its audience."[12] In short, the marketing of legal services on the Internet does not preclude the application of state rules of professional conduct. It should also be obvious that it is unethical for a lawyer to communicate information that is deceptive on a home page, just as it is unethical to do so using any other medium.

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[10] *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

[11] Elizabeth Wasserman, "Lawyers File Few Objections to Advertising on the 'Net,'" *San Jose Mercury News*, July 17, 1995.

[12] *Cincinnati v. Discovery Network Inc.,* 507 U.S. 410 (1993).

The codes for attorney professional conduct traditionally were stringent on “lawyer advertising” and generally encompass a prohibition against an attorney or firm holding himself out as an expert or specialist, or even to state that he/they have limited their practice to a specific field, unless certain conditions are met. In most states, that precondition is met if the state bar or the American Bar Association has recognized an area of law as a specialty or practice area. Potential purchasers of legal services will search for law firms with special expertise or training in law relating to Homeland Security. Recognition of a practice area in Homeland Security Law will then permit attorneys and law firms which specialize in this new area to market themselves as specialists without fear of violation of the ethical rules. Yet the experience of state Bar Associations indicates that the ethical implication of web-based advertising is still an unresolved issue.

For example, New York State published changes to the New York Code of Professional Responsibility, effective on February 1, 2007. The new definition of “advertisement” is “any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.”

The definitions section provides a separate definition of “computer accessed communications,” however, the remainder of the Code references “advertisements” and “solicitations,” but does not reference “computer accessed communications” specifically, except in rare instances. Lawyers and law firms with websites must preserve the

contents of their site at initial launch, at the time of any major content revision or re-design, or at least every 90 days. The rules appear to be less content-restrictive, and more intent on creating parameters through procedural restrictions. For example, attorneys will have to retain copies of their e-mail and Web site solicitations for only one year. There is not a requirement to initiate a new retention every time there is a relatively minor modification to their Web site. Advertisements, however, have to be retained for three years.

On the other hand, the Florida Supreme Court also released revised professional rules recently, but expressly demurred from issuance of a rule on Internet advertising, until further study by the Florida Bar was concluded.[13]

In short, with the lack of specificity in current professional rules on Internet content, the distinction between a "practice area" and an "area of practice" of the law is unlikely to attract the attention of Bar ethics committees.

[13] Supreme Court of Florida, "In re: Amendments to the Rules Regulation the Florida Bar – Advertising," http://www.floridasupremecourt.org/decisions/2006/sc05-2194-Rules.pdf [Accessed March 7, 2007].

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II. OVERVIEW OF HOMELAND SECURITY STATUTES AND APPROACHES BY LAW SCHOOLS AND FIRMS

It is problematic to survey the theoretical field of Homeland Security Law, as there is no consensus that the field of law exists, and if it does exist, what the scope of the law might be. The initial survey was then akin to a "Literature review" in that it involved review of the statutes passed by Congress since September 11, 2001. The next step was to ascertain the ways in which academics and practitioners responded to the spate of new laws. Law firms and law schools were then surveyed using Internet resources, including using search engines such as Google, and through the use of web-based search tools.

A. CONGRESS' RESPONSE

Congress' response to the attacks on September 11, 2001, was swift, but not necessarily sure. The USA PATRIOT Act, almost 350 pages in length and amending 15 federal statutes, was passed with little debate and in less than six weeks. Those laws passed to assure domestic security, to enhance law enforcement efforts against terrorism, to assure information sharing between federal, and between state and federal agencies, to increase protections of critical industries, borders, and infrastructure, and to create and combine federal agencies to address the potential terrorist threats and to assure protection of the U.S. citizenry and economy, will have as yet unknown, but far reaching effects, as the laws continue to be extended or amended in the years since September 11. Those laws collectively form the basis for a separate practice area of Homeland Security Law. An attempt to list the potential

statutes that may be considered as included within Homeland Security Law, by subject matter, is included in Appendix A. Those statutes that are deemed most likely to be considered a part of Homeland Security Law are also discussed immediately below. The full effects of two of those statutes, the USA PATRIOT Act and the Homeland Security Act of 2002, are still being realized, as both amended dozens of other laws as well.

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001,[14] is commonly known as the USA PATRIOT Act of 2001. The Act was intended to provide greater tools to law enforcement and to federal agencies to fight terrorism within the continental United States. Those tools include, *inter alia,* authorizing the Attorney General to share grand jury information that involves foreign intelligence with national security officials including the intelligence, national defense and immigration communities[15]; authorizing the Attorney General to seek and obtain Department of Defense assistance from criminal violations involving weapons of mass destruction[16]; provides for roving electronic surveillance[17] under the Foreign Intelligence Surveillance Act of 1978 (FISA)[18]; increases the permissible length of FISA surveillance for non-U.S. Citizens who are agents of foreign power[19]; expands, subject to conditions, the use of Pen registers and trap and trace

[14] USA PATRIOT Act, Pub. L. No. 107-56 (2001).

[15] 18 USC 2510; 18 USC 2517

[16] 18 USC 2332e

[17] 50 USC 1805

[18] 50 U.S.C. 1801 et seq. (2002).

[19] 50 USC 1805; 50 USC 1824.

devices;[20] requires reports of over $10,000.00 in currency or coins for a variety of non-financial trade or business transactions[21]; provides for mandatory disclosure of specified information for certain financial accounts[22] and amends the Right to Financial Privacy Act to permit the transfer of financial records to other agencies upon certification that the records are related to foreign intelligence or counterintelligence activities.[23]

The Homeland Security Act of 2002.[24] The law passed by Congress establishes the new Department of Homeland Security (DHS). The Act contains a number of other provisions, including the training of airline flight and cabin crews in self-defense and in conducting cabin searches[25], for deputizing qualified pilots as Federal flight deck officers and thereby authorizing them to carry firearms and to use force when confronted with acts of air piracy or other criminal violence[26]; criminalizes unauthorized use of protected information, permits the use of emergency pen register and trap and trace devices if officials are confronted by an immediate threat to national security or an ongoing attack to protected computer system[27] and tightens the criteria for purchasing, shipping, handling or transporting explosives[28].

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[20] 18 USC 3121, 18 USC 3123, 18 USC 3124, and 18 USC 3127.

[21] 31 USC 5312, 31 USC 5317, 31 USC 5318, 31 USC 5321, 31 USC 5326, and 31 USC 5338.

[22] 31 USC 5318A

[23] 31 USC 5311, 31 USC 5318 and 31 USC 5319.

[24] Homeland Security Act, 6 U.S.C. §§ 101-557 (2002).

[25] 49 USC 44918.

[26] 49 USC 44921.

[27] 18 USC 1030, 18 USC 2511, 18 USC 2512, 18 USC 2520, and 18 USC 2701 – 2703.

[28] 18 USC 841 – 18 USC 845.

The Cyber Security Enhancement Act.[29] Among other things, the Act (1) authorizes law enforcement to use pen/trap devices in certain emergency situations, such as threats to national security and attacks on protected computers; (2) increases penalties for computer hacking offenses that cause death or serious bodily injury; (3) instructs the Sentencing Commission to examine the penalties for all hacking offenses; and (4) increases penalties for certain invasions of privacy.

The Critical Infrastructure Information Act (CIIA) of 2002.[30] The CIIA consists of provisions that address the circumstances under which the Department of Homeland Security may obtain, use, and disclose critical infrastructure information as part of a critical infrastructure[31] protection program. CIIA establishes several limitations on the disclosure of critical infrastructure information voluntarily submitted to DHS.

Contained within the CIIA is a section which creates a new "Exemption 3 statute" under the Freedom of Information Act,[32] for "critical infrastructure" information that is

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[29] Cyber Security Enhancement Act, 6 U.S.C. § 225 (2002).

[30] Critical Infrastructure Information Act, 6 U.S.C. §§ 211-215 (2002).

[31] While "critical infrastructure information" is defined therein, "critical infrastructure" is not defined in the Homeland Security Act. It references the definition contained in the USA PATRIOT Act, which provides at Section 1016(e) the following definition of critical infrastructure: "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of these matters."

[32] Freedom of Information Act, 5 U.S.C. § 552(b)(3) (2000).

obtained by that new federal department[33]. Section 214 of the Act, entitled "Protection of Voluntarily Shared Critical Infrastructure Information," contains the new Exemption 3 statute.

Maritime Transportation Security Act of 2002.[34] This landmark legislation establishes, among other things, a series of regulatory requirements including a security infrastructure to protect U.S. ports from terrorist activities. The legislation seeks to deter terrorists' attacks against vessels and facilities and includes requirements to prepare security plans.

The Aviation and Transportation Security Act[35] was one of two primary pieces of legislation passed post-September 11, 2003, affecting the aviation industry. The Act established a new Transportation Security Administration (TSA) to oversee transportation security in all sectors of transportation.

Enhanced Border Security and Visa Entry Reform Act of 2002,[36] requires inter-agency information sharing between the State Department and INS, and federal law enforcement agencies to create a fuller operational picture of individuals seeking visa or who were inadmissible or deportable.

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[33] After September 11, 2001, many state legislatures also recognized the need for legislation creating new exceptions to state Freedom of Information Acts to prevent public dissemination of information, data or plans which could aid terrorists in attacks against the people or infrastructure in the U.S. The author was involved in developing the law in Michigan, MCL 15.243. Another example of a state statute that created such exceptions is the CA Government Code sec 6254 (aa).

[34] Maritime Transportation Security Act, Pub. L. No. 107-295 (2002).

[35] Aviation and Transportation Security Act, Pub. L. No. 107-71 (2001).

[36] Enhanced Border Security and Visa Entry Reform Act, Pub. L. No. 107-173 (2002).

The Public Health Security and Bioterrorism Preparedness and Response Act of 2002,[37] is intended to improve the ability of the United States to prevent, prepare for, and respond to bioterrorism and other public health emergencies. Individuals or businesses who use any of 42 biological agents listed by the Secretary of Health and Human Services as posing "a severe threat to public health and safety", must register with the Secretary and be subject to reasonable safety and security requirements, including access controls and screening of personnel, and inspections. The act also authorizes the Secretary to temporarily waive certain requirements of Medicare, Medicaid, and the State Children's Health Insurance Program (SCHIP) during disasters declared by the president pursuant to the National Emergencies Act or the Robert T. Stafford Disaster Relief and Emergency Assistance Act or a public health emergency declared by the Secretary under the Public Health Service Act.

Terrorism Risk Insurance Act (TRIA) of 2002.[38] TRIA creates a temporary (it was extended in 2005) terrorism re-insurance program, backed by the federal government. The intent was to stabilize the insurance industry and indirectly the economy by the creation of access to affordable insurance coverage. TRIA created "a shared public/private compensation backstop for future losses."[39]

Bills pertaining to homeland security continue to be introduced and debated in the new Congress. Two bills,

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[37] Public Health Security and Bioterrorism Preparedness and Response Act, Pub. L. No. 107-188 (2002).

[38] Terrorism Risk Insurance Act, Pub. L. No. 107-297 (2002).

[39] John J. Pavlick Jr., D. Edward Wilson, Jr., and Locaria Dismas, "The Terrorism Risk Insurance Act," in *Homeland Security Deskbook* eds. Venable LLP and James O'Reilly (New York: Matthew Bender, 2004).

pending at the time the thesis was finalized, both extremely detailed and addressing many diverse topics in Homeland Security Law, suggest that the new majority in the 110th Congress will also contribute greatly to this expanding area of law:

- Implementing the 9/11 Commission Recommendations Act.[40]
- Improving America's Security Act of 2007.[41]

B. EXECUTIVE BRANCH RESPONSE

As a result of authority granted by the above Homeland Security legislation, or by inherent Presidential authority over the Executive Branch, an extremely large and very diverse body of administrative regulations is accumulating within the expected boundaries of Homeland Security Law. In the first two months of 2007 alone, the DHS and it subordinate agencies promulgated twenty (20) sets of new Final Rules, and proposed thirteen sets of new rules[42]. The potential breadth and the potential impact of the cumulative effect of the rules enacted since the Department was formed is truly breathtaking. The Federal Rules for the implementation of the REAL ID Act requirements for states to meet federally-imposed standards for Drivers License by 2013, run to 162 pages[43].

Rulemaking by the Department of Homeland Security or its subagencies, must follow the dictates of the federal Administrative Procedures Act. Those rules proposed by DHS

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[40] H.R. 1, 110th Cong. (2007).

[41] S. 4, 110th Cong. (2007).

[42] The Federal Rules promulgated by DHS thus far are too lengthy to be included in Appendix A.

[43] Proposed Rules, Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 6 CFR Part 37, March 5, 2007.

or any federal agency with rulemaking authority must be published in the Federal Register to permit opportunity for public comment, and must provide for public hearings. After the comments are reviewed by the agency, the final rule is published in the Federal Register.

Final rules have the force of law. As the following examples demonstrate, the rules will have a substantial impact on the costs and procedures for doing business in a wide array of commercial endeavors. There will be substantial opportunity for counsel to guide their business clients in assessing the full impact of the regulations, both during the public comment period and after their effective date. The following examples were selected as they were promulgated under the authority of the statutes identified above.

1. Regulations

Each of the statutes discussed above authorized DHS and/or other federal agencies to promulgate administrative rules as needed to effectuate the statute's intent.

Section 326 of the USA PATRIOT Act, for example, requires the Secretary of the Treasury to jointly prescribe with each of the Agencies, the Securities and Exchange Commission (SEC), and the Commodity Futures Trading Commission (CFTC), a regulation that, requires financial institutions to implement reasonable customer identification programs for banks (i.e., credit unions, private banks, trust companies and savings associations.) including instituting procedures to determine whether the person appears on any terrorist watch lists.[44] Similar

[44] 67 Fed. Reg. 48299, July 23, 2002.

requirements for special due diligence programs for certain foreign accounts to thwart money laundering were also enacted.[45]

The Homeland Security Act of 2002 created an exception to the Freedom of Information Act, and rules have been enacted to protect data on critical infrastructure supplied to it under this act. DHS intended to assure private sector owners that their information will be "safeguarded from abuse by competitors or the open market"[46].

The Transportation Security Administration enacted lengthy rules, as required by the Act, on the control and screening of airline passengers and their baggage, including, requirements on submission to screening, and prohibitions against interference with screening personnel and the carriage of firearms explosives or other weapons.[47]

Under the Enhanced Border Security and Visa Entry Reform Act of 2002, the State Department eliminated the crew list visa, thereby ensuring that all airline crewmembers entering the United States will have completed the appropriate visa forms, submit a valid passport and undergo an interview and background checks. Elimination of joint, or crew list is intended to assure that each airline crew member is individually screened[48].

The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 authorized the Food

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[45] 67 Fed. Reg. 37736, May 30, 2002; 67 Fed. Reg. 48348, July 23, 2002.

[46] 6 CFR Part 29 (2004).

[47] 49 U.S.C. 114, 5103, 40113, 44901–44907, 44913–44914, 44916–44918, 44935–44936, 44942, 46105. (2002).

[48] 22 CFR Part 41 (2004).

and Drug Administration (FDA) to enact rules to provide for rigorous screening of imported food supplies[49].

Under the Terrorism Risk Insurance Act (TRIA) of 2002, the Department of Treasury enacted procedures for insurers to follow in filing claims and receiving payment of the federal share of compensation for insured losses under the Terrorism Risk Insurance Program.

2. Executive Orders and Directives

The Executive branch through the President has also issued Executive Orders and Homeland Security Presidential Directives (HSPDs) to mandate needed procedures or actions by the federal government. (The full list of HSPDs can be found at Appendix A.)Some of the relevant Executive Orders or HSPDs include:

- Homeland Security Presidential Directive 5 ("Management of Domestic Incidents," Feb. 28, 2003).
- Homeland Security Presidential Directive 7 ("Critical Infrastructure," Dec. 17, 2003).
- Critical Infrastructure Protection. Exec. Order No. 13,010.[50]
- Critical Infrastructure Protection in the Information Age. Exec. Order No. 13,231.[51]
- Amendment of Executive Orders, and Other Actions, in Connection With the Transfer of Certain Functions to the Secretary of Homeland Security. Exec. Order No. 13,286.[52]

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[49] 21 CFR 1.276, et. seq. (2003).

[50] 3 C.F.R. 198 (1996).

[51] 100 C.F.R. 807 (2001).

[52] 3 C.F.R. 166 (2003).

C. LAW SCHOOLS' RESPONSE

There are 151 accredited law schools in the United States. Those schools that posted their curriculum were reviewed to ascertain how many schools offered a course in Homeland Security Law or included Homeland Security Law as a significant portion of another course. This review of curriculum revealed that while relatively few schools offer a course in Homeland Security Law, many of the schools that do offer a course have created an Institute, Clinic, or other means to create a multidisciplinary approach to the discipline, aggregate related courses, or to showcase their efforts to prospective students.

Please see Appendix B for a short summary of the schools of law[53] that provide curriculum that focuses on the study of the law of Homeland Security.

D. LAW FIRMS' RESPONSE

The response of law firms was qualitatively assessed by two methods: a review of the various attorney locater web sites to determine if firms using this marketing tool insisted on Homeland Security Law as a separate practice area and if so, which firms used this tool; and secondly, by reviewing law firms web sites directly to again ascertain if, and if so, which, firms specifically indicated that they offered Homeland Security Law as a separate practice area at their firm.

[53] All of the courses listed herein are offered by Law schools for law students; many graduate schools, such as Schools of Criminal Justice or International Studies also offer courses which include "homeland security law" as a substantial element of the course. A sampling is included in the Appendix B. Appendix D lists other law school resources in related fields, primarily National Security Law and Law of Terrorism.

E. MAJOR FIRMS' ADOPTION OF HOMELAND SECURITY AS A PRACTICE GROUP: 2004 SURVEY

While little has been written about the proliferation of *ad hoc* homeland security practices, at least one legal journal has conducted a survey of firms to determine the scope of these practices. The National Law Journal surveyed 250 of the largest law firms in the country, and published their results in 2004.[54] These results indicated that 14 of these firms had started a homeland security practice of some sort. Perhaps because the survey was conducted so soon after the events of September 11, and prior to the effective enactment of legislation in response thereto, the approach and the scope by the law firms varied widely. Many firms view the creation of a Homeland Security group within their firm simply as a marketing tool, as a means to demonstrate to potential and existing clients the breadth of their expertise. Because of the potential interaction with professional or ethical constraints discussed above, the methods of marketing a firm's homeland security skills are briefly considered herein.

Many firms, however, view the creation of a Homeland Security practice area as a "best practice", as a means to create a community of interest within the legal community, starting within their law firm. Finally, many firms saw it as a means of re-organizing their resources to best provide service to their clients.

[54] David Hechler, "Firms embrace homeland security," *National Law Journal*, no. 4 (October 2004).

1. Law Firm Locators

Law firms have embraced the use of the Internet, both for marketing of their firm's attributes and to seek other law firms for assistance on specialized matters, not within their own areas of practice. Those Internet-based law firm locators were sampled to determine if the locators recognized a practice area of Homeland Security Law. See Appendix E for further discussion on how these tools were tested. When individual or corporate citizens seek out counsel, they either search by geographic area or by practice area. As noted above, a recent study indicated that 65% of corporate buyers of legal services used the Internet to locate potential outside counsel. That when doing so, the corporate buyers of legal services almost always used a search engine, and that 84% of these potential clients searched by practice area[55]. Since there was a need to identify private practitioners of Homeland Security Law to participate in the survey, anyway, it was first necessary to survey those search engines and ascertain how many Homeland Security practitioners could be located. What was found, instead, was that very few of the web sites[56] listed "Homeland Security Law" as an area of practice. See Appendix C. One of the few that does, Westlaw, was ultimately used to locate potential respondents to the survey.

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[55] This can not be surprising to any attorney who had to market their name or their firm's name. The most commonly consulted published directories, such as Martindale-Hubbell Law Directory, *Martindale Hubbell Bar Register of Pre– Eminent Lawyers, The Best Lawyers in America,* and *Chambers Global The World's Leading Lawyers* all list attorneys by areas of specialty.

[56] A purposeful sampling of the "attorney locator" web sites was conducted, rather than attempt a comprehensive survey of all sites.

F. MARKETING OF FIRMS WITH HOMELAND SECURITY PRACTICES

Two methods were used to search for law firms that specialize in Homeland Security Law. First, the most popular “attorney finder” web sites were used, as noted above. Secondly, reasoning that firms that offer legal services and advice in Homeland Security Law were likely to utilize an independent Net-based marketing tool for the firm, and to note that area of practice on their web site or brochure, a simple Google search for law firms was used. The first method is described in Appendix E.

The second search method was to search the Internet for examples of law firms which advised the public and potential clients that they had an area of practice which included Homeland Security Law. Google was used and the search terms “law firm” and “homeland security law” were entered. Because the purpose of this survey was to ascertain the type of information law firms were providing the public, specifically, that information which outlined their efforts or expertise that had the effect of also assisting in the establishment of a separate practice area of Homeland Security Law, a random sampling of firms was then conducted.

In reviewing the public marketing information for a number of practices, several trends become apparent. Venable, LLP, for example, highlights the fact that their practice group is led by former DHS Undersecretary Asa Hutchinson. The National Law Journal article indicates that Homeland Security Practice Group leaders have been recruited from highly visible positions in the Department of Homeland Security and the 9-11 Commission.

Similarly, Bracewell & Patterson, changed their name to Bracewell & Giuliani, to reflect the accession of perhaps the most well-known public figure to arise from the tragic events of September 11, 2001. The firm lists 62 practice areas including "Defense and Homeland Security." Their website also highlights specific achievements of their Homeland Security Practice Group, including their role in passage of the Terrorism Risk Insurance Act and their representation of a large medical facility which has had to cope with new immigration standards for its international research staff. The Homeland Security Law Deskbook, discussed herein also benefited from contributions from Bracewell attorneys.

Kilpatrick & Lokhart Nicholson Graham LLP emphasizes its existing contacts with the public sector to encourage potential clients who seek to gain lucrative homeland security government contracts.

A Texas firm, Cooley Godward, LLP, gained significant free publicity from its successful advocacy *pro bono publico* in *Santillan v. Gonzales*,[57] was selected by the *National Law Journal (NLJ)* as one of the country's top *pro bono* cases of 2005. Only four *pro bono* cases nationwide earned this recognition. In a case seeking to protect the rights of up to 12,000 immigrants, Cooley and the Texas Lawyers' Committee for Civil Rights filed a nationwide class-action lawsuit against the Department of Justice (DOJ) and the Department of Homeland Security (DHS) for denying documentation of lawful status to lawful permanent residents. The suit sought to compel the DHS to provide evidence of lawful status to thousands of immigrants who had been granted such status by the immigration courts.

[57] *Santillan v. Gonzales*, 388 F.Supp.2d 1065 (N.D. Cal.) 2005.

DLA Piper is one of the largest “global” law firms with over 3200 attorneys in 62 offices in 24 countries. The firm has seven “global practice groups”, including “Regulatory and Government Affairs.” That service area is then divided into fifteen countries with the services available from the firm for each country then listed. For the United States, DLA Piper has 25 different practice areas, including Homeland Security. Their web page for Homeland Security is quite lengthy and focuses on most of the legal issues in Homeland Security confronting businesses today, with separate discussions of business continuity, “white collar practices”, cyber security, cross-border activities, “critical industry sectors” including aviation security, telecommunications, chemical industry and others. DLA Piper’s Homeland Security web page also discusses federal regulatory agency practice and federal contracting.

The random sampling of law firm web sites reveals significant differences in the structure of Homeland Security Practice Areas. While the structure varies by firm, few firms appear to have attorneys dedicated full time to the group. Most firms bring the skills of various attorneys from established practices to bear on homeland security issues as they arise. A potential client seeking legal support for compliance with new homeland security laws may require the services of a product liability attorney, who is only peripherally connected to the Homeland Security group.

III. METHODOLOGY

A. POPULATION

For purposes of this research, the population to be surveyed is the total of all Law Schools in the United States (195 schools), those law firms that have displayed, through some form of postings or advertising or subject matter articles by members, a capability in Homeland Security Law, and attorneys from public agencies who work in the field of Homeland Security.

The goal to be accomplished creates the inherent difficulty, if not contradiction, in this survey: the lack of an accepted definition of homeland security law or recognition of its scope or even existence, could likely detrimentally affect the response rate.

In this survey, three different groups – academicians, public agency lawyers and practitioners – are being separately surveyed, that is, the surveys will differ slightly, but the responses are intended to parallel each other. The survey questions cover the same subject matter, but the questions are worded slightly differently to reflect the different use of the law.

B. SURVEY METHODOLOGY

Two different data collection methods were used to assure wider distribution to the proper respondents and to assure their response. A web based survey was used for ease of broad distribution[58] with targeted email messages with links to the web based survey sent to identified professors and practitioners, that is, those discovered through an

[58] Holly Gunn, "Web-based surveys: Changing the survey process," *First Monday*, Volume 7, Number 12 (December 2 2002).

internet survey their publications or advertisements, to be practicing some form of Homeland Security Law.

Zanutto[59] described many of the reasons for the popularity with Web surveys: Web-based surveys are relatively inexpensive; faster response rate; easier to send reminders to participants; easier to process data, since responses could be downloaded to a spreadsheet, data analysis package, or a database; dynamic error checking capability; option of putting questions in random order; the ability to make complex skip pattern questions easier to follow; the inclusion of pop-up instructions for selected questions; and, the use of drop-down boxes. These are possibilities that cannot be included in paper surveys.

Zanutto also discussed a number of issues concerning Web surveys: Questionnaires do not look the same in different browsers and on different monitors; Respondents may have different levels of computer expertise. This lack of computer expertise can be a source of error or non-response; Web survey not truly a random sample, and there is no method for selecting random samples from general e-mail addresses.

One of the most reported drawbacks to web based surveys is the inability to discern the overall percentage of the general population that is connected to the Internet and computer literate. The Internet population differs from the general population in many ways, and there is great variation in Internet access between some rural and urban

[59] Elaine Zanutto, "Web & E-mail Surveys" (2001), http://www-stat.wharton.upenn.edu/~zanutto/Annenberg2001/docs/websurveys01.pdf [Accessed August 26 2006].

areas and with different ethnic groups.[60] Connectivity is almost universal on university campuses,[61] and with large law firms.[6263] This makes sample bias with Web surveys not as great a concern in those populations being surveyed. Secondly, since the survey pool is either practitioners or academicians, both areas requiring high familiarity with use of computers for communication, there should not be any drop off in response rates due to receipt of an electronic survey.

None of the other drawbacks listed above was expected to affect the results of the surveys either. The surveys were sent using a commercial product which indicates that it strives to assure uniformity on different operating systems or types of computers and thereby assuring that respondents receive the same visual stimulus. It is certainly true that the samples surveyed were not a randomly created pool; the surveys were directed at specific sub-groups of a professional discipline, so a random survey would not be expected. Finally, Zanutto's suggestion that respondents will be concerned with privacy is lessened by the sophistication of the respondents and the written assurance within the surveys that the data inherent in an electronic transaction will not be misused,

[60] Mick P. Couper, Michael W. Traugott, and Mark J. Lamias, "Web Survey Design and Administration," *Public Opinion Quarterly*, volume 65, number 2 (Summer 2001): 230-253.

[61] Couper, Traugott, and Lamias, "Web Survey Design and Administration," 230-253.

[62] 94% of firms responding to the survey indicated that they had wireless IT networks in their firms, and over 90% reported that they supplied partners with Blackberries or Treos. From Marcy Burstiner. "AmLaw Tech Survey: Law Firms Play Variations on Old Themes," *Law.com Legal Technology* (October 19 2006). http://www.law.com/jsp/legaltechnology/PubArticleFriendlyLT.jsp?id=1161162316587 [Accessed 21 December 2006].

[63] Marcy Burstiner, "AmLaw Tech Survey: Law Firms Play Variations on Old Themes".

that professional opinions are being requested, but that those opinions will be in aggregate data, unless an interview is requested.

Non response errors were the greatest concern with this survey. Non-response errors may occur if not all people in a sample are willing to complete the survey, or just fail to do so. Web surveys have a lower response rate than mail surveys, and failure to complete a questionnaire or abandonment is a major concern in Web surveys.[64]

The causes of survey abandonment are of concern, obviously, as an increased response rate increases the likelihood of survey validity. Bosnjak and Tuten[65] cited research that explained some of the reasons for dropping out in Web-based surveys, and included open-ended questions, questions arranged in tables, fancy or graphically complex design, pull-down menus, unclear instructions, and the absence of navigation aids. Solomon[66] described two points in a Web survey when respondents stop completing the survey: (1) when respondents encounter a complex grid of questions and responses, and (2) when respondents were asked to their give their e-mail address. He noted that user logs do not show any difference in the failure to complete surveys based on gender, age or education.

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[64] Couper, Traugott, and Lamias, "Web Survey Design and Administration," 230-253.

[65] Michael M. Bosnjak and Tracey L. Tuten, "Classifying Response Behaviors in Web-based Surveys," *Journal of Computer-Mediated Communication,* volume 6, number 3 (April 2001).

[66] David J. Solomon, "Conducting Web-based surveys," *Practical Assessment, Research and Evaluation*, 7(19) (2001).

Based on the above concerns, the following steps were added to the methodology.

1. Great attention was spent on the primary question to assure that respondents continue on and complete the survey.
2. Questions were kept as straightforward as possible; even though the classes of respondents are quite familiar with complex issues, the need to minimize the drop-off rate was paramount;
3. Sensitizing emails were sent out one week prior to the email with survey link being sent;
4. The last survey question required an email address of the respondent in order for the survey answer to post, to minimize survey abandonment as well as to provide means to follow up with questions.

The potential respondents were advised that only aggregate survey responses and analyses would be discussed in the thesis and further, that any participants who indicated an interest in the survey results could receive a copy of the thesis. They were also told that individual responses would be confidential.

C. SURVEY QUESTION VALIDATION

The object of the survey, in part, was to identify whether certain known categories of law, or legal issues, were treated by the Academy or by the practitioners as a component of homeland Security Law. The appropriate areas of law needed to be preliminarily identified by a defensible method, and then validated by a panel of experts in the field. The existing literature on Homeland Security Law was reviewed, searching first for the division of law

under review into identifiable categories. The categories used by the authors or editors then would provide guidance on the subject matter considered by them to be components of Homeland Security Law. Five works were identified and reviewed in this limited literature search.

The Defense Threat Reduction Agency (DTRA) Office of General Counsel sponsored a seminar for federal attorneys in agencies with responsibilities for responding to Weapons of Mass Destruction on May 31, 2001. As an outgrowth of the success of that conference, the DTRA Advanced Systems and Concepts Office agreed to fund the efforts of the Office of General Counsel with the assistance of the other federal agencies to develop a *Domestic WMD Incident Management Legal Deskbook*.[67] This salutary cooperative effort, started before but completed after the attacks of September 11, 2001, focuses in comprehensive fashion on the statutes, federal regulations and Executive Orders which concern prevention or response to a WMD event. Because of the narrower focus and its publication after the seminal statutes, the USA PATRIOT Act and the Homeland Security Act of 2002 were enacted, but prior to others, limited its utility for this work.

Also in 2003, the Homeland Security Law Handbook[68] was published by a group of practitioners from well known private firms. This work was of great assistance in two respects. The first two chapters are thoughtful, provocative essays, both co-authored by the Honorable Ed Bethune, which suggest some bases for the beginning of Homeland Security Law, and suggest the direction of growth

[67] Defense Threat Reduction Agency, *Domestic WMD Incident Management Legal Deskbook* (2003).

[68] Anthony H. Anikeef et. al., *Homeland Security Law Handbook* (Rockville, MD: Government Institutes, 2003).

that this practice area may assume. Secondly, the second article[69] therein suggests potential foundations and sources for Homeland Security Law. It identifies and discusses eight statutes passed in 2001-2202 by Congress, directly in response to the attacks of September 11, 2001. These statutes closely parallel the statutes discussed in "Congress' Response" above. Chapters 3-9 of the Handbook then discuss in greater detail the following areas, *seriatim*: Air Transportation Security, Maritime Transportation Security, Chemical Security, Terrorism Risk Insurance, Public Health and Bioterrorism, Immigration and Border Security, and cyber security. Those discussions aided in the distilling of the potential areas to be considered part of Homeland Security Law.

Homeland Security Laws and Regulations, 2004 edition, was published by LexisNexis.[70] Like many of its products, it has an accompanying CD-ROM with the statutes and regulations in easily accessible form. While the focus of this work is primarily on the applicable criminal statutes, it does separate out the topics by subject matter, with criminal statutes under headings such as "Terrorism", "Stored Wire and Electronic Communications" and "Monetary Transactions". A number of the subject matter headings were useful for this effort however: "Immigration and Nationality,", "Enhanced Border Security and Visa Entry Reform", "Public Health and Welfare" and "Transportation Security."

The American Bar Association published "A Legal Guide to Homeland Security and Emergency Management for State and

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[69] Anikeef, et. al. *Homeland Security Law Handbook,* 47-90.

[70] Lexis Nexis, *Homeland Security Law and Regulations* (Charlottesville, VA: Matthew Bender and Company, 2004).

Local Governments" in 2005.[71] As the title indicates, the focus of this work is markedly different. It contains a series of excellent articles on issues for government counsel to consider in their government agencies interactions with FEMA, DHS, the private sector, the media, other state and local governments. Specific issues such as intergovernmental agreements, donations management, emergency and disaster declarations, dual sovereignty, use of the military and, of course, grants funding are all subjects of articles therein. Even in this volume, directed to a specific niche, some subjects in common with the previous works can be seen. Public Health issues, information privacy and disclosure issues, airport security, and protection of other infrastructure, are all issues raised in the other publications that are also addressed herein.

Homeland Security Law and Policy,[72] edited by Professor William Nicholson, provides a broad survey of potential Homeland Security Law for upper-level undergraduate or graduate students. The range of this work is immense, as emergency management, anti terrorism, national security and Operation Iraqi Freedom, are included. Approximately the first third of the book[73] discussed emergency management and discussed the policy implications of FEMA becoming a subagency of DHS. Many of the articles contained in this work focus on policy more than law. Admirably, the work addresses in a balanced fashion, the constitutional rights

[71] Ernest B. Abbott and Otto J. Hetzel, eds., *A Legal Guide to Homeland Security and Emergency Management for State and Local Governments* (Chicago, IL: ABA Publishing, 2005).

[72] William C. Nicholson, ed., *Homeland Security Law and Policy* (Springfield, IL: Charles C. Thomas Publisher Ltd. 2005).

[73] Nicholson, ed., *Homeland Security Law and Policy,* 23 – 87.

and individual liberties affected by the USA PATRIOT Act. The text does address the statutes enacted in response to the 2001 terror attacks, with topics including Mass Transit Security, Aviation Security, and Bioterrorism Defense.

The *Homeland Security Deskbook*[74] was written by the attorneys at the Law Firm of Venable LLP and edited by Professor James T. O'Reilly, University of Cincinnati law school. Published in 2004, and updated annually by Matthew Bender This work is very accessible: starting at the third chapter, each chapter covers a specific subject matter and lists the statutes, regulations, Executive Orders, and National Strategies or Policy statements which impact that topic, prior to the synopsis at the very beginning of each chapter. The Homeland Security Deskbook devotes separate chapters to the following discrete subjects that have at least one new Homeland Security statute or regulation affecting them: Critical Infrastructure, Telecommunications and Cyber Security, Government Contracting, Immigration, Trade and Transportation, Disclosure and Privacy, and Insurance.

Grounded theory analysis was applied to the subjects or articles across the five texts on Homeland Security Law. As is often stated, "grounded theory" is theory that is "grounded" in data of the kind that it seeks to describe or explain.[75] Grounded theory is distinguished from other research in that it is explicitly emergent.[76] Using content

[74] Venable LLP and James O'Reilly, eds. *Homeland Security Deskbook* (New York: Matthew Bender, 2004).

[75] Langabourne Rust, "Developing Grounded Theory: Qualitative Analysis for Hard-Nosed Researchers," Presentation to the New York Association of Public Opinion Researchers, (1993) http://langrust.com/grounded.htm [Accessed March 8, 2007].

[76] *Resource Papers in Action Research*, "Grounded Theory: A Thumbnail Sketch," http://www.scu.edu.au/schools/gcm/ar/arp/grounded.html [Accessed March 8, 2007].

analysis to identify those topics or subjects which "emerge" from our review, the subjects which consistently appeared include aviation security, public health, immigration, business protections and insurance, cyber security and information privacy. As expected, conceptual labels emerged from the analysis of the texts *in toto.* Those labels include maritime security, border security, white collar crime, anti-terrorism, critical infrastructure, bioterrorism and facility security. Many of these terms may not be strictly considered as areas of law, and some are not believed to be part of Homeland Security Law. The subject matters to be tested by the survey, however, were devised to approximate the closest area of law to the emergent labels. Even if not believed to be part of Homeland Security Law, the areas are clearly related to it, and the survey results are expected to define the parameters of this practice area.

As a result, the subject matter for Survey Questions # 2 and 3, were developed through identification of the key conceptual labels used by the identified texts. The specific questions can be found in Appendix D.

The survey questions are unique, since there is no publication of any studies on the perception of the need for, or scope of, a practice area in Homeland Security Law, previously. Thus one of the earliest concerns is the assurance of the validity of the questions. The survey questions, once drafted to satisfaction of the author, were also reviewed by two other instructors at the NPS well as the author's Advisor and Second Reader. Since it is nearly impossible and certainly impractical to convene a group of attorneys in a room for a discussion without months of

advance planning, use of some form of internet communication was quickly recognized.

First, a small panel of five students with law degrees that were now studying for their Masters in Homeland Security at the Naval Postgraduate School were asked, by email, to take the survey and then to review the survey form and content as if they were a responding Homeland Security Law practitioner. The survey link was sent to them as if they were potential participants. Their comments and reactions were received back by email[77]. While the comments were terse, but positive, all four respondents agreed that all areas identified in Questions #2 and 3 were areas within the practice area of Homeland Security Law.

It had been previously arranged through a series of email communications between October 20 and November 4, 2006, for the questions to be reviewed by a panel of professors and instructors from the School of Criminal Justice at Michigan State University led by Dr Edmund McGarrell. Professor McGarrell is Director and Professor of the School of Criminal Justice at Michigan State University. McGarrell also serves as Co-Executive Director of the Global Community Security Institute at Michigan State University (MSU). The Institute serves as an umbrella for MSU's homeland security initiatives that build on the university's particular strengths in interdisciplinary research, public-private partnerships, and online education tools.

Besides Professor McGarrell, Dr. Phil Schertzing of the Global Security Institute at MSU and the former Emergency Management Director for the state of Michigan,

[77] Foreshadowing the survey results, perhaps, only 4 of 5 attorney-students responded.

Dr. Steve Chermak from the MSU School of Criminal Justice, and Professor Mike Lawrence, Professor of Constitutional Law from the MSU School of Law, agreed to act as reviewers and panel members. Due to unforeseen conflicts, however, on November 9, 2006, only Drs. Chermak and Schertzing were available for the meeting. The four professors had been provided with the approved Thesis Proposal and with the draft Survey Questions in advance so that all would be prepared for detailed discussion on the date of the meeting, and to develop any email-based discussion as well.

The purpose of the meeting was to review, analyze, edit and ultimately validate the proposed survey questions. The discussion was lengthy and very conducive to objective analysis of the various specified areas of the law, which seem to overlap with or be considered part of, Homeland Security Law.

One of the areas covered at length was a review of the specialized areas of law that should be included within a core course or within their firm or agency's scope of Homeland Security Law practice. After asking what areas of law, in their practice, were included, each respondent would then be asked which specialized areas of the law *should* in their opinion, be considered as part of the practice of Homeland Security Law, or, if a Law professor was responding, which areas must be included in a course on Homeland Security Law.

A substantial time was spent at the meeting in discussion of the Law of Terrorism vs. Homeland Security Law. Neither concept has yet been defined in a form acceptable to all. Terrorism is susceptible to varying definition because of different disciplines affected, and the wide range of criteria. Likewise, Homeland Security Law

seems to be capable of varying definitions depending on the context used, and the user. The discussion included raising such questions as: Is Homeland Security Law a subset of Terrorism Law, which many consider a subset of National Security Law? Should the definition of Homeland Security Law then be limited to those laws which govern how governments respond to terrorism? Terrorism is an amorphous term[78], just as "homeland security" is not yet clearly defined. Consensus of the group was that Anti-terrorism and Counter Terrorism were distinct areas with distinctly applicable laws.

The set of laws that would be included in Homeland Security Law seems to be much broader than the functional areas and agencies included within the DHS umbrella organization, or from the syllabi from surveyed law schools or from the chapters to the four seminal works found on the subject.

It was agreed, however, that Homeland Security Law appears to becoming more focused as DHS imposes its standards on business, and on state and local government. For example, but for the Immigration and Naturalization Service merger into the DHS under the Homeland Security Act of 2002, it was suggested that few would consider Immigration Law to be a component area of Homeland Security Law.

The other area of discussion was the inclusion of Emergency Management and Preparedness Law as an area impacted by Homeland Security Law. One author based his conceptual definition of Homeland Security on a purposeful sampling of the syllabi of undergraduate and graduate

[78] Banks (2005) notes that the federal government has more than 150 definitions of terrorism.

schools offering a course in Homeland Security.[79] Under his purposeful sampling logic, the largest possible number of homeland security courses was used, and then refined by discarding courses that did not contain a primary focus on homeland security, as stated in the course's mission or objectives.[80] Applying a grounded theory paradigm, through identification of key phrases, the core category that emerged was emergency response/preparedness.[81] His conceptual definition of homeland security became a "system of emergency preparedness that requires military and civilian response to perceived, potential, or eminent terrorist threats against U.S. citizens and interests at home."[82]

This concept, however, based on a purposeful sampling of syllabi from many disciplines, is not useful for describing the focus or interests of those in a single profession lawyers practicing homeland security law. The practice of law is strongly market-driven, is reactive to new legislation or regulation, and seeks to define, through a number of mechanisms, the rights and opportunities of individuals and corporations *vis a vis* the government which enacted the law(s). The group agreed that emergency preparedness is not generally considered as a separate area of law, but more of a functional area.

D. METHODS OF ANALYSIS

Qualitative analysis can follow either a positivist or an interpretivist approaches. University of Michigan

[79] Smith, "Defining "Homeland Security."

[80] Ibid., 237.

[81] Ibid., 240.

[82] Ibid., 245.

political scientist Ann Lin suggests a useful analytic approach: “Generally speaking, qualitative work that takes an interpretivist approach seeks to understand what general concepts like ‘poverty’ or ‘race’ mean in their specific operation, to uncover the conscious and unconscious explanations people have for what they do or believe, or to capture and reproduce a particular time, culture, or place so that actions people take become intelligible”. “Law” including “Homeland Security Law” is similarly a general concept in which we are attempting to discern the parameters of comprehension, the scope of a very new area which is recognized or assumed, to exist by practitioners, but without yet a formal study of how to define homeland security law.

Lin continues, “The differences in interpretivist and positivist qualitative work thus are differences in the questions one asks of the data and the types of conclusions one wishes to draw. Both forms of qualitative work look for details about preferences, motivations, and actions that are not easily made numeric. Positivist work, however, seeks to identify those details with propositions that then can be tested or identified in other cases, while interpretive work seeks to combine those details into systems of belief whose manifestations are specific to a case. While both in the end can comment about general principles or relationships, positivist work does so by identifying general patterns, while interpretivist work does so by showing how the general pattern looks in practice.”[83]

[83] Ann Chih Lin, “Bridging Positivist and Interpretivist Approaches to Qualitative Methods,” *Policy Studies Journal*, Vol. 26 (1998).

E. SURVEY DEPLOYMENT

Once the questions were validated, a commercially available software package to create a web-based survey was used. Zoomerang was selected as the web based survey tool for two pedestrian, yet compelling reasons: ease of use by both the academic and the respondent, and it offers good value at low cost.

The selection of the respondents proved to be difficult. The previously referenced "Catch-22" of trying to find Homeland Security Lawyers to ask if Homeland Security Law exists was fully engaged. It was known, however, that there would be three potential groups of respondents: public agency counsel that advise first responders or homeland security agencies, private practitioners who advise businesses and individuals on the potential effects or applications of Homeland Security laws, and the Law Academy who not only teach, but may objectively evaluate new legislation or regulation. The web based searches for private counsel specializing in Homeland Security Law revealed few such practitioners until Westlaw was used. Westlaw and LexisNexis are the two primary legal Internet-provided research tools. The Westlaw site also contains a database directory of attorneys. The Westlaw directory of attorneys was well-suited to our needs: it not only permitted attorneys to provide their "areas of practice"[84], but also required the attorneys to provide an email address. Because Westlaw had fashioned the "Area of Practice" as a searchable term, it was therefore relatively

[84] The format of the Westlaw directory permitted attorneys to designate their practice within the categories expressly recognized by Westlaw, described as "West Practice Categories", but had a second area, where attorneys could indicate other areas of specialty, which Westlaw describes as "Areas of Practice."

simple to locate all attorneys that had indicated an area of practice of Homeland Security Law, and then to create an Excel spreadsheet of those attorneys with their email addresses. With the searchable area of practice on the Westlaw site, we could be assured that all of our potential respondents were members of the population to be surveyed.

Locating a discrete and willing population of public agency counsel who specialized in Homeland Security Law proved difficult. Attorneys in public practice have no incentive to use legal directories to hold themselves out as a specialist in a particular area of the law. Similarly, because their client(s) are well known to them and usually designated by law or agency policy, their email addresses are not easily retrievable – despite being categorized as "public" counsel, they rarely have any compelling reason to communicate with the public by email and many public agencies have policies or IT solutions to prevent public communication. Attempts at contacting the General Counsel and Deputy General Counsel of the Department of Homeland Security were not fruitful. The National Emergency Management Association[85] has a Legal Subcommittee, however, whose members are all attorneys for state agencies or of the Federal Emergency Management Agency. The email list of members from the Chair of the Legal Committee was used, although the population of counsel for state emergency management directors may not be precisely equivalent to the desired population of public practitioners of homeland security law. Connection was also accomplished with the Staff Judge Advocate for U.S. Northern Command, NORTHCOM,

[85] The National Emergency Management Association (NEMA) is the professional association "of, and for, state emergency management directors" See http://www.nemaweb.org/ [Accessed February 13, 2007].

and he graciously agreed to forward the survey link to his attorneys, which completed the pool of the smallest group, public counsel.

From the survey of law school websites, it was ascertained that not every law school has a course in homeland security law, or indeed, even listed all of their courses, or their course syllabi, on their website. It was therefore impossible to assure with any certainty from the survey of law school websites that every law school course which is entitled “Homeland Security Law” or which is primarily focused on Homeland Security Law, would be captured within our survey of websites. Without this data, we could not be confident that our survey would reach the desired population of professors of Homeland Security Law. It *was* easily ascertained, however, that every law school had a Dean, and every law school web site contained the Dean’s abbreviated biography and email address. Therefore, an excel spreadsheet was created of the Dean’s email address for each school. The email communications sent to the deans of the law schools, varied slightly from that sent to the practitioners, as it requested that the Dean forward the email with the survey link to that professor who taught Homeland Security Law or a closely related course.

A sensitizing communication was sent first. This is believed to be crucial for two reasons. First, in many cases the “postcard” can assist in identifying the respondent. It may be, for example, that the law firm that has Homeland Security Law as a specialty can be identified but the individual within that firm that can best respond was not known to the writer. Similarly as noted above, the Dean of the law school was sent the card when the

appropriate professor was not known. In both cases they were instructed to pass on the card, to the partner or professor best suited to answer the survey questions. The survey also had some short demographic information designed to determine the degree of expertise of the respondent. They were be asked the year they graduated from law school, the number of years of practice or of teaching, and the number of years of practice of teaching in Homeland Security Law.

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IV. DISCUSSION OF SURVEY RESULTS

As noted in the Methodology Chapter, the three surveys were sent to a total of 428 sites: 151 Law Schools, 230 Private Practitioners and 47 Public Practitioners. The results may seem somewhat underwhelming: 30 law professors, 23 private firm attorneys and 21 attorneys from public agencies responding.

Figure 1. Response Rates

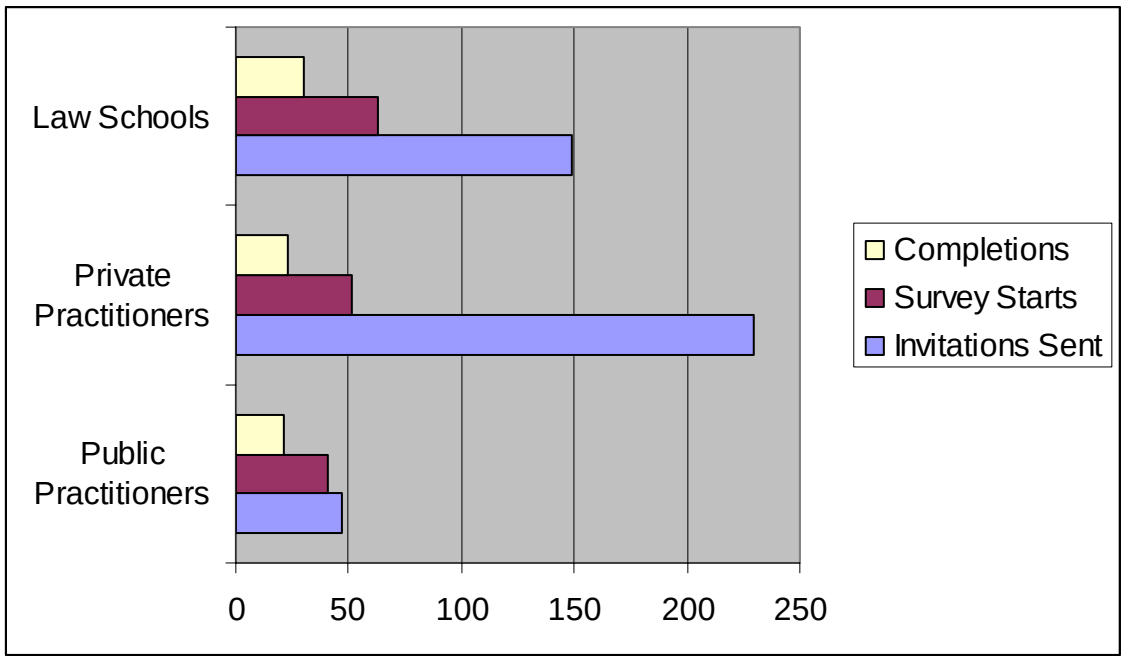

Table 1. Response Rates

Response Rates			
	Public Practitioners	Private Practitioners	Law Schools
Invitations Sent	47	230	149
Survey Starts	41	51	63
Completions	21	23	30

But upon analysis, the results are not unduly disappointing. The public practitioners, all of whom are known to practice Homeland Security Law at least in part, had a response rate of 44%. Considering the potential drawbacks with online surveys identified in the Methodology Chapter, the public counsel survey had a very acceptable even successful rate of return.

While the rate of return for the survey of law schools appears to be low, with 30 of 149 responding for an apparent 20% rate of return, that analysis is incomplete. The email communication to the Law School Deans expressly requested that the survey link be provided to the "professors at your school that offer a course in 'Homeland Security Law' or any related course which covers Homeland Security Law." Ten responses were received that indicated that their school did not offer a course that fit the description provided[86]. The Academy, of course, well understands the need for accuracy in survey results. When that information is coupled with the handful of school websites that clearly offer such a course, it is entirely reasonable to assume, then, that the number of survey starts, 63, is the more likely quantity for the targeted population. If that assumption is accepted, then the rate of return is 30 of 63, for 48%.

The rate of return from the survey of private counsel, however, is dismally low, at exactly 10% of the survey responses solicited. There are a number of possible reasons for this low response. Attorneys in private practice

[86] Examples of the responses received include: "I do not believe we have anyone teaching a course in the area you have indicated." ; "At this time, we do not have any faculty teaching such a course. Best wishes." ; and "I regret to say that we do not really have a current course covering the subject matter of Homeland Security."

commonly bill their time in increments of 1/10 of an hour. Both emails, the sensitizing postcard and the survey link, expressly advised that the survey would require "10-15 minutes of their time.[87]" The first email was somewhat lengthy as it endeavored to explain the reasons for the impending survey as well as the survey process itself. It is probable to assume that counsel upon receipt, believed that the time to read the instructions and explanation AND respond to the email would cost more than three billing increments or 20 minutes and simply declined to act. It is also possible that private counsel, unlike the public attorneys and law professors, could find no common point of interest with the author of the emails[88]. It is also possible that attorneys just do not care to answer surveys or to provide their email address. In all three surveys, the survey could not be submitted unless an email address was included. It was believed that since their professional opinion was being solicited, the ability to follow up with questions was needed, although they were promised that their email address would not be disseminated.

A. LAW SCHOOLS

A link to the survey was sent to all law schools. The first question therefore clarified the status of Homeland Security as a separate course within the school. After screening out the 2 instances where more than one respondent from a single school, results showed that 15 of 30 law schools responding offer a discrete course in Homeland Security Law.

[87] The emails are attached hereto at Appendix F.

[88] I would note, however, that two partners, from different, well-known firms, initiated calls to the author to offer advice and encouragement.

Question #2 asked each law school respondent to identify those specialized areas of law that their school includes in their core course on Homeland Security Law.

Question #2 results then must be considered based on whether or not the school offers a specific course in HS. Just 50%, fifteen of thirty respondents reported that their schools offered a course in Homeland Security Law. For two schools, however, George Mason University and University of Akron had four and two respondents, respectively. Subtracting the four from the same school(s) to determine the number of schools that offered a course specifically in Homeland Security Law, then reveals that only eleven schools actually offer such a specific course.

Considering those responses then are based on the eleven schools: All of the schools include “National Security Law” as part of the curricula of the Homeland Security Law course. An identical number include “Anti-Terrorism” as part of the course. Five schools include “Civil Rights/Rights of Minorities” as part of the course. Three of ten include immigration as part of the Homeland Security Law course. Three schools include “Physical Security of Facilities” in their curricula. Three schools include “Cyber Security” in their Homeland Security Law course, but two schools included “Information Security and Privacy” as part of their course. One school includes aspects of “Criminal Procedure” while one school, “White Collar Crime.” Only one school included each of the following: “Maritime Law,” “Transportation and Common Carrier Law,” “Practice before Government Agencies” and “Administrative Law.”

In other words only 5 professor-respondents indicated that they include “Immigration” as part of the curricula of

the Homeland Security course, But that sampling result must be evaluated as 5 of 14, rather than 5 of the total of 29 respondents since the question is limited to only those who actually offer such a course. After comparison with the following question, the answers demonstrate consistency: 5 of 12 which actually offer a course in Homeland Security Law believe that Immigration should be a part of the course, while 22 of 30 respondents believe Immigration should be considered in a course on Homeland Security Law.

Question #3 considered the same separate practice areas, but asked each respondent to designate which areas, *in their opinion,* should be included in a course in Homeland Security Law. Obviously, then, all 30 respondents who indicated that they either taught Homeland Security Law or taught Homeland Security Law as part of another course were included in the survey results. Thus, 28 of 30 or 93% of respondents would include National Security Law as part of the core course on Homeland Security Law, 27 of 30, or 93% would include “Civil Rights/Rights of Minorities,” 26 of 30, or 90% would include Anti-Terrorism, 24 of 30, or 83% would include “Cyber Security”, 22 of 30, or 76% would include “Immigration Law” and the same number would include “Information Security and Privacy.” “Physical Security of Facilities” was the only other area endorsed by a majority, with 17, or 59% selecting it.

Question #4 asked the respondents to suggest any other area of practice that should be included in a course on Homeland Security Law, in their opinion. Seven respondents offered suggestions. Those recommended further subjects or practice areas included:

- The Law of War;
- International Law (3 respondents);
- International Human Rights (2 respondents);
- “Money Laundering”;
- “Tort Claims involving Disasters or Terror Attacks”;
- Law of Consequence Management, such as Stafford Act, Insurrection Act and the Posse Comitatus Act;
- Environmental Disasters;
- Aspects of Federalism, “in the Homeland Security Context”;
- “National Guard in Title 32 status”;
- Search and Seizure “as it relates to intelligence] collection”
- Military Law;
- Habeas Corpus should be included in the section on “Civil Rights/Rights of Minorities.”

Question #5 also asked for the respondents’ professional opinion, inquiring as to what, if any, areas of the law were “displaced or subsumed by Homeland Security Law?” Sixteen of the respondents (76% of those answering[89]) indicated that, in their opinion, “National Security Law” was so displaced or subsumed. Ten respondents or 48% similarly agreed that “Emergency Management and Response” was subsumed within Homeland Security Law. No one indicated that Immigration Law had been subsumed within Homeland Security Law, and only one other category, “Risk Management and Insurance”, had as many as two “votes”.

[89] Only twenty respondents chose to answer this question.

Question #6 also asked for their opinion, as it inquired as to what specific functional areas should be included within a course on Homeland Security. Twenty-six (26) of 30 or 90%, of the respondents believe that the areas of “Counter Terrorism”, “Critical Infrastructure Protection” and “Aviation Security” should be taught as part of the Homeland Security Law curricula. Only one less respondent, or 25 of 30 at 86%, consider “Money Laundering and Suspicious Activity reports from Financial Institutions,” the “Enemy Combatant Cases” and “Mass Transit Security” as crucial parts of the Law of HS course. There were two remaining categories, “Weapons of Mass Destruction” and “Consequence Management.” 16 of 30 respondents, or 55%, agreed that “Weapons of Mass Destruction” should be included, and only 12 of 30 or 41%, believed that “Consequence Management” should be included.

Question #7 then followed up, asking if any other functional areas should be included in the Law of HS. There were four respondents, who offered the following:

- Disaster Management;
- Emergency Management;
- Cyber Security;
- Asymmetric warfare;
- “Classification of Intelligence”; and
- “Basic rights of Americans and prisoners.”

Question # 8 used a Likert scale based question to determine the level of interest among the law schools’ respondents for the American Bar Association recognizing Homeland Security Law as a recognized Practice Area. 3 respondents or 10% strongly disagreed and 9, or 30%, disagreed with the concept. Similarly, 7, or 25% agreed

that Homeland Security Law should be a separately recognized practice area, and one respondent strongly agreed. The largest category obviously, at 33%, had no opinion.

B. PUBLIC AGENCIES

Because of the means by which the list of addresses for the public agency attorneys was created, there was a high degree of confidence that all the attorneys for whom responses were solicited would be in public practice of Homeland Security Law. The responses to question #1, which specifically asked that question, were 100% involved in Homeland Security Law.

Question #2 asked the respondents to identify which specialized areas of law their agency either enforces or is directly engaged in that is part of the law of Homeland Security. The fifteen specialized areas then listed in Question #2 are identical to the practice areas that the law professors were queried on. Some of the specialized areas, such as Immigration, Maritime Law and Admiralty, all with either one or no respondents answering affirmatively, are almost exclusively the purview of the federal government and thus, there was little or no practice by attorneys for state government agencies, although it is entirely likely that the NORTHCOM attorneys would be acquainted with them.

The highest response was for administrative law at 76%. 43% also included “Practice before Government Agencies”. 57% of the respondents also selected “Physical Security of Facilities” and 67% of respondents selected “Anti-terrorism.” A slight majority also selected Information Security and Privacy.”

While the majority of the attorney respondents are employed by their state's attorney general, at least 2 are employed by FEMA, and one or more are employed the National Guard in their state. As a result, it was anticipated, and the responses demonstrated, that there would be multiple specializations listed, and thus considered, part of Homeland Security Law by the respondents.

Question #3 requested the respondents to consider the same areas of law as in question #2, and to opine as to which of the same areas should be considered part if the law of Homeland Security. All respondents agreed that Anti-Terrorism Law is a part of Homeland Security Law. 90% considered "Information Security and Privacy" and 95% considered "Physical Security of Facilities" to be an vital sections of Homeland Security Law. The same number of respondents also considered Cyber Security to be part of Homeland Security Law. 71% of public agency lawyers selected Immigration Law and 67% selected Administrative Law to be part of Homeland Security Law. 48% considered Practice before Government Agencies within the Homeland Security Law discipline, and finally, a bare majority, at 62%, considered Civil Rights/Rights of Minorities and Transportation and Common Carrier Law to be inherent segments of the Law of HS. Over half of the respondents believe Risk Management and Insurance Law to be included within the law of Homeland Security Law.

Question #4 was open-ended and provided the public attorneys with the opportunity to contribute any areas of Homeland Security Law which they believed should have been included as part of the practice area. Of the contributed specialties, that is, those areas suggested by the respondents, the most prevalent was Emergency

Management/Preparedness at 36%. Because it was open-ended, the question provided an opportunity for comment although none was solicited. One counselor who selected Emergency Management law also opined that “the concept that HS (Homeland Security) somehow stand separate from EM (Emergency Management) is at best flawed.” Another respondent indicated that Emergency Preparedness “overlaps with, but should not be completely covered by – ‘Homeland Security Law’.” Three attorneys contributed some variation of Public Health Law. Other responses received included “International Law”, Criminal Law, “Constitutional limitations on state action”, and Military Law.

Question #5 was designed to provoke thought on the extent or scope of Homeland Security Law. The intent of the question was to determine the impact of “homeland security” as a new concept on existing practice areas of law. Because the question expressly sought to divine those areas of law now subsumed within Homeland Security Law, it was not expected that there would be a high or varied number of responses. With the public agency attorneys, only one area, Emergency Preparedness and Response, was believed to be displaced or subsumed by Homeland Security law by a majority, 73%, of respondents.

Question #6 sought opinion on which functional areas of the law should be included in a Continuing Legal education course for practitioners, whether in public or private practice. 95% of respondents believe that Critical Infrastructure Protection should be included. A clear majority of 81% believe that Consequence Management must be included. Sixty-four (64%) percent found that Counter Terrorism should also be included, and a majority, 71%,

agreed that Mass Transit Security and Aviation Security, should also be included in a CLE course on Homeland Security Law.

Question #7 then asked respondents to suggest any functional areas of the law that should be taught, not included in Question #6. The responses were varied: two responses suggested Emergency Management; two suggestions for Constitutional Limits on State Action; two suggestions for federalism; and one vote each for military law, international law, public health law, funding aspects, criminal law, and privacy issues on information gathering.

Question #8 inquired whether Homeland Security Law should be a separately recognized practice area by the American Bar Association. Only 1 respondent disagreed with this assertion, three agreed, and two strongly agreed, but eight respondents had no opinion.

C. PRIVATE PRACTITIONERS

All 23 respondents indicated, at Question #1 that their firms practiced Homeland Security Law. Since the firms were selected based upon their representation of Homeland Security Law as a practice area, this result is not unexpected.

Question #2 sought to define the specialized practice areas within Homeland Security Law in which private firms were actually engaged. The greatest number, 20 of 23, indicated that they were involved in Practice before Government Agencies at 87%, followed by 19 attorneys who practice Information Security and Privacy for 83%. Slightly fewer, 17 of 23 respondents, or 74% designated that they were engaged in Administrative law or Federal Government Contracting. An identical number, 74% percent, indicated

that they practiced National Security Law. Two-thirds of respondents replied that they represented their clients in Risk Management and Insurance matters. The substantive practice areas of Transportation and Common Carrier Law, and White Collar Crime were close to Risk Management and Insurance, with 61% of practitioners reporting this area. Fifty-seven (57%) percent, or 13 attorneys, noted that Anti-Terrorism was an area practiced by their firm. A bare majority, at 52%, specified Cyber Security, Immigration Law, and Physical Security of Facilities as areas practiced by their firms. Thirty-nine (39%) percent listed Maritime Law, but only 17% included Admiralty. Only one –third of the attorneys reported that their firms practiced Civil Rights/Rights of Minorities Law. Other areas of practice included within their firm's practice of Homeland Security Law, but not offered as a choice by the survey included: "Trade Facilitation" (CTPAT)[90]; "AML/CFT compliance[91]"; Bioshield[92]; two votes for Legislative and/or Government relations; "Implications for Intellectual Property Law"; Employment Law; Emergency Management and Response Law; Customs, Export Control; and Anti-Money Laundering.

Question #3 asked the practitioners to consider the same practice areas, whether or not offered by their firms,

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[90] The Customs Trade Partnership Against Terrorism is a voluntary joint initiative between the U.S. government and U.S. importers to strengthen U.S. border security by the provision of specific information about their trucks, drivers, cargo and suppliers to U.S. Customs and Border Protection (CBP).Benefits to the importer should include eligibility for the FAST lane, for expedited customs release of cargo, fewer inspections, and reduced border wait times. http://www.cbp.gov/xp/cgov/import/commercial_enforcement/ctpat/ [Accessed 24 December 2006].

[91] Anti-Money Laundering and Combating the Financing of Terrorism. For more information, visit the International Monetary Fund website, at http://www.imf.org/external/np/mae/aml/2002/eng/091002.htm [Accessed 24 December 2006].

[92] Project BioShield Act, Pub. L. No. 108-276 (2004).

which in their opinion, are included with in the practice area of Homeland Security Law. Every respondent included Information Security and Privacy as part of Homeland Security Law. A high majority, 91%, or 21 of 23 respondents, included the following areas as within Homeland Security Law:

- Immigration Law;
- Physical Security of facilities;
- Risk Management and Insurance; and
- National Security Law.

Almost as high was the percentage 87%, or 20 of 23 respondents, that considered Anti-Terrorism Law, Cyber Security, Federal Government Contracting, and Practice Before Government Agencies. Just behind those areas was Administrative Law, and Transportation and Common Carrier Law at 83%. Over two-thirds of the private practitioners responding (70% and 65% respectively) believe that Maritime Law and Civil Rights/Rights of Minorities are included. Fifty-seven (57%) would include White Collar Crime as part of Homeland Security Law. A bare majority, 52%, would include Admiralty Law, as within the practice area of Homeland Security Law.

Question #4 provided an opportunity for the private practice attorneys to suggest any other area of law that should be included in the practice area of Homeland Security Law. There were eleven respondents participated, reflecting a broad range of subject matter and reflecting, to some degree, the practice areas of their firms. Those suggestions included: Emergency Management and Response Law; Preparedness; Bioterrorism; “Bioshield”; the Bioterrorism Act of 2002; “Finance and money transfers”;

banking and finance; “Anti-Money Laundering”; Customs(2); “Export Controls”; “Import/Export”; “Trade facilitation”; “Technology Transfer”; Intellectual Property – specifically protecting IP when designing solutions for the government and preventing competitors from using non-competition and invention assignment contracts to thwart that development”; “Weapons and Weapons Systems Transfer/End User”; Space Law, Aviation Law; Military Law; Legislative and Government relations”; “Public Policy(lobbying)”; “Local Government Contracting and Affairs”; Privacy Law and Employment Law.

Question #5 expressly required the attorney-respondents to agree that an established practice area is displaced or subsumed by Homeland Security Law. Eighty-two (82%) percent concurred that Emergency Preparedness and Response Law was subsumed or displaced by Homeland Security Law. No other category had a majority, although National Security Law and Immigration Law were selected by 47% believing that they had been subsumed within Homeland Security Law. Risk Management and Insurance was found by 24% of respondents to be subsumed with in Homeland Security Law, all other categories were 18% (Maritime Law) or less, with Admiralty at 12%, and Military Law at 0%. It should be noted, however, that 36% believed that NO recognized practice area had been subsumed by Homeland Security Law. One respondent volunteered that Homeland Security Law is “a fabricated area, an amalgam” of existing practice areas.

Question #6 required the private practitioners to designate those functional areas of the law which should be included in a Continuing Legal Education (CLE) instruction on Homeland Security Law. The purpose of “functional areas” is to highlight or emphasize those areas of interest, utility or actual practice by their clients which the

attorneys believe that they should learn in depth to better serve their clients. In short, the attorneys need to understand their clients business to fully represent their clients' interests. Designation of needed training in functional areas is intended to indicate those areas that the attorneys believe their clients need the most assistance. A substantial majority, 87% selected Critical Infrastructure Protection as well as "Money Laundering and Suspicious Activity Reports from Financial Institutions." A very close majority, 78%, designated that "Mass Transit Security" and "Aviation Security" should be included in a CLE program. 61% believed that Counter Terrorism should be included, and a majority, 57%, considered Consequence Management a necessary part of any such CLE training. The remaining functional areas, Weapons of Mass Destruction and the "enemy combatant" cases were considered necessary for inclusion by only 39% of the respondents.

Question #7 requested suggestions of other functional areas that they believed should be included not listed as choices in Question #6. There were only a few suggestions: Intellectual Property Protection; Import/Export Laws, "especially prohibitions of trade with certain countries and the prohibition of selling certain products"; "Terrorist Finance and trade issues"; "Emergency Management and Response Law"; and Privacy Law.

Question #8 used a Likert scale for the respondents to note their opinion on whether Homeland Security Law should be a recognized practice area by the American Bar Association. The results were polarized, with 6 respondents indicating that they "strongly disagree," and 2 "disagree" while 5 respondents "agree" and 8 "strongly agree" with

the concept of a separately recognized practice area of Homeland Security Law. Only 2 individuals indicated they had no opinion.

V. RESULTS

A. SURVEY QUESTIONS AND RESULTS DISCUSSION

1. Does Your Agency Practice Homeland Security Law or a Related Practice Area?

Table 2. Responses to Question 1

Public Practitioners:			
	Yes	21	100%
	No	0	0%
	Total	21	100%
Private Practitioners:			
	Yes	23	100%
	No	0	0%
	Total	23	100%
Law Schools:			
	Yes	14	48%
	No	15	52%
	Total	29	100%

The results were as expected as they comport closely with the methodology used, and thus, could be said to validate the methodology. The Methodology chapter detailed the process for searching for attorneys which specialize in Homeland Security Law. It was expected that the public practitioners would practice only Homeland Security Law, as the 2 groups selected were those attorneys who were members of the Legal Committee at NEMA, and by their membership mostly state attorneys, with some federal FEMA members; the rest are on staff at NORTHCOM as a military attorney. Similarly, the Methodology chapter includes the description of searching the attorney locater websites, for instances

where attorneys or law firms hold themselves out as practitioners of Homeland Security law. Since a representative sampling of those firms was taken, it, again, was expected that all respondents would represent themselves as Homeland Security law practitioners. Since several law schools were found to have closely related courses, of which Homeland Security law was a large component, the survey was not targeted just to those schools which referred to their course as HS Law, but, unlike the other two areas, was sent to ALL law schools, in an effort to ascertain which now offered a course where Homeland Security law was a vital component.

2. Status Quo Practice and Ideal State of Homeland Security Law

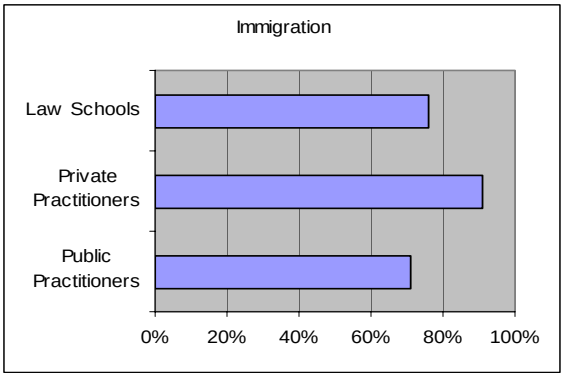
An identical list of fifteen areas of the law was listed in Questions 2 and 3, which are lists of the potential components of Homeland Security Law. Question 2 had asked, as to those fifteen areas, whether the areas were actually taught or practiced as part of their Homeland Security course or practice, and Question 3 has asked for their opinion, whether, without regard to whether they were presently practicing or teaching, that area should be considered a component of Homeland Security Law. For the following discussion then, the results to questions 2 and 3 will be considered together. The discussion will then compare and contrast the topics actually practiced as components of Homeland Security Law and those areas in which the professional opinions agree should be a component of Homeland Security Law. The discussion will be fragmented into those fifteen topic areas the attorneys were asked to consider, with charts for each area, as needed.

a. Immigration

The fact that very few public practitioners practice Immigration Law is a function of (1) the area being highly specialized within a specific federal subagency and (2) no attorneys from that agency were sought out to respond to this survey. Obviously, the opinion of attorneys from the Immigration and Customs Enforcement agency would be quite interesting.

It is equally interesting, however, that a majority of the private practice attorneys, who hold themselves out as practicing Homeland Security law, do practice Immigration Law, and by implication, consider this discipline as within the purview of Homeland Security Law.

Figure 2. Percentage of opinions that Immigration should be included within Homeland Security Law.



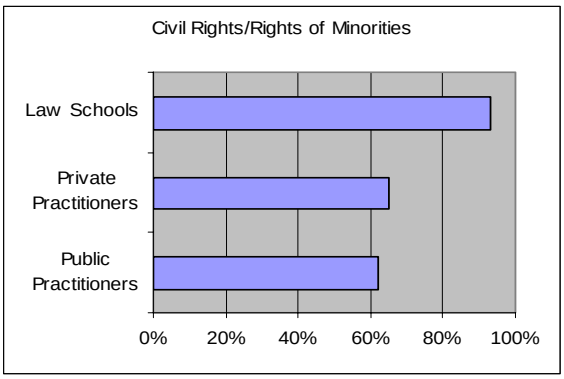
Very strong majorities in all three groups believed that Immigration Law should be included within Homeland Security law practice area. This is somewhat curious as Immigration law has traditionally been considered as a completely separate area of the law. With the inclusion of INS within the Department of Homeland Security, the stronger emphasis on border security and the

information sharing provisions contained in the Enhanced Border Security and Visa Protection Act, however, the profession's attitudes towards Immigration Law have clearly changed.

b. Civil Rights/Rights of Minorities

Equal numbers of attorneys in private and public practice, roughly one-third in each group, represent their clients on Civil Rights issues as part of Homeland Security Law. Almost half, 47%, however, of the law professors discuss the civil rights or rights of minorities as part of their course offerings on Homeland Security Law.

Figure 3. Percentage of opinions that Civil Rights/Rights of Minorities should be included within Homeland Security Law.



The law school respondents had the highest positive response with 93% indicating that civil rights/rights of minorities must be included within the Homeland Security practice area. A very strong majority, two-third's of the respondents of the public and private practitioners believe that this area, encompassing constitutional rights, civil rights provided by other federal law international law or treaty must be included.

Given the strong reaction by the Bar to many of the actions of the administration in the past few years, all members of the profession are sensitized to the need to balance the rights of the few with the security of the many.

c. Maritime Law

Maritime law covers legal affairs and dealings between ship owners, crew members, passengers and cargoes on the high seas and other navigable waters. Traditionally, many of the issues under Maritime law were concerned with physical or other injuries to passengers or crew of ships[93]. Only 39% of private counsel indicated that they included Maritime law within their Homeland Security practice. When asked whether maritime law *should* be included within Homeland Security Law, however, 70% of private counsel believed that it should. The percentages in the other two groups was quite low and remained low, with only 7% of both public agency attorneys and law professors including Maritime Law within their practice or Homeland Security Law course, and 43% of the public counsel and 29% of law professors opining that it should be included.

It could be that the survey targeting just a few representative firms did not capture those geographic areas where maritime law is more prevalent. It could also be that as the U.S. Coast Guard continues to promulgate rules under

[93] The Jones Act (46 U.S.C. § 688 (2006)) was recently expanded by Congress, effective October 6, 2006. It expands the definition of "seamen" to include workers on Offshore Oil Rigs, Stationary Production Rigs, Tug Boats, Barges, Cruise Ships, Private Yachts, Charter Boats, Riverboat Casinos, Shrimp Boats, Fishing Boats, Trawlers, Tankers, Crew Boats, Ferries, Water Taxis, and any other vessels on waters classified as "navigable", including intra-coastal waterways, rivers, canals, inland lakes and bays. Divers and underwater personnel can also be covered by the Jones Act. Maritime law then is a much broader category than Admiralty law.

the authority of the Maritime Security Act, that this area of law will be recognized as part of Homeland Security Law.

d. Admiralty

Admiralty law is a very discrete, and highly specialized area of the law, practiced by few. These results are consistent with that as only 17% of the private practitioners, and no one from the other groups, indicated that they practiced Admiralty Law as a component of a Homeland Security Law practice. Admiralty is the body of international law governing the relationships between private entities which operate vessels on the oceans. It was expected that very few, if any, would select Admiralty as a subset of Homeland Security Law. The differing responses between Admiralty and maritime Law indicates that the respondents well understood the definitions, or at least understood the distinctions between the two specialties. It can further be assumed that if the respondents grasped the distinction between Maritime law and Admiralty, that they similarly understood the definitions of the other specialties.

Not surprisingly, given its specialized nature, when asked whether Admiralty *should* be included within Homeland Security law, a strong majority of both law professors and the public attorneys declined to include it. A bare majority of private counsel at 52% agreed that it should be included.

e. Transportation and Common Carrier Law

Interestingly, only private practitioners responded affirmatively that they provided representation in Transportation and Common Carrier Law as part of their

Homeland Security practice, but in that category, 2/3 of them do provide this service to their clients. Transportation security is an area which is receiving increasing attention with legislation unsuccessfully proposed in 2005 at the end of the 109th Congress. The recent bombings in Madrid and London highlighted the vulnerability of common carrier systems and particularly public transit systems: to be accessible to all, as required by other laws, they are then vulnerable to all. Private ownership of common carrier systems may rightly be concerned about the vulnerability of their passengers or cargo, and thus, may have raised liability or other risk management issues, such as employee injury compensation with counsel. Alternatively, private clients may have sought counsel on or advocates for/against proposed legislation concerning carrier or transit systems.

When asked whether Transportation and Common Carrier Law should be included within Homeland Security Law, 57% of Public Practitioners agreed, and law schools was lower at 46%. Private Practitioners, however, had 83% believe that it was part of Homeland Security Law.

f. Practice before Government Agencies

Law professors disagreed that Administrative law was being taught or needed to be taught as part of a course on Homeland Security Law. Both the public and private attorneys acknowledged that Practice before Government Agencies was a component of their Homeland Security practice, with a very high percentage of private counsel(87%) indicating their engagement in this area. The identical percentage of private counsel agreed that it should be included within the Homeland Security Law

practice area, while 64% of the public bar surveyed agreed that it was a needed component. Practice before government agencies, of course, is to be found in many areas of practice and is by no means unique to Homeland Security Law. The high response reflects, perhaps, the growing need for legal representation when dealing with the Department of Homeland Security or its many sub-agencies.

g. Administrative Law

A very high and consistent majority of both public and private practitioners (71 and 74%, respectively) found Administrative law to be a necessary subset of Homeland Security Law itself. When asked as to whether Administrative Law *should* be included within the Homeland Security practice area, almost identical percentages of the public and private practitioners agrees, with the percentage of private practitioners increasing a few points, and that of public counsel remaining steady. In either circumstance, only one-third of law professors would agree that Administrative Law was necessary.

Again, Administrative Law was not intended to be considered as a part of Homeland Security law, as it is an integral part of any practice before federal agencies. The *need* for administrative law practice, like the need for practice before Government Agencies and federal contracting, was the subject to be ascertained. Therefore, the identical numbers by private and public practitioners affirms that administrative law is a necessary component of the *practice* of Homeland Security law, that is, the provision of legal services to clients grounded in the laws of Homeland Security.

h. White Collar Crime

The USA Patriot Act and other federal, as well as state laws, post September 11, 2001, criminalized a large range of terrorist activity or declared a broad range of activity to constitute support to terrorist activity. The breadth of the statute alone requires a specialized practice of law. It is not surprising that public attorneys would not rate white collar crime highly, unless they worked as prosecutors. It is somewhat surprising that only one professor included white collar crime, however. The expanded definition of a "financial institution," the heightened due diligence requirements, and the other increased duties placed on financial institutions suggested opportunities for academic debate. Conversely, of course, it may be that using the phrase "white collar crime" in the survey was just too broad or ambiguous for the respondents. A majority of the private practitioners (61%) do include the defense of white collar crime, however, in their Homeland Security practice.

The number of attorneys in the three subgroups who opined that white collar crime should be included within the practice of Homeland Security Law did not markedly change from the groups who reported actually practicing in this area. It should be noted that 61% of private attorneys reported practicing white collar criminal defense as part of their Homeland Security Law practice group, but only 57% believed that it belonged within the group. The number of public attorneys remained the same at only 21% agreeing that it should be included the same number as practiced in the area. White Collar crime is an area, like administrative law, contracting, and practice

before government agencies, that must be practiced as a component of a full Homeland Security Law practice, but is certainly not unique nor more closely identified with Homeland Security Law than another area of practice involving the federal or state governments.

i. Federal Government Contracting

A high percentage of practice for counsel representing clients with business before the Department of Defense engage in Federal government contracting, but this is apparently not true of attorneys representing clients before the Department of Homeland Security. When the question was asked whether Federal Government Contracting was a necessary part of a Homeland Security Practice, 83% of the private bar agreed, while only 25% and 29% of the public attorneys and law professors agreed, respectively. On December 4, 2003, the DHS issued an interim rule establishing the Department of Homeland Security Acquisition Regulation[94] (HSAR). On December 19, 2003, DHS issued the first edition of the Department of Homeland Security Acquisition Manual, which supplements both the FAR and the HSAR[95].

It may be that after the terms and conditions contained therein are studied and attempted by those seeking to sell goods and services to the DHS for a period of time that this specialized area may grow as attorneys

[94] Acquisitions by the Transportation Security Administration (TSA) are not covered by the HSAR. Rather, they are separately controlled by the Aviation and Transportation Security Act, which made the FAA's Acquisition Management System applicable to TSA acquisitions and allowed TSA to modify that System for its particular purposes.

[95] The Homeland Security Acquisition Manual (HSAM) is non-regulatory in nature and provides uniform procedures for the internal operation of the DHS acquisition process.

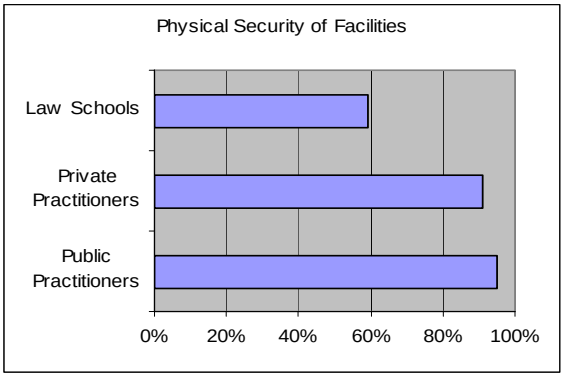
specializing in Defense contracting has flourished both with defense attorneys and those representing vendors. It also may be, however, that the magnitude of DHS direct spending may not approximate the defense budget, or, it may be that the contract practice may remain separate from the construct of Homeland Security Law.

j. Physical Security of Facilities

Results to this question are remarkable as there is a close correlation between the 57% of public practitioners (from the NEMA group) and the 52% of private practitioners that would include the Physical Security of Facilities as within the practice area of Homeland Security as actually practiced. In short, clear majorities of practicing attorneys, whether in public or private practice, assist and advise their clients in the physical security of facilities. Physical security of facilities has been recognized as a counter terrorism measure for years prior to September 11, 2001. The Department of Justice published standards for protection of federal facilities and buildings on April 4, 2003.[96]

[96] U.S Department of Justice, "Department of Justice Standards for Protection of Federal Facilities," http://www.countermeasures.com/physical_security_docs/DOJ%20Minimum%20Security%20Standards%20for%20Federal%20Bldgs.pdf [Accessed February 2, 2007].

Figure 4. Percentage of opinions that Physical Security of Facilities should be included.



Few areas of law practice displayed such near unanimity on the question of whether that area should be included within Homeland Security Law as the agreement between the public and private bar that the Physical Security of Facilities was a component of Homeland Security law, with 93% of the public bar and 91% of the private bar in accord. Academe had a somewhat lower percentage, 75% in agreement with their practicing brethren. Critical Infrastructure

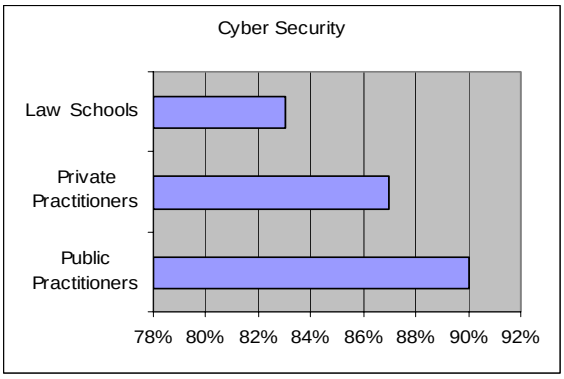
k. Cyber Security

Cyber Security has been defined as 'the protection of electronic networks (and the information they store or transmit) from the threat of intentional access or misappropriation by unauthorized third-parties for malicious purposes."[97] One-third of the public agencies and law schools noted involvement in Cyber Security as an element of Homeland Security practice or instruction, although a majority of private practitioners recorded that they offered advice and representation in Cyber Security to

[97] Glenn B. Manishin, Contributing chapter to *Homeland Security Law Handbook*, ABS Consulting (Rockville, MD: Government Institutes, 2003).

their clients. The scope and existence of cyber security is, perhaps, more open to debate than the scope of Homeland Security Law. The relationship between Cyber Security Law and Information Security and Privacy has not yet achieved consensus, although generally, Information Security and Privacy is perceived as a sub category of Cyber Security Law. Practitioners are actively creating recognition of Cyber security law as a separate practice area, however, through websites[98] and legal writings. The Homeland Security Act of 2002, as noted above, contains the Cyber Security Enhancement Act of 2002.

Figure 5. Percentage of opinions that Cyber Security should be included.



While a higher percentage of attorneys in individual categories may have agreed accorded some areas of the law higher percentages than those received by Cyber Security, overall, responses selecting Cyber Security were remarkably consistent across the three categories of counsel, as each area gave Cyber Security an identical

[98] Glasser Legal Works, "CyberSecuritiesLaw Tribune," http://www.cybersecuritieslaw.com/ [Accessed February 2, 2007].

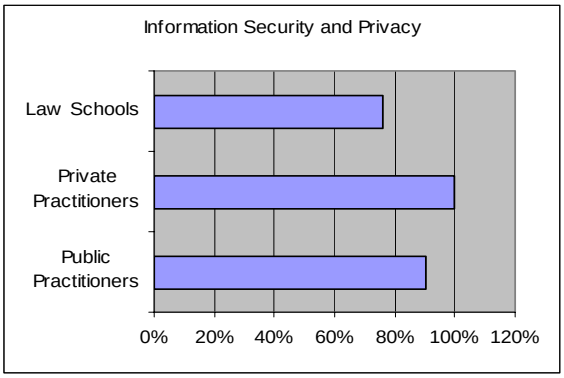
"score". In each category of attorneys, 86% agreed that Cyber Security was an integral part of Homeland Security Law.

Cyber Security legislation could be stronger at the state level in California than federal legislation. In 2003, California passed a state statute which requires private companies to disclose to their customers any intrusions into their databases or IT systems[99].

There is scant federal legislation on the protection of IT systems directly. The Cyber Security Enhancement Act and provisions within the USA PATRIOT Act grant greater access for federal law enforcement to IT systems by expanding the use of certain law enforcement tools and lowering the threshold requirements for search warrants, but they do not increase the *security* of IT systems of networks, directly.

l. Information Security and Privacy

Figure 6. Percentage of opinions that Information Security and Privacy should be included.



An extremely high percentage (83%) of private practitioners included Information Security and Privacy

[99] Cal. Civ. Code § 1798.29 (2002).

within their practice of Homeland Security Law. The requirements of the CIIA and the scope of the exception to the federal FOIA, were both matters of concern at the time of enactment which undoubtedly continue. There are any number of nuanced issues for counsel to apprise clients that own critical infrastructure. For example, the Critical Infrastructure Information Act[100] creates a "critical infrastructure information" exception to disclosure under the federal FOIA, places other restrictions on the use of the information, and criminal penalties for violations thereof. Whether submitted information is covered from disclosure is dependent on whether the facility meets the definition of critical infrastructure found elsewhere.[101] One issue that could arise is whether volunteered CII of a facility which the owner believes in good faith to meet the statutory definition, to be critical infrastructure, that does not, is protected.[102] Other issues are the extent to which the protections of the CII Act will apply if the same information is also provided to another federal agency and the interplay between the protections afforded CII and those afforded to Critical Energy Infrastructure Information.[103] The CII Act expressly preempts state statutes with differing protections of CI information. This preemption is diametrically opposed to the law on trade secrets, which is still largely a matter of state law. State law is the primary source of rights in trade secrets.

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[100] Section 214 of the Homeland Security Act.

[101] The definition of "critical infrastructure" is contained in the USA PATRIOT Act, while the definition of "critical infrastructure information" is contained in the Homeland Security Act of 2002.

[102] See 6 C.F.R. § 29 (2003) which provides that all properly submitted CII will be presumed protected.

[103] See 18 C.F.R. § 388.113(c)(1).

Forty-three (43) states and the District of Columbia have adopted the Uniform Trade Secrets Act (UTSA), which means that they have decided to adopt a common legal approach to the law of trade secrets and that variations between them, if any, will be minor. The UTSA defines a "trade secret" to mean "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.' UTSA, § 1. Even in states that have not adopted the UTSA, trade secret protection generally requires some element of secure and restricted access to the information in question.

The percentages of attorneys that believe that Information Security and Privacy was a component of Homeland Security law, was not as consistent as Cyber Security, but the numbers were very high, with 100% of the private bar, 93% of the public attorneys and 75% of the law professors in agreement.

m. Risk Management and Insurance

A significant majority of private firms (65%) provide representation and advice in Risk Management and Insurance to their clients. Given that private sector is said to own 85% of the critical infrastructure in this country,[104] and, unlike publicly-owned infrastructure, less

[104] Jenny Menna, "Sector Partnership Framework," *Presentation by the U.S. Department of Homeland Security*, Washington DC, January 2007.

likely to have legislatively created limits on liability nor legislatively supplied funds for reconstruction, reliance on the insurance industry and close scrutiny of factors affecting risk, is unsurprising. There has been substantial legislation[105] passed to address insurance coverage concerns, and the language thereof, or its potential sunset in 2005[106], could raise questions for private sector owners of potentially exposed infrastructure. Only 43% of the public bar and a mere 7% of the professors include Risk Management and Insurance in their Homeland Security practice.

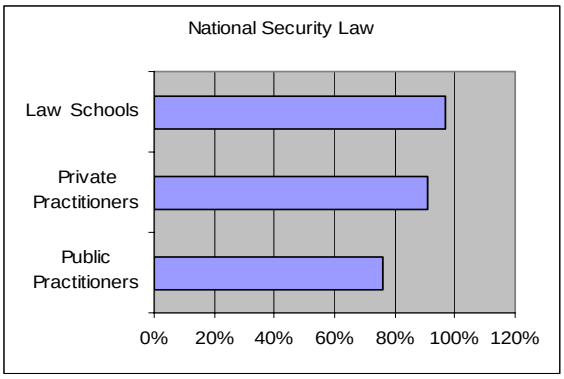
Risk management is an area where it was expected that the results would more strongly suggest its inclusion within Homeland Security Law. The concerns raised by the airline industry immediately after September 11, 2001, the quick Congressional response, the passage of TRIA, and its renewal in 2005.It is somewhat surprising, however, given the attention devoted to the issue of the extension of the TRIA, that such a low percentage of professors (36%) would agree that it should be included. The public bar did not agree either, as they split equally between including and excluding Risk Management and Insurance from the Homeland Security law area of practice.

[105] E.g. TRIA, etc.

[106] Terrorism Risk Insurance Extension Act, Pub. L. 109-144 (2005).

n. National Security Law

Figure 7. Percentage of opinions that National Security Law should be included.

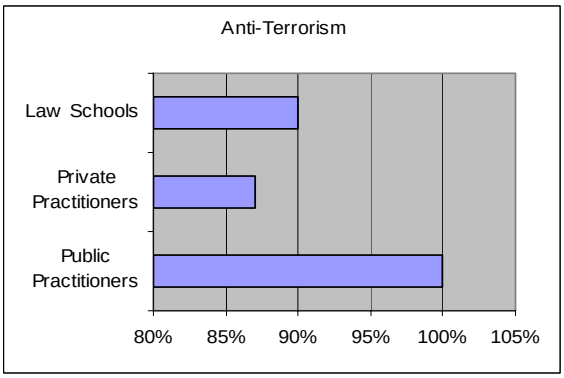


Strong majorities of law professors (87%) and private counsel (74%) include National Security Law within their instruction or practice of Homeland Security Law. When asked their opinion on whether National Security Law is a part of Homeland Security Law, 96% of the law professors and 91% of the private attorneys agreed. The Public agency counsel still had almost two-thirds agree, but the number is substantially lower than the private counsel and law professors.

Many of the public attorney respondents are employed by state agencies which are less likely to have daily contact with National Security Law issues. There is a strong correlation between the law schools and private practitioners on the need for National Security Law. As noted elsewhere herein, of the three groups surveyed, private firms and law schools are most likely to respond to the dynamics of market forces, that is, to offer representation or instruction in those areas demanded by potential clients or students.

o. Anti-Terrorism

Figure 8. Percentage of opinions that Anti-Terrorism should be included.



Anti-terrorism law is generally regarded as those criminal and civil legislative measures created to prevent or deter actual terrorist activity or activity in support of terrorists or terrorist activity. Title IV of the USA PATRIOT Act of 2001, expands the definition of "terrorism," and mandates measures to facilitate data sharing among federal agencies charged with preserving U.S. security. The law adds new grounds of inadmissibility for representatives of foreign terrorist organizations that publicly endorse terrorist activity and that the secretary of State determines undermine U.S. efforts to reduce terrorist activity. Spouses and children of such non-U.S. citizens deemed inadmissible on terrorism-related grounds are also inadmissible, except for those who did not know or reasonably would not have known of the terrorist activity as well as spouses and children who have renounced terrorist activity.

The law also accords the secretary of State authority to designate as a "terrorist organization" any

foreign or domestic group, and for publishing the designation in the Federal Register.

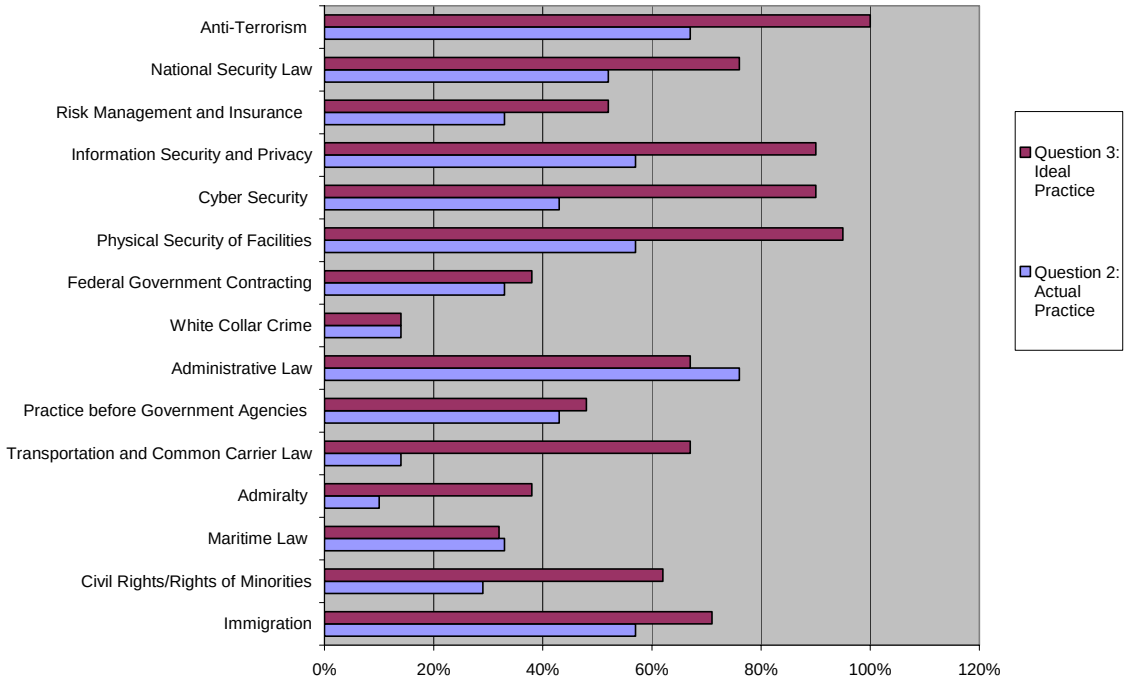
One of the law’s most controversial features is its expansion of the definition of “terrorist activity,” as a reason for inadmissibility and deportability. It expands the definition to include soliciting funds or providing material support to a group the secretary of State has designated as a terrorist organization, even if such contributions were made without intent to further terrorist goals.

Under the law, soliciting funds and providing material support to terrorist organizations that are not officially designated are deportable offenses unless the contributor can prove that he or she did not know and should not reasonably have known that the solicitation would further the organization's terrorist activity. Certain of the new grounds of inadmissibility, however, do not apply to actions taken before enactment for a group that was not designated as a terrorist organization by the secretary of State at the time.

Not surprisingly, an almost identical majority of attorneys, at 57%, in both private and public practice, currently grapple with the application of the federal and state anti-terrorism laws. It is of interest that 100% of the public bar believes that Anti Terrorism Law is included within Homeland Security Law, and the private bar has the lowest percentage that agrees, at a still high 87%. A very high majority of law professors, 87%, include Anti-terrorism in course offerings on Homeland Security Law. That percentage is extremely consistent with the 89% of professors who believe it should be included. Thus, almost

every professor who believes that Anti Terrorism should be included within Homeland Security Law, does, in fact, include it in their course offering. Again, these results are not surprising, given the enactment of these measures immediately after September 11, 2001, and their immediate and substantial impact on non-citizens in the U.S.

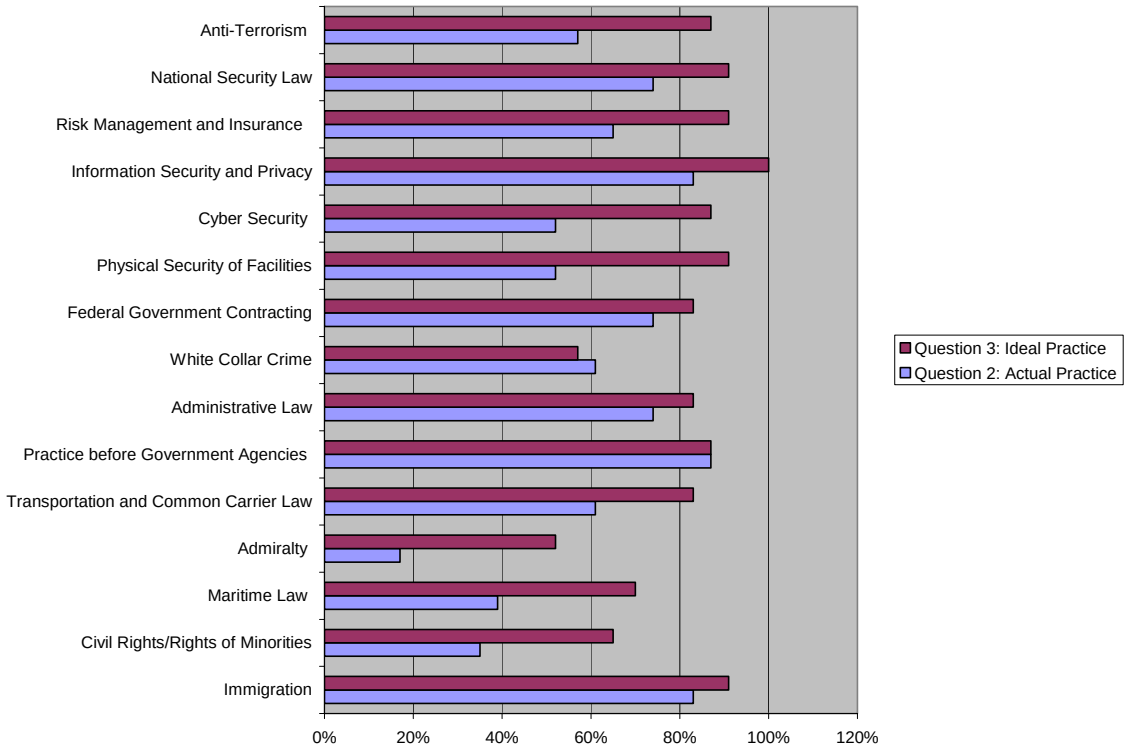
Figure 9. Actual versus Ideal Practice of Law by Public Practitioners



The next set of three figures compares the answers for each group, to Question 2, which areas the respondents actually practice as part of Homeland Security Law, and Question 3, which areas *should* be considered a part of it. The comparison of the "actual practice" of certain types of law within Homeland Security as compared to the public attorneys' "ideal practice" provides a number

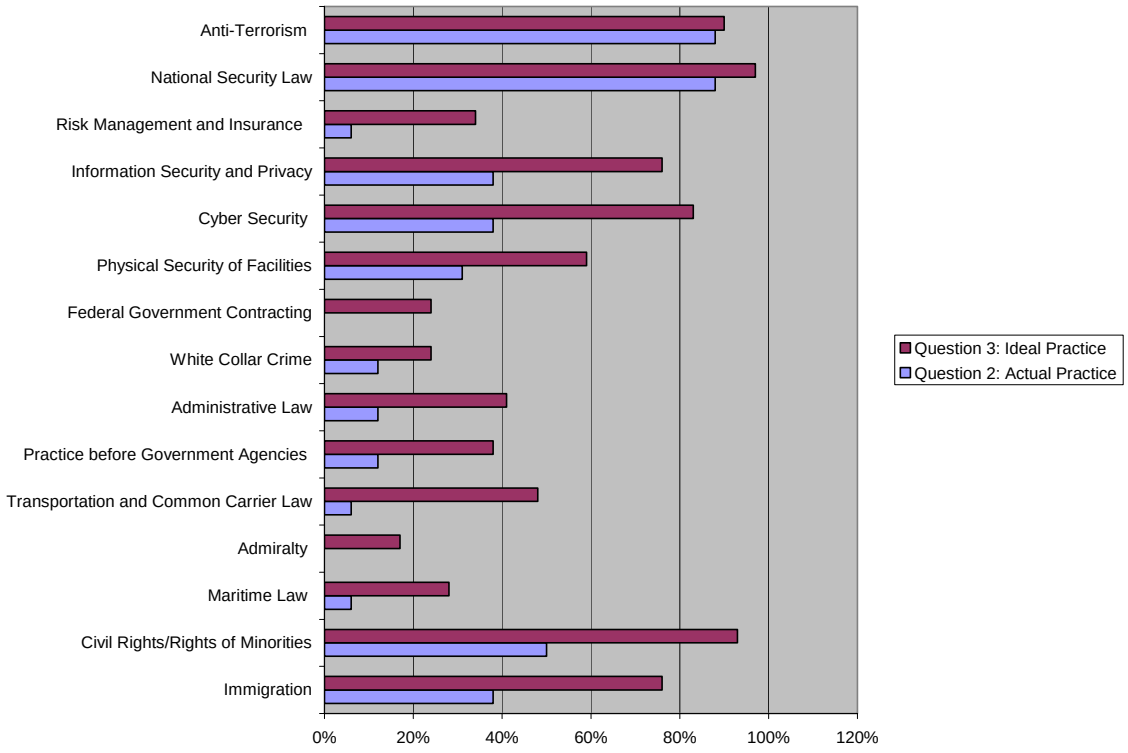
of interesting conclusions. The widest discrepancy between practice and expectations is in Transportation and Common Carrier Law, where few public attorneys apparently practice in this field, but almost 60% more believe that they should be practicing in this area. A similar, although not as dramatic, difference can be seen between those actually practicing, and those that believe they should be practicing, in Anti-terrorism, Cyber Security, Information Security and Privacy, and Physical Security of Facilities. The results for Information Security and Privacy are surprising. The public attorney pool of respondents is all either state agency attorneys / Assistant Attorneys General, FEMA counsel or judge advocates. Presumably all public agency counsel, whether at the state or federal level, is familiar with the requirements of Freedom of Information Acts or state sunshine laws. Judge Advocates have the additional expertise in intelligence oversight. Yet there is a large discrepancy between those who practice this area of the law, and the considerably more who indicated they *should* know the area. There was near unanimity that Physical Security of Facilities should also be part of their Homeland Security practice, but much fewer actually do so. Finally, a dramatically greater number of public attorneys indicated that civil rights and rights of minorities should be part of Homeland Security Law, than those that actually have it as part of their practice.

Figure 10. Actual versus Ideal Practice of HS Law by Private Practitioners



For private practitioners, there was little disagreement in most components of Homeland Security Law between the status quo and the ideal practice. Where there was a divergence, it was not as great as with the other two groups. Since the practice is driven by market forces to a great extent, that result is unsurprising. There were differences in Cyber Security, Physical Security of Facilities and in civil Rights and Rights of Minorities that closely parallel the differences seen with public attorneys, however. There was also a wide range between those who practiced wither Admiralty or Maritime Law and those who believed that they should be practicing it.

Figure 11. Actual versus Ideal Practice of HS Law by Law Schools

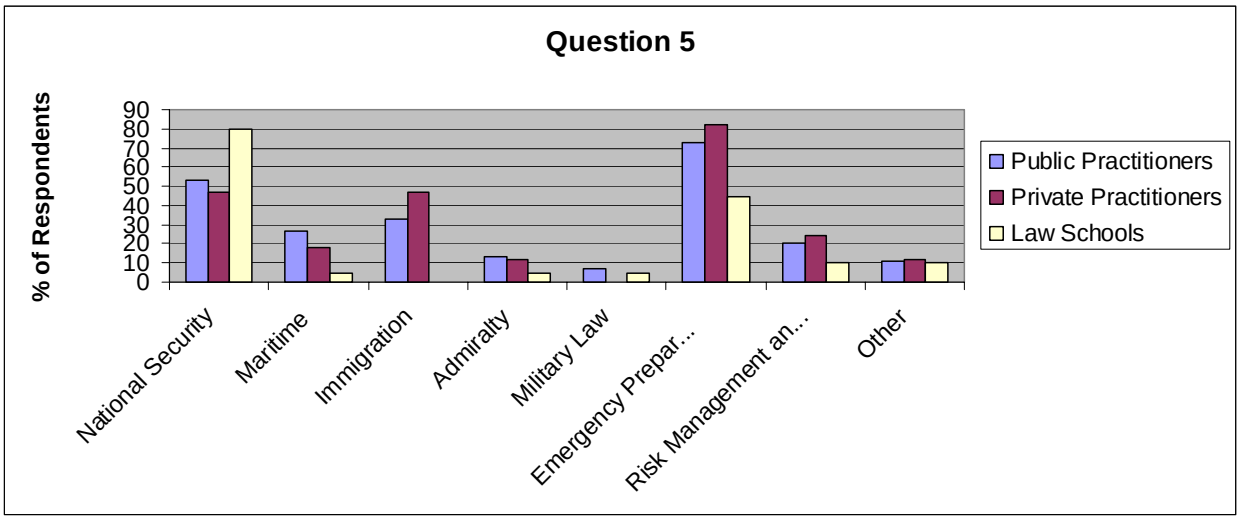


The questions to the law professors compare those areas actually taught as part of Homeland Security Law with those components that should be included within the curriculum. Caution is needed in comparison with the practitioners, then, as the questions are not identical. The responses from the law professors suggest that their courses are heavily weighted towards National Security and Anti-terrorism, as both of those components have almost equally high results for the actual teaching of that area and those that believe that they should include it. In every other area, particularly the practical or technical areas, such as Risk Management and Insurance, Transportation and Common carrier Law, Federal Government Contracting, Cyber Security, and Maritime Law, the actual instruction is far behind the "ideal" and behind that of

the public and private attorneys as well. The gap between the actual instruction of the Law of Civil Rights and Rights of Minorities with the percentage that believe that ideally it should be included in a Homeland Security Law course was somewhat unexpected. Given the substantial public debate on whether recent laws such as the USA PATRIOT ACT, and the actions of the executive branch in fighting terrorism, infringe on the rights of individuals, it was expected that equally high numbers of law professors would both expect this area to be included, and would include it within a course on Homeland Security Law.

Question #4 was identical in all three surveys and solicited opinions as to whether any of the listed established practice areas was displaced or subsumed by Homeland Security Law, and if so, to identify those that were displaced or subsumed.

Figure 12. Which areas of law are displaced or subsumed by Homeland Security Law?



p. National Security

q. Immigration

r. Emergency Preparedness and Response

The three categories listed immediately above were the only categories to receive substantial response. A two-thirds majority of public attorneys and 82% of the private counsel believe that Emergency Preparedness and Response law has been subsumed or displaced by Homeland Security law. There was not accord from the law professors, however, as only 43% agreed. It is also interesting that 80% of the professors believe that National Security Law has been subsumed or displaced. Only a slim majority of private counsel agreed, however, and public counsel did not. There was not consensus then that any area identified has been subsumed or displaced by Homeland Security Law.

The next question asked which of the listed functional areas, in their opinion, should be included in a Continuing Legal Education course on Homeland Security Law (or Law of Homeland Security Course) and to select all that applied.

The ABA, as part of its efforts to assure that attorney standards of competence are maintained over the course of a career, Continuing Legal education courses are encouraged by a number of means, including the creation of a Model Rule for State Bar Associations to consider for enactment. That model rule provides that a CLE course must contribute directly to the attorneys' professional competence or skills, or "to their education with respect

to their professional obligations."[107] As the question was presented asked the practitioners, public and private, what functional areas should be included in a CLE course. The question as included in the survey of law schools asked which of the delineated functional areas should be included in a law school course. "Functional areas" are components of the underlying discipline or business of the client represented, on which the attorney seeks education or training to better understand, and thereby better represent, the client's interests. The term therefore does not squarely fit within the instruction to be received in a law school course.

Consequence Management is seen as a component of Emergency Preparedness. As noted above, Emergency Preparedness is a function of governmental agencies, and until recently, state and local agencies were considered the primary first responders to assess and address the consequences of an event, with financial support form the Federal government through FEMA. As a result, it is not surprising that neither the law professor nor the private practitioner group would consider consequence management as a functional area which should be taught to attorneys practicing in the Homeland Security field.

Only a bare majority of law professors believed that Weapons of Mass Destruction should be included in a Homeland Security Law course. Neither of the other surveyed groups, public or private counsel, agreed that it should be the subject of a CLE course. As noted above, CLE courses are a popular means for practitioners to remain current in

[107] American Bar Association, "ABA Model Rule for Continuing Legal Education with Comments," http://www.abanet.org/cle/ammodel.html [Accessed February 4, 2007].

subject matter areas needed for their practice. The courses selected therefore are extremely susceptible to economic forces.

Initially it seemed somewhat surprising that such large majorities, in all three categories of attorneys, would all agree that Critical Infrastructure Protection should be included within a CLE or Law School course. Yet the need to protect critical infrastructure was apparent from the minute that Flight #11 was intentionally crashed into the World Trade Center, consistent with the al Qaeda Handbook directive to attack economic and iconic targets.

Almost identical high numbers of law professors and identical number of private practitioners believe that Mass Transit Security and Aviation security should be the subjects of a CLE or Law School course. Certainly the mandate of the Transportation security Administration, created by the Aviation and Transportation Security Act was to bolster multiple forms of public transportation. In recent months, including when the survey was offered, the TSA has been publicly discussing its strategy for surface transportation, particularly including rail and transit. Further, the TSA just issued 167 pages of regulations on air cargo in May 2006. Whether these areas should be considered a functional area or a separate area of the law can be debated, but in either case, the private practitioners have demonstrated a compelling reason for their inclusion.

All three surveys then asked whether there were any other functional areas, in their opinion, that should be included. There was not consensus on any area although the areas were instructive, as they are closely aligned

with those 15 areas originally raised, and suggest a close relationship or overlap between the areas of law.

Public Agencies provided the following suggestions:

- Funding
- Federalism
- Constitutional Limits on State Action
- Emergency Preparedness and Response
- Information Gathering and Management
- Information Operations
- Defense Support to Civil Authorities

Private practitioners offered the following practice areas:

- Intellectual Property Protection
- Import/Export Laws
- Terrorist Finance and Trade Issues

Law professor respondents recommended the following:

- Disaster Management
- Basic Rights of Americans and Prisoners
- Asymmetric Warfare
- Constitutional Liberties

If not consensus, there are still certain trends that can be observed from these suggestions. For example, two of four suggestions from the law professors encompass individual liberties and civil rights, but this suggestion was not reflected in responses from either group of practitioners. It is consistent with Question #3 to the Law Professors, however, where a high percentage responded that

Civil Rights/Rights of Minorities should be included in any course offering on Homeland Security Law. Further, both the private and public practitioners suggest that Emergency Management as a functional area under Homeland Security Law. Finally, the mixture of responses suggests that there was confusion in discerning between practice areas and functional areas.

The last substantive question asked, #7, inquired whether they believed that Homeland Security Law should be a recognized Practice Area by the American Bar Association. The private practitioners were the only group of the three where a majority, 55%, contends that the ABA should recognize the Law of Homeland Security at the present time. That figure is significant, however. Neither the public practitioners nor the law professors had a majority either for or against the proposal. The law school professors are almost evenly split on the issue, with 38% disagree or strongly disagree, 35% have no opinion, and 27% agree or strongly agree, that it should be a recognized practice area by the ABA. The public agency attorneys had only 7% disagree, and 35% agree or strongly agree with the concept of ABA recognition, but the majority at 58% had no opinion.

Figure 13. Percentage of respondents who agree that Homeland Security Law should be recognized as a practice area by the ABA.

Again, it is significant that there is a strong majority of private counsel favoring immediate recognition when compared with the other two groups overwhelming neutrality. The recognition of a separate practice area would provide the greatest benefit to private counsel, who can then overtly market their firms' expertise in a specific practice area.

The overall conclusions from the surveys, and from the surveys and interviews, are addressed separately in Chapter VII.

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VI. INTERVIEWS

Because of the need to follow up on many areas, to validate that there was consensus on those areas suggesting that an area of Homeland Security Law, representatives from each of the 3 categories were selected for telephonic interview. One or more sensitizing emails was sent to the interviewee to solicit his interest and support, and once gained, to schedule the interview. Standard questions were developed to be used for each interview. The questions were intended to support, validate, the survey questions, but the interview questions were intended and to develop further the issues noted during analysis of the survey results.

The following questions were asked of each interviewee:

1. Do you conceptually perceive Homeland Security Law as a separate area of the Law?
2. What, in your opinion, is the most important area of the law included within Homeland Security Law, if any?
3. Of the following which, in your opinion, are, or should be, included within the practice area of Homeland Security Law:
    a. Emergency Management or Preparedness
    b. Anti-Terrorism
    c. National Security Law
    d. Immigration Law
    e. Cyber Security Law
    f. Information Privacy
    g. Critical Infrastructure.

4. Should there be a separate practice area of Homeland Security Law?
5. Should Homeland Security Law be recognized now as a separate practice area of law?
6. What is the tipping point at which Homeland Security law will be recognized as a separate practice area of the law?
7. Which of the following statutes, in your opinion, should be considered as wholly within Homeland Security Law:
    a. the Homeland Security Act of 2002;
    b. USA Patriot Act;
    c. Terrorism Risk Insurance Act;
    d. Aviation and Transportation Security Act;
    e. Maritime Transportation Security Act of 2002;
    f. Border Security and Visa Defense act;
    g. Public Health Security and Bioterrorism Preparedness and Response Act of 2002.[108]

The interviewees were selected based on experience and position, and to provide a representative sampling of the three categories of lawyers: two law professors, two practitioners from large corporate firms with Homeland Security practice groups, one in Washington D.C. and one in Boston; and two public attorneys, the Staff Judge Advocate to U.S. Northern Command, and an Assistant Attorney General for the state of New Jersey. The interviewees included

[108] These statutes selected as they were all passed by the 107th Congress in 2002, directly in response to the terror attacks, and they all directly or indirectly affect a wide spectrum of businesses, individuals, and governments. These statutes are believed to form the nucleus of Homeland Security Law.

Professor Amos Guiora from Case Western Reserve University, Professor Michael Greenberger from the University of Maryland, Mr. Thomas Balint, Deputy Attorney General for the state of New Jersey; Capt (N) Kurt Johnson, SJA at U.S. Northern Command; Mr. Rick Rector, Partner with DLA Piper, and Joseph Lipchitz, Partner with Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

The question results of the two lists are aggregated and discussed separately, followed by comments of note from the interviewees.

A majority of the representatives agree that Emergency Management and Critical Infrastructure, as well as components of Anti-Terrorism Law and National Security Law, are now integrated within the practice area of Homeland Security Law. Similarly, but more strikingly, there was either unanimity or a strong majority agreed that all seven the statutes listed were components of the Law of Homeland Security Law. There was unanimity that portions of the USA PATRIOT Act and the Homeland Security Act of 2002 were best considered as part of Homeland Security Law. It was also unanimous that the TRIA, the Border Security and Visa Defense Act and the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 were all elements of Homeland Security Law.

Professor Amos N. Guiora, is the Director of the Institute for Global Security, Law and Policy, at Case Western Reserve University. In his opinion, Homeland Security Law should not yet be recognized as a separate practice area. The field is still evolving, but Professor Guiora believes that the field will be recognized. In his opinion, the field is student driven; an increasing number of students, whether new law students or employees at

federal agencies such as the U.S. Coast Guard, FBI, and Judge Advocates seek further professional training specifically in Homeland Security Law. The confluence of legal issues that the professionals will raise, discuss and resolve, whether in law school or in their careers, will strongly assist in compelling the recognition of Homeland Security Law. Substantial discussion ensued on the parameters of the various related practice areas. Professor Guiora compared National Security Law and Homeland Security Law, noting that National Security Law is comprised of International, Constitutional, and Criminal Law, while Homeland Security Law also contains elements of Constitutional and Criminal Law, but instead of International Law issues, is concerned with Administrative Law and Emergency Management. This exemplifies Professor Guiora's essential point: that neither Homeland Security nor National Security law, nor the sub disciplines such as Anti Terrorism or Critical infrastructure, can be seen as linear, or disparate areas of law. They are interlocking or overlapping areas which necessitate a multidisciplinary approach to this area.

Professor Michael Greenberger is the Director of the University of Maryland, Baltimore Center for Health and Homeland Security. Professor Greenberger teaches two Homeland Security Law courses: "Homeland Security and The Law of Counterterrorism," and "Homeland Security: Emergency Response to Natural and Man Made Disasters," He believes that Homeland Security Law is already a separate area of law. He does not, however, have a strong opinion on whether the ABA should recognize Homeland Security Law as a separate practice area. Practically speaking, he considers Homeland Security a distinct subject and teaches it as a

separate course. After September 11, the anthrax attacks, and Hurricane Katrina, he believes that there is a compelling movement of legislation and of attorney practice, to create the practice area. In his opinion, if a tipping point is still needed for full recognition of Homeland Security Law, it will either be one more terrorist attack, or two more Katrina-scale natural disasters.

Thomas Balint has been with the New Jersey Attorney General's Office and working specifically with Emergency Management personnel for over 20 years. While he views Homeland Security Law as a separate practice area, he sees it "on a continuum" with a flexible border between Emergency Management and Homeland Security Law. Mr. Balint notes that Emergency Management has traditionally focused on the response and recovery to natural disasters. Homeland Security has prevention against terror attacks, a protection focus. This distinction highlights two major differences between the two fields: Homeland Security Law includes those legal issues specifically arising from efforts needed to (a) create protections or resiliency for Critical infrastructure and systems and (b) arising from the collection and fusion of intelligence and information sharing in efforts to discern terrorist activity by all levels of law enforcement. Secondly, the legal solutions or actions needed in response to terror attacks may be primarily criminal while the legal responses needed to a natural disaster will be primarily civil or administrative remedies or contractual issues. Mr. Balint used the example of an overturned chemical tank truck versus a similarly sized terrorist-caused explosion at a chemical plant: both

events may trigger the same Hazardous Materials clean up and first responder actions, but the legal response needed will be entirely different.

Joseph Lipchitz is a partner with Mintz, Levin, P.C. In his opinion, Homeland Security Law is already recognized by private practitioners as a separate area of law. He cautions, however, that it is still a multi-subject or multidisciplinary practice group, much like Environmental Law was when that term was first used. He points out those aspects of Information Privacy, corporate, employment and administrative law are all involved in the practice of Environmental law. Then, as the practice area progressed, with increasing judicial and administrative decisions, and with legislative and administrative regulation, it slowly became codified into a recognized separate practice area of law. The tipping point at which there is a generally recognized separate practice area for Homeland Security law, however, is his opinion, will not be when there is a critical mass of regulation, but when there are standardized statutory provisions at the state level, a uniform code of Homeland Security Law, enacted by state legislatures to (1) fill any gaps in the federal statutory scheme, and (2) to assure uniformity across the several states. He believes that the most important area within Homeland Security Law right now are the white collar crime provisions, the money laundering and requirements for suspicious activity reporting of financial transactions. If states seek to then create other, further, requirements then the need for uniformity while drive the need for a uniform code and result in recognition of Homeland Security Law as a separate practice area. Mr. Lipchitz opined that all of the seven statutes suggested are within the area of

Homeland Security Law. He agrees that Emergency Management, Anti-Terrorism Law, National Security Law, Immigration are all within the practice area of Homeland Security, and that Cyber Security, Critical Infrastructure, and Information Privacy are “conditionally” within the practice area.

Mr. Rick Rector is a partner in the Washington D.C. office of DLA Piper. When asked whether Homeland Security Law is a recognized separate practice area, he paused, and then replied that “Homeland Security Law is not quite there yet” He analogizes this area to Information Technology law, and points out that twenty years ago, when practitioners first called themselves “IT lawyers” there was a certain puzzlement, even resistance, among attorneys as the traditional practice areas predominated. Now, while the traditional areas are still the majority, new practice areas, such as Information Technology Law are also recognized. Using his own career as an example, Mr. Rector points out that he is a Government Contracts lawyer, but with the influx of legislation, post September 11th such as the SAFETY Act, he has had to add Homeland Security law to his repertory. Homeland Security Law is thus better described as an “area of practice” which impacts on many recognized practice areas. For it to be a recognized practice area, Mr. Rector considers it necessary for attorneys to begin to practice it as their exclusive practice. And for that to happen there must be a greater demand from the private sector. That may happen as the result of another catastrophic event, an event “that mobilizes industry and government to further action” as a result. Absent an event of that magnitude, there will be a more gradual change as more Law School courses are created, as legislation continues to be enacted, albeit more slowly,

and bar associations, including the ABA, create standing committees on the subject matter, all combining to create a "growing presence" that will finally be recognized. Mr. Rector suggests that law firms act and react to their clients' needs, and thus, are not as quick to "self identify" new practice areas. He concludes that for law firms, Homeland Security Law is still a niche area that impacts across the disciplines, and thus will remain a necessary area of practice, until the above described events provide the expected recognition.

CAPT (N) Kurt Johnson has been serving for over two years as the Staff Judge Advocate to the U.S. Northern Command. He agrees, with some hesitation, on the concept of "Homeland Security Law" as a separate area of the law; his hesitation, however, is based on the "large overlap" in his practice between Homeland Security Law and National Security Law. The areas of law he considers most important within the Homeland Security Law practice area are Constitutional Law and Intelligence Oversight[109]. He agreed that Emergency Management Law, parts of Anti-Terrorism and National Security Law, Immigration law, Cyber Security Law, Information Privacy and Critical Infrastructure were all components of Homeland Security Law.

CAPT Johnson does not believe that we have yet reached the point of recognition of a separate practice area of Homeland Security law, and believes that point will be reached when there is further evolution of the field, with

[109] The U.S. military has stringent regulations on Command Oversight of the use of intelligence. See Domestic Law Handbook, Chapter 9, INTELLIGENCE LAW AND POLICY CONSIDERATIONS DURING DOMESTIC SUPPORT OPERATIONS, DODD 5240.1 - DOD Intelligence Activities; and DOD 5240.1-R - Procedures Governing the Activities of DOD Intelligence Components That Affect U.S. Persons

a greater number of attorneys practicing in the area, more attorneys recognizing the field separately, and greater number of law students.

The attorneys had been asked to select, from identified specialty areas of the law, which areas they believed to be part of the Law of Homeland Security. The answers from the 6 interviewees were quite consistent, even though they represent three different types of law practice. Five out of six attorneys agreed that Emergency Management Law was a specialty area within Homeland Security. Four of six said that Anti-terrorism was all within Homeland Security Law, while the other two interviewees agreed that it partially or largely overlapped with Homeland Security Law. Five attorneys interviewed agreed that Critical Infrastructure was within the area, with partially agreeing. Four agreed that Information Privacy was within Homeland Security Law and one agreed conditionally.

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VII. CONCLUSIONS AND RECOMMENDATIONS

Two themes emerged and were sustained throughout the surveys and interviews. First, if Homeland security is not yet recognized as a separate practice area, it will be, and probably soon. Two forces are working in parallel to assure that this will occur. There is the overwhelming amount of legislation enacted by Congress in their efforts to assure the security of the United States from further terror attack. At the time the thesis was completed the first bill of the 110th Congress, the "Implementing the 9/11 Commission Recommendations Act," was under consideration. This Bill, and the also-pending "Improving America's Security Act of 2007" suggest two points. That the initial spate of legislation arising from the terror attacks over five years ago has not yet concluded, as both bills seek to address gaps in the prevention of terror attacks and in the necessary sharing of information between federal, and between state and federal law enforcement and intelligence agencies. Further, both bills seek to amend sections of the Homeland Security Act of 2002, suggesting that there may be a continuing need to revise and to hone legislation passed hastily in 2002.

Secondly, market forces, from two directions, are working at least in parallel to create the field of Homeland Security Law: law students are demanding courses in Homeland Security Law, according to the interviews and judged by the increase in Homeland Security-specific or related courses. But also as Congress continues to create new legislation, there will be an increasing need to scrutinize that legislation for its effects upon the

business. Thus, increasingly, corporate and individual business clients will seek experienced counsel with acumen in deciphering the nuances in these overlapping components within Homeland Security Law. The clients may not know the distinctions between legislation requiring their business to develop a risk management plan under the Clean Air Act and the Chemical Facilities Security Act, but they will know that it has something to do with Homeland Security, and will describe it thusly.

The continuing and even escalating number, and length, of the federal regulations promulgated by the Department of Homeland Security or one of its subagencies since 2002 will likely have a great impact on private industry. As the number of regulations increases, the need for administrative procedures to respond to the effect of those rules, and for a bureaucracy to enforce those rules and to process requests for relief from the effect, will all grow and flourish. In turn, the private sector will seek relief through administrative or legal action before or against the agency, or through appealing to the Congress. Whichever method is used, legal representation will be needed to navigate the increasingly complex administratively created system.

Law firms follow the money, and when their clients need representation on Homeland Security matters, they will assure that it is provided. For Homeland Security Law to be recognized as a practice area, rather than an “area of practice” which impacts across existing practice areas requires an evolution of recognition from the legal community.

Homeland Security Law exists, because of the perception that it exists, whether or not it has yet gained

recognition as a separate practice area by the ABA. But there is not yet uniformity on what is included therein.

The American Bar Association has had a Standing Committee on Law and National Security since 1962. The Standing Committee "conducts studies, sponsors programs and conferences, and administers working groups on law and national security related issues. The committee's activities are designed to assist policymakers, to educate lawyers, the media and the public, and to enable the committee to make recommendations to the American Bar Association governing body"[110].

The standing committee produces an excellent periodical *National Security Law Report*. Review of the report reveals the following subject matter: intelligence oversight, transnational terrorism, anti-terrorism operations under the USA PATRIOT Act, international law in the conduct of the military, NSA Eavesdropping and constitutional concerns, and the role of law in preventing the proliferation of weapons of mass destruction. Some of the issues addressed in the *National Security Law Report* fall within Homeland Security Law, as used herein, but many do not, demonstrating the overlap, and the distinctions, pointed out by Professor Guiora. The Standing Committee has co-sponsored, together with the Section of Administrative Law and Regulatory Practice, a Homeland Security Law Institute in 2006 and 2007.

Many of the areas addressed by the Section of Administrative Law and Regulatory Practice, such as federal-state preemption, immigration and border security,

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[110] American Bar Association, "Standing Committee on Law and National Security," https://www.abanet.org/natsecurity/home.html [Accessed March 7, 2007].

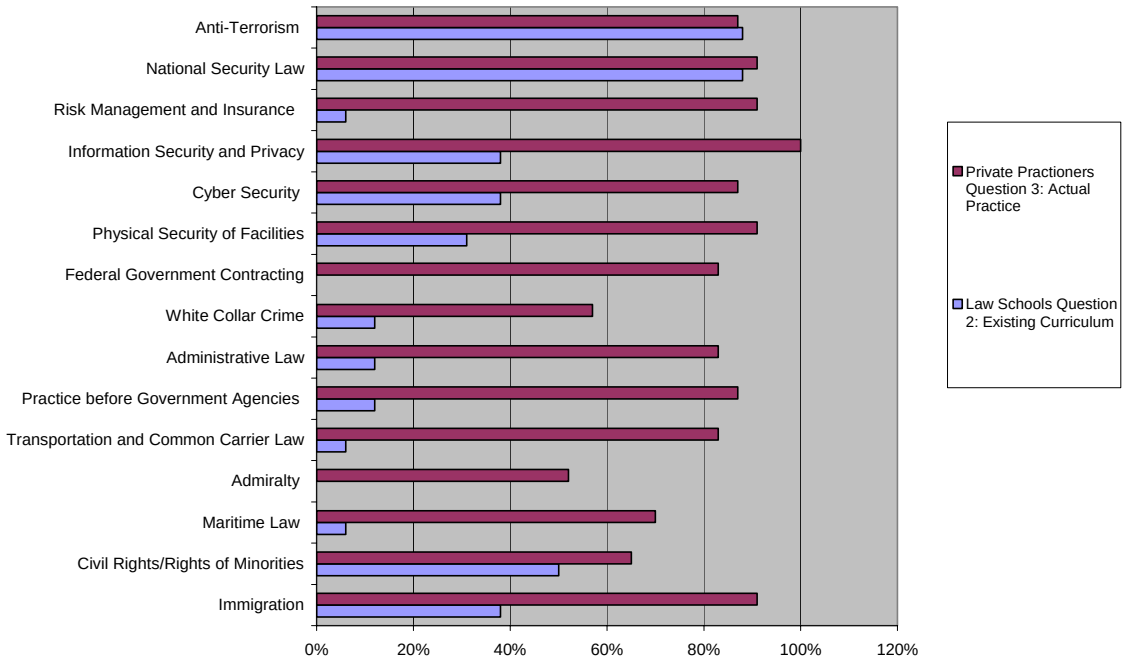
administrative practice before federal agencies, FOIA and the protection of private security information from disclosure, but none of the issues can be said to be unique to Homeland Security. Those laws which address the protection of transportations systems and other critical infrastructure, such as Physical Security of Facilities, Cyber Security, Information Security and Privacy, Risk Management and Insurance, Transportation and Common Carrier Law, and Maritime law do not to be included within either group. Many of the issues then which by consensus are components of Homeland Security Law are not addressed by either the Standing Committee on Law and National Security or the Section of Administrative Law and Regulatory Practice.

With the practical need to consider these specialty areas together within a practice area, the steadily increasing volume of statutes on Homeland Security issues and of regulations from the DHS, the ABA should reflect the actions of the firms and law schools and provide a forum for discussion and consideration of these laws, by creation of a Standing Committee on Homeland Security Law.

In an effort to answer the question, “Are Law Schools meeting the expectations of the marketplace?” the data between what subjects are actually being taught and what the firms need was compared. This was done by comparing the results from the Law Schools in Question 2, where they indicated those subject areas contained in their syllabi and currently taught as part of Homeland Security Law, with the Law Firms’ results from Question 3, where they indicated those subject matter areas that they believed to be included within Homeland Security Law, and are a necessary part of that body of law. The private firms

indicated, in answering this question, those areas that are needed to fully provide representation in the field of Homeland Security law. See graph immediately below.

Figure 14. Difference Between Law School Curriculum and Private Sector Expectations



As can be immediately seen, there is strong agreement that instruction on both National Security Law and Anti Terrorism is needed by and is being taught to prospective Homeland Security attorneys. Anti-terrorism is one of the few areas where there was any support for the concept that it had been subsumed within Homeland Security law, as opposed to being a necessary component within the area.

The next four subjects depicted on the graph, however, have a wide disparity between the identified need by private firms and the provision of instruction by the law schools. Risk Management and Insurance, Information Security and Privacy, Cyber Security, and Physical Security

of Facilities are all areas that private practice strongly indicates are a vitally needed part of Homeland Security Law practice. The Homeland Security legislation passed in the last four years certainly supports this contention, as new legislation directly impacting all four areas has been enacted, and corporations and individuals are undoubtedly seeking counsel on the effects of this new legislation, including the Critical Infrastructure Information Act, the Cyber Security Enhancement Act, both found in the Homeland Security Act of 2002.

Critical Infrastructure Law requires separate comment because of the widespread support for this construct as an integral component of Homeland Security Law. As noted in Figure 14, private practice almost unanimously recognizes the need for a critical infrastructure area of practice. That conclusion is supported by the data indicated in Figures 9 and 10, displaying the responses from Questions 2 and 3. A substantial majority of responses from both public and private practitioners stated that even if they do not yet have critical infrastructure issues as part of their practice, it should be.

Lawyers are comfortable with shades of gray; from law school on, nuances have been insinuated into their thinking through fear and the Socratic Method. But their clients, corporate, individual, government, need clear guidance.

Homeland Security Law, like many areas of the law, involves substantial overlapping subjects with other areas. For example, Constitutional Law and civil rights issues can be found in almost any application of a law generally considered part of Homeland Security Law: From an issue relatively minor such as securing critical infrastructure often involves limiting access to buildings otherwise open

to the public to those willing to display or surrender identification cards to larger issues such as the degree of privacy to which U.S. citizens' private internet email correspondence is entitled.

There are many areas of law in which there is unanimity or a substantial majority believes to be part of the Law of Homeland Security now. Certainly there is unanimous consensus that the legal and policy parameters of the response to a terror event by federal, state and local governments is part of the law of Homeland Security. So, too, with the legal issues involving prevention of terror attacks occurring domestically. Most specifically, the protection and assured resiliency of networks or systems of critical infrastructure, whether publicly or privately owned, raises legal issues which all consider part of Homeland Security Law.

Homeland Security Law may not be capable of easy definition nor of delineation. Many of the academics most comfortable with the concept of the "Law of Homeland Security" are also at ease with a sense of "portability" of creating an interdisciplinary approach to this dynamic area of practice. Such comfort with an interdisciplinary approach was noted from both the law professors and private practitioners, in both survey results, and personal interviews. This need for an interdisciplinary approach is not limited to Homeland Security law, but is common in the actual practice of law, where a client's legal needs often require a team response, and in academe where areas of law can easily overlap, whether the intended scope or the impact of a law is considered. Syracuse University, which created its counter terrorism center pre-September 11, 2001, uses an interdisciplinary approach, believing that

such an approach not only is the best model for resolving legal problems, but serves to raze artificial barriers between disciplines on the same or related subjects.[111]

As a result of the findings thus far, the following recommendations are offered:

1. Law schools need to tailor their Homeland Security Law curricula to more closely parallel those subject matter areas private firms are using in their practice, as Figure 14 demonstrates a substantial gap between what schools teach and firms utilize.

2. Law schools should not lose emphasis on Constitutional Law or Civil Rights issues, however, as whenever discussions of individual citizens, corporations or other units of government were raised in the context of their relations with the federal government, issues of sovereignty, rights or liberties followed. Large majorities of respondents in all three groups replied that Civil Rights must be included within the Law of Homeland Security.

3. Continuing Legal Education courses are desired by most of the responding practitioners, and not just in expected practice areas, but in the "functional areas," those areas of their clients business that intersects with legislation or regulation in the homeland security field.

4. Critical Infrastructure was an area of concern to a majority of public and private practitioners. Although 85% of Critical Infrastructure is in private hands,

[111] Professor William Banks: "our experience… suggests that the model of an interdisciplinary course on countering terrorism can be successful and exciting for students and faculty from a range of disciplines…As legal education grows its national security curricula, there is an opportunity to utilize the vexing problems of countering terrorism to respond to a fundamental set of legal problems while working to break down institutional barriers across interdisciplinary education of lawyers."

governments have demonstrated a need for detailed information on the design, construction, and operation of privately owned facilities and systems. Workable laws that provide not just protection from disclosure but also permit ease of response planning by state and local responders are urgently needed.

5. An overwhelming majority of survey respondents agree that Anti-terrorism law is a part of Homeland Security Law. Anti-terrorism is generally considered to be the efforts by the nation’s law enforcement and intelligence officials to prevent or thwart threats of terrorist attacks or the actual attacks.

6. A similar large majority agree that Homeland Security Law remains distinct from National Security Law. Homeland Security Law should be viewed, as the name suggests, with a strictly domestic focus that National Security Law does not have.

7. Responses to both the surveys and to the interviews suggested that Emergency Management Law was superseded by Homeland Security Law. Since Emergency Management Law was not expressly included in the list of specialty areas denominated in Questions #2 and 3, however, a follow up survey should be undertaken that includes this question.

8. To state a working definition of Homeland Security Law then, Homeland Security Law is those laws and

regulations enacted or promulgated to ensure[112] domestic security[113] from man made or natural attack or disaster.

9. Lawyer advertising is an ethical and constitutional quagmire and one that most bar associations would rather ignore. But more than a fight over rules and procedures, for the good of the public, Homeland Security Law should be debated and discussed amongst the bar.

10. While there is not yet broad consensus that Homeland Security Law must be identified by the American Bar Association as a separate practice area, there is agreement that practitioners and clients are treating it as a separate practice area. Therefore, the ABA should establish a separate Standing Committee on Homeland Security Law.

[112] "Ensure domestic security" is defined as the sum total of all actions to preserve security, prevent attack, and to respond to, recover from, or mitigate the effects of, attack or disaster.

[113] The use of domestic security is intended to assure a focus limited to the jurisdictional limits of the United States, although not necessarily the geographical boundaries of the United States. Congressional actions such as "S.J. Res. 22, a joint resolution expressing the sense of the Senate and House of Representatives regarding the terrorist attacks launched against the United States on September 11, 2001, and S.J. Res. 23, the Authorization for Use of Military Force are not included as their focus is outside the U.S..

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APPENDIX A. LIST OF HOMELAND SECURITY LAWS AND REGULATIONS

FEDERAL LEGISLATION BY SUBJECT MATTER:

As explained in the text above, the following is a compilation by subject matter of those statutes passed since September 11, 2001 that are considered to be the Law of Homeland Security. Because the working definition of Homeland Security Law is those laws and regulations enacted or promulgated to ensure[114] domestic security[115] from man made or natural attack or disaster, the statutes included herein may not be as extensive as other lists.

ANTI-TERRORISM AND ASSISTANCE TO LAW ENFORCEMENT

- USA PATRIOT Act of 2001, Pub. L. No. 107-56 (2001) "The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001."
    - o The Act includes several law enforcement tools to expedite federal law enforcement access to certain financial and personal records or conversations, including: (1) increased search warrant availability for email and voicemail; (2) provides access by subpoena to ISP billing and other personal information and for government

[114] "Ensure domestic security" is defined as the sum total of all actions to preserve security, prevent attack, and to respond to, recover from, or mitigate the effects of, attack or disaster.

[115] The use of domestic security is intended to assure a focus limited to the jurisdictional limits of the United States, although not necessarily the geographical boundaries of the United States. Congressional actions such as "S.J.Res. 22, a joint resolution expressing the sense of the Senate and House of Representatives regarding the terrorist attacks launched against the United States on September 11, 2001, and S.J.Res. 23, the Authorization for Use of Military Force are not included as their focus is outside the U.S..

monitoring. ISPs are given immunity for such disclosures. (3)expands the scope of pen registers and trap and trace orders; (4) provides immunity to communications service providers for cooperation with government information requests; (5)lowers the requirements for obtaining multi-device search warrants for foreign intelligence gathering; (6)promotes data sharing between domestic and foreign intelligence focused federal agencies;(7) increases funding for federal law enforcement agents, including Justice, Customs Service and Border Patrol; and (8) increases monitoring requirements of aliens and visa holders, expressly including student visas.

  - Providing Material Support to Terrorists and Providing Material Support or Resources to Designated Foreign Terrorist Organizations, were first adopted in 1996 as part of the Anti-Terrorism and Effective Death Penalty Act, and were amended by the USA PATRIOT Act in 2001. 18 U.S.C. 2339a and b (1996).

- USA PATRIOT Improvement and Reauthorization Act, Pub. L. No. 109-177, (2006).
- USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178, (2006).
- Terrorist Bombings Convention Implementation Act of 2001, 18 U.S.C. § 2331 et al, Pub. L. No. 107-197 (2002), amends the Federal criminal code to prohibit the detonation of an explosive in or against a place of public use, a state or government facility, a public transportation system, or an infrastructure

facility, with intent to cause death, serious bodily injury, or extensive destruction of one of the above listed places resulting in major economic loss. The statute contains a number of separate anti-terrorism provisions, criminalizing certain activities, including: Use of certain weapons of mass destruction, 18 U.S.C. § 2332a;

  - Acts of terrorism transcending national boundaries, 18 U.S.C. § 2332b;
  - Bombings of places of public use, government facilities, public transportation systems and infrastructure facilities, 18 U.S.C. § 2332f;
  - Harboring or concealing terrorists,; 18 U.S.C. § 2339;
  - Providing material support to terrorists, 18 U.S.C. § 2339A; and
  - Providing material support or resources to designated foreign terrorist organizations, 18 U.S.C. § 2339B.

- Amendment to the Immigration and Nationality Act to provide permanent authority for the admission of “S” visa non-immigrants. The “S” visa is given to aliens who assist U.S. law enforcement to investigate and prosecute crimes and terrorist activities. 8 U.S.C. § 1184(k)(2005).
- Defense Against Weapons of Mass Destruction Act, 50 USC §§ 2301-2369 (2005), directs the DoD to provide specified expert advice to federal, state, local, agencies on WMD, create domestic terrorism rapid response teams; train in emergency response to WMD events; and create a program for testing and training

civil agencies response capability to biochemical events; all subject to the demands of military preparedness and national security.

GOVERNMENT RE ORGANIZATION AND ASSISTANCE TO STATE, LOCAL AND PRIVATE ENTITIES

- The USA PATRIOT Act includes minimums for future section 1014(c)(3) on Homeland Security grant funding to the several states and territories – .75 of one percent of the total allocation for each state, commonwealth of Puerto Rico and the District of Columbia., and .25 of one percent of the total allocation for American Samoa, Northern Marianas Islands, Guam, and U.S. Virgin Islands.
- The Homeland Security Act of 2002, 6 U.S.C. §§ 101-557(2002), the law passed by Congress to establish the new Department of Homeland Security (DHS) Pub. L. 107-296 is immense; the table of contents alone is 14 pages long. The Senate passed the nearly 500-page bill on Nov 19, 2002, just a few days after it won House approval. The legislation combines 170,000 federal workers from 22 agencies into a single Department of Homeland Security responsible for protecting the nation from terrorists. The measure is considered the biggest federal reorganization since the Department of Defense was established in 1947.
    - o A new Homeland Security Advanced Research Projects Agency will fund research on “revolutionary changes in technologies that would promote homeland security,” the law states. The law authorized $500 million for the agency for fiscal 2003.

- Within a year of enactment of the Homeland Security Act the DHS had to establish a university-based center or centers for homeland security.
- The new department was required to appoint a Homeland Security Science and Technology Advisory Committee, which will advise the DHS undersecretary for science and technology. The committee has 20 members representing fields such as emergency response, research, business, product development, and management consulting.

CRITICAL INFRASTRUCTURE[116], CYBER SECURITY, AND INFORMATION PRIVACY

The Homeland Security Act's greatest impact on the federal government and upon U.S. society may prove to be the effects of the many statutes contained therein, however:

- The Cyber Security Enhancement Act, 6 U.S.C. § 145 (§ 225 of Homeland Security Act); Homeland Security Act, 6 U.S.C. §§ 101-557 (2002) contains a number of amendments that improve security and privacy on computer networks. Among other things, the Cyber Security Enhancement Act (1) authorizes law enforcement to use pen/trap devices in certain emergency situations, such as threats to national

[116] There is a certain circular path to be followed when one attempts to parse these terms: The category of Critical infrastructure could certainly include many aspects of Cyber Security, as the definition of critical infrastructure includes those "systems" vital to the public health safety and welfare, which is certainly written broadly enough to include IT systems, which are inherent in most other CI. Cyber Security also includes protections against identity theft and "hacking" and thus includes many of the privacy concerns contained in Information Security and Privacy. Finally, information security and Privacy is often discussed as including the CIIA, the Critical Infrastructure=ure Information Act, owners are concerned with releasing such information to public agencies.

security and attacks on protected computers; (2) increases penalties for computer hacking offenses that cause death or serious bodily injury; (3) instructs the Sentencing Commission to examine the penalties for all hacking offenses; and (4) increases penalties for certain invasions of privacy. The Cyber Security Enhancement Act also altered sentencing for Computer Fraud and Abuse Act (CFAA) violations in two respects. First, the act authorizes sentences for certain CFAA violations of: (a) a fine, imprisonment for up to twenty years, or both, where offenders "knowingly or recklessly cause or attempt to cause serious bodily injury;" and (b) a fine, imprisonment for any terms or years up to and including life imprisonment, or both, for offenders convicted of "knowingly or recklessly cause or attempt to cause death." Section 225 (g). The Cyber Security Enhancement Act directs the United States Sentencing Commission to review, and if needed, amend its guidelines for sentencing persons convicted of violating the CFAA.

- The Federal Information Security Management Act (FISMA), 44 U.S.C. §§ 3541-48 (2002), which was enacted to: "(1) provide a comprehensive framework for ensuring the effectiveness of information security controls over information resources that support Federal operations and assets; (2) recognize the highly networked nature of the current Federal computing environment and provide effective government wide management and oversight of the related information security risks, including coordination of information security efforts throughout the civilian, national security, and law enforcement communities;

(3) provide for development and maintenance of minimum controls required to protect Federal information and information systems; [and] (4) provide a mechanism for improved oversight of Federal agency information security programs." To meet these broad goals, the act gives the Director of the Office of Management and Budget the responsibility to oversee agency information security policies and practices, including by: (1) developing and overseeing the implementation of information security policies; (2) requiring agencies to identify and provide information security protections commensurate with the risk and magnitude of the harm resulting from the unauthorized access, use, disclosure, disruption, modification, or destruction of information or information systems used or on behalf of an agency (including systems operated by agency contractors); and (3) coordinating the development of standards and guidelines between NIST and the NSA and other agencies with responsible for national security systems "to assure, to the maximum extent feasible, that such standards and guidelines are complementary with standards and guidelines developed for national security systems."

- The Critical Infrastructure Information Act of 2002 (CIIA), 6 U.S.C. § 131 *et seq.* (2002), is found in Subtitle B of Title II of the Homeland Security Act (sections 211 - 215). The CIIA consists of provisions that address the circumstances under which the Department of Homeland Security may obtain, use, and disclose critical infrastructure information as part

of a critical infrastructure[117] protection program. CIIA establishes several limitations on the disclosure of critical infrastructure information voluntarily submitted to DHS. The CIIA was enacted, in part, to respond to the need for the federal government and owners and operators of the nation's critical infrastructures to share information on vulnerabilities and threats, and to promote information sharing between the private and public sectors in order to protect critical assets[118]. Although the Homeland Security Department defines Critical Infrastructure Information (CII), it allows submitters to use their discretion in determining what will qualify. DHS defines CII as information relating to the security of critical infrastructure -- systems and assets so vital to the nation's well-being that their incapacity or destruction could jeopardize security, public health or safety

- Contained within the CIIA is a section which creates a new “Exemption 3 statute” under the Freedom of Information Act[119], for “critical infrastructure” information that is obtained by

[117] While “critical infrastructure information” is defined therein, “critical infrastructure” is not defined in the Homeland Security Act. It references the definition contained in the USA PATRIOT Act, which provides at Section 1016(e) the following definition of critical infrastructure: “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of these matters.”

[118] Congressional Research Service, Library of Congress, Homeland Security Act of 2002: Critical Infrastructure Information Act, February 28, 2003. http://www.fas.org/sgp/crs/RL31762.pdf Accessed February 3, 2007.

[119] 5 U.S.C. § 552(b)(3) (2000).

that new federal department[120]. Section 214 of the Act, which is entitled "Protection of Voluntarily Shared Critical Infrastructure Information," contains the new Exemption 3 statute.

- Chemical Facilities Security Act of 2004 (CFSA) S. 994, 108th Cong. (2004) would have required that all facilities subject to risk management plan (RMP) requirements under the Clean Air Act (CAA) to conduct site vulnerability assessments and develop security plans and other measures to protect against terror attacks. Unlike the CAA RMPs, those under the CFSA would not be subject to disclosure to the public. The Act also provided authority for the DHS to promulgate security rules, which may preempt state regulations.

Significant State Legislation on Critical Infrastructure, Cyber Security and Information Privacy

- In 2003, California passed a state statute, Cal. Civ. Code 1798.29 *et seq.* (2003) which requires private companies to disclose to their customers any intrusions into their databases or IT systems[121]. Any intrusion, release of third-party data, or holes in the security of their IT systems must be disclosed to their customers. The legislation is particularly broad and far-reaching as it applies to any company that electronically stores data and does business in the

[120] After September 11, 2001, many state legislatures also recognized the need for legislation creating new exceptions to state Freedom of Information Acts to prevent public dissemination of information, data or plans which could aid terrorists in attacks against the people or infrastructure in the U.S.. The author was involved in developing the law in Michigan, MCL 15.243. Other state statutes that created such exceptions include CA Government Code § 6254(aa));

[121] The statute also creates a private cause of action for damages to any individual harmed by violation of the Act.

state of California. Considering the breadth of the statute, and ongoing concerns about cyber security, it would not be surprising to see other states pass similar legislation. There would be expected to be pressure on the state legislatures to create uniform statutes, or upon the Congress to create a national standard. In either event, companies engaging in e-commerce would seek legal guidance, expanding the area of Cyber Security. Concededly, the California statute was enacted to address potential identity theft and fraud as much as concerns of cyber attacks on IT networks.

OTHER BUSINESS PROTECTIVE LEGISLATION

- Air Transportation Safety and System Stabilization Act Pub. Law No. 107-42 (2001). An Act "to preserve the continued viability of the United States air transportation system" passed on September 22, 2001. The Act provides that victims' families that chose to sue for damages arising out of the terror attacks of September 11, 2001, were limited in their recovery to insurance policy limits.
- The Support Anti-terrorism by Fostering Effective Technologies Act (SAFETY Act) 6 U.S.C. §§ 441-44 (2002) (§§ 861-65 of Homeland Security Act), limit liability of and thereby encourages development of, anti terrorism technology.
- Terrorism Risk Insurance Act of 2002. Pub. L. No. 107-297 (2002). The act created a federal reinsurance program with no premium charged to the insurers. It mandated that the insurers write terrorism coverage,

which would then be backed by the federal reinsurance program. If a terrorism event occurs, the Secretary of the Treasury must then certify that the event qualifies as a reimbursable loss under TRIA, with at least $5 million in aggregate losses, and that individuals acting for a foreign interest had committed the attack. If an incident met these criteria, then taxpayers were responsible to pay for insurance industry losses.

- Terrorism Risk Insurance Extension Act of 2005, Pub. L. No. 109-144 (2005).

Significant State Legislation - Business Protection

- Nevada statute 463.790, effective October 1, 2003, requires each resort hotel to adopt and maintain an emergency response plan. The law requires that each resort hotel's emergency response plan include an engineer's drawing or other floor plan of the hotel, including a description of all ingress/egress routes, location and inventory of emergency response equipment and resources and of any hazardous substances.

PUBLIC HEALTH AND BIO-TERRORISM

- Homeland Security Act, § 304 provides that the HHS secretary must collaborate with the DHS secretary to set priorities, goals, objectives, and policies for "human health-related research and development activities relating to countermeasures for chemical, biological, radiological, and nuclear and other emerging terrorist threats." Moving from HHS to DHS are three offices that deal with emergency

preparedness: the National Disaster Medical System, the Metropolitan Medical Response System, and the Office of Emergency Preparedness (OEP), according to Section 503 of the legislation. The OEP is part of HHS's Office of Public Health Preparedness, the rest of which apparently is staying within HHS. Smallpox vaccine immunity included which will protect individuals and healthcare "entities" that give smallpox shots from liability for harmful side effects. The federal government would defend against any lawsuits over adverse events, and plaintiffs could receive compensation for injuries but no punitive damages. The liability shield also covers vaccine manufacturers. The protection would apply only during and 30 days after an emergency declared by the HHS secretary. The legislation also provided that **t**he DHS will take over the U.S. Department of Agriculture's Plum Island Animal Disease Center, but the USDA will still conduct research there.

- The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107-188 (2002) imposes both food facility registration requirements and food importation reporting requirements to assure food supply security. It also amended the Safe Water Drinking Act, adding a new section, Sec. 1433 which requires vulnerability assessments of water systems serving for more than 3,000 persons, to terrorist attack.
- The Project BioShield Act, Pub. L. No. 108-276 (2004), provides authorities for *inter alia,* biomedical countermeasures procurement, smallpox vaccine

development for the National Stockpile, and other authorities relevant to biodefense activities.

- Pandemic and All-Hazards Preparedness Act, Pub. Law No. 109-417 (2006).

PREVENTION AND INFORMATION SHARING

- The U.S. Intelligence Reform and Terrorism Prevention (IRTP) Act of 2004, 6 U.S.C. § 485 (2004).
    - The REAL-ID Act, contained within the U.S. Intelligence Reform and Terrorism Prevention Act of 2004. (IRTP) provides minimum standards which each state must achieve in the creation new driver's licenses for the state’s driver’s license to acceptable for federal purposes or facilities.
- Intelligence Authorization Act for Fiscal Year 2004, Pub. L. No. 108-177 (2004).
- The National Security Act, 50 U.S.C. § 401 *et seq.* (2002).
- Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. 1801 *et seq.* (2002).

TRANSPORTATION SECURITY

- Maritime Transportation Security Act of 2002, Pub. L. No. 107-295 (2002). This landmark legislation seeks to deter terrorists’ attacks against vessels and facilities and includes requirements to prepare security plans. The legislation also grants broad regulatory authority to the U.S. Coast Guard and the Bureau of Customs and Border Protection. Under MTSA, the agencies have issued a series of regulatory

requirements for dockside, non-traditional, as well as traditional maritime businesses, intended to create a broad security strategy to protect U.S. ports from terrorist activities.

- Aviation and Transportation Security Act was one of the primary pieces of legislation passed post-September 11, affecting the aviation industry. The Act, inter alia, established a new Transportation Security Administration (TSA) to oversee transportation security in all sectors of transportation.
- The Security and Accountability For Every Port (SAFE Port) Act, Pub. L. No. 109-347 (2006).
- The Rail Security Act of 2004, S. 2273, 108th Cong. (2003) mandates a comprehensive approach to rail security. The legislation directs the DHS, in consultation with the Department of Transportation and the private sector, to conduct vulnerability assessments of freight and rail transportation carriers.

BORDER SECURITY

- Enhanced Border Security and Visa Entry Reform Act of 2002, 8 U.S.C. 1701 et al., PL 107-173 (May 1, 2002), requires inter-agency information sharing between the State Department and INS, and federal law enforcement agencies to create a fuller picture of individuals seeking visa or who were inadmissible or deportable.
- In May 2005, President Bush signed the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, Pub. Law

No: 109-013 (2005) into law. The provisions contained in the law included expanded authority for determinations of asylum, inadmissibility and deportability.

- The Secure Fence Act of 2006, Pub. Law No: 109-367 (2006), authorized the construction of 700 miles of double-layered fencing on the U.S.-Mexico border by the end of 2008. The law requires the Department of Homeland Security create a border surveillance system within 18 months, using unmanned aerial vehicles, ground-based sensors, satellites, radar and cameras to prevent all unlawful U.S. entries. Congress also approved $1.2 billion in a separate homeland security spending bill to bankroll the fence, though critics say this is $4.8 billion less than believed needed for construction.
- The Military Commissions Act of 2006, Public Law No: 109-366 (2006). At the bill signing ceremony on October 17, 2006, the President called this Act, "one of the most important pieces of legislation in the war on terror."[122] Criminal charges of two counts of providing material support for terrorism, were filed against Australian David M. Hicks on March 1, 2007 marking the first use of rules established by the Military Commissions Act of 2006, enacted after the U.S. Supreme Court struck down the rules for the military trials under the Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism signed by

[122] The White House, "President Bush Signs Military Commissions Act of 2006," http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html [Accessed March 7, 2007].

President George W. Bush on 13 November 2001, in *Hamdan v Rumsfeld,* 126 S.Ct. 2749 (2006), on 29 June 2006.

NATURAL DISASTERS

- IRTP Act, § 406 amends the Stafford Act to promote consistent compacts for terrorism as well as disasters and emergencies.
- Post-Katrina Emergency Management Reform Act of 2006, 6 USC 747.
- The Stafford Act, 42 U.S.C. § 5121 *et seq.* (2002).
- The John Warner Defense Authorization Act of 2007 Pub. L. No. 109-364 (2007) revised the Insurrection Act (10 U.S.C. § 333), now titled the *Major Public Emergencies; Interference with State and Federal Law*, now provides that, if the legal requirements of the Insurrection Act are met, the President may now call up the National Guard even for a natural disaster, epidemic, or naturally occurring condition without the consent of the Governor when, in the judgment of the President, the state authorities can no longer maintain public order. Since response to natural disasters or other events has always been the first prerogative of the several states, this post-Katrina grant of expanded authority to the federal executive is a decided shift in the balance of dual sovereignty on which the U.S. is founded.
- Victims of Terrorism Relief Act of 2001, Public Law No: 107-134, (2002).

- 2001 Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States, Pub. Law No. 107-038 (2001).
- Mychal Judge Police and Fire Chaplains Public Safety Officers' Benefit Act of 2002, Pub. Law No: 107-196 (2002).
- Designating September 11 as Patriot Day, Public Law No: 107-089 (2001)
- Implementing the 9/11 Commission Recommendations Act, H.R. 1. 110th Congress, 2007.
- Improving America's Security Act of 2007, S.4. 110th Congress.

EXECUTIVE ORDERS AND PRESIDENTIAL DIRECTIVES

- Delegation of Disaster Relief and Emergency Assistance Functions, Exec. Order 12148 (1979).
- Critical Infrastructure Protection, Exec. Order 13010 (1996).
- Critical Infrastructure Protection in the Information Age, Exec. Order 13231 (2001).
- National Counterterrorism Center, Exec. Order 13354 (2004).
- Strengthening the Sharing of Terrorism Information to Protect America, Exec. Order 13356 (2004).
- Assignment of Emergency Preparedness. Responsibilities, Exec. Order 1265 (1988).
- Establishing the Office of Homeland Security and the Homeland Security Council, Exec. Order 13228 (2001).
- Exec. Order 13284, (January 23, 2003)

- Amendment of Executive Orders, and Other Actions, in Connection With the Establishment of the Department of Homeland Security Exec. Order 13286 (2003).
- PDD-39 defines policies regarding the Federal response to threats or acts of terrorism involving nuclear, biological, and/or chemical material, and/or weapons of mass destruction (January 21, 1995)
- PDD-62, Protection Against Unconventional Threats to the Homeland and Americans Overseas (May 22, 1998)
- HSPD-1, Organization and Operation of the Homeland Security Council (October 29, 2001)
- HSPD-3, Homeland Security Advisory System (March 11, 2002)
- HSPD-2 (Combating Terrorism through Immigration Policies).
- HSPD-4 (National Strategy to Combat Weapons of Mass Destruction).
- HSPD-5 (Management of Domestic Incidents -mandating the existing National Response Plan [NRP] and the existing National Incident Management System [NIMS]).
- HSPD-6 (Integration and Use of Screening Information).
- HSPD-7 (Mandating the National Infrastructure Protection Plan).
- HSPD-8 (National Preparedness - mandating the National Preparedness Goal, the National Planning Scenarios, the Universal Task List {UTL], the Target Capabilities List [TCL], the Homeland Security Grant Program Guidance and the National Preparedness Guidance).
- HSPD-9 (Defense of United States Agriculture and Food).

- HSPD-10 (Bio-Defense for the 21st Century).
- HSPD-11 (Comprehensive Terrorist-Related Screening Procedures).
- HSPD-12 (Policy for a Common Identification Standard for Federal Employees and Contractors).
- HSPD-13 (Maritime Security Policy).
- HSPD-14 (Domestic Nuclear Detection).

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APPENDIX B. LAW SCHOOL COURSE OVERVIEW

Arizona State University, Sandra Day O'Connor College of Law . Orde Kittrie, Professor. Course offerings: **Homeland Security Law**.

Case Western Reserve University School of Law. Amos Guirora, Professor and Institute Director; Sharpe, Associate Professor; Gregory S.McNeal, Institute Assistant Director and Adjunct Assistant Professor of Law. **Institute for Global Security Law and Policy.** Courses offered: **Terrorism Prosecution Lab, Comparative Counterterrorism Law, Terrorism Prosecution Lab II, United States Coast Guard (USCG) & Homeland Security Lab, Religion and Terrorism, taught as part of the Summer Institute for Global Justice in Utrecht, The Netherlands , International Humanitarian Law and a Professional Education for Terrorism Trials Program.** Proposed future courses include: **Terrorism Financing, Homeland Security, and Immigration and Terrorism.**

George Mason University School of Law, John A. McCarthy, Director. **Critical Infrastructure Protection (CIP) Program** The Critical Infrastructure Protection Program integrates "the disciplines of law, policy, and technology" to enhance "the security of cyber-networks, physical systems and economic processes supporting the nation's critical infrastructures"[123]. McCarthy and a staff of fourteen provide outreach to the private and public sector, engage

[123] George Mason University School of Law, Critical Infrastructure Protection Program, http://cipp.gmu.edu/mission/ Accessed February 11, 2007.

in research and writing on core CI subjects, and funds multidisciplinary and inter-university research and related projects. Joseph Zengerle is Research Professor for National and Homeland Security Studies.

George Washington University School of Law. Professors Koenig, Roberts, and Whitley. Course Offering: **Homeland Security Law and Policy.** Course Description: “Legal issues related to homeland security before September 11, 2001, and the adoption of the Homeland Security Act of 2002. Protection of critical infrastructure; information sharing; liability for terrorist attacks; risk insurance; attempts to prevent the use of weapons of mass destruction; threats to electronic infrastructure; and combating the financing of terrorism.”

Indiana University School of Law, David Fidler, Professor. Courses Offered: **National and Homeland Security Law** Course Description: “National security as an area of U.S. policy and law has undergone a revolution since the events of September 11, 2001, both in terms of the country's external security …….. and the development of “homeland security” in response to the threat of global terrorism. ….In the course, we will examine the legal framework for national and homeland security, discuss the recent enemy combatant cases decided by the Supreme Court, look at the relationship between national security and war (with emphasis on the war against Iraq), consider the counter-terrorism objectives of homeland security and analyze the implications of homeland security policy and law on civil liberties in the United States. Time permitting, we will also look at another important aspect of homeland security-

consequence management in the aftermath of an attack on the U.S. homeland."

Saint Louis University College of Law. Course offering: **PUBLIC HEALTH EMERGENCY LAW, BIO-SECURITY AND HOMELAND SECURITY.** A seminar exploring the law of public health emergencies and response in relation to homeland security law and systems.

University of Maryland, Baltimore. Michael Greenberger, Director and Professor. **The Center for Health and Homeland Security.**

University of Toledo College of Law. Courses offered: **Certificate in Homeland Security Law**

Washington University in St Louis, Kathleen Clark, Professor; Neil M. Richards, Associate Professor of Law. Courses offered: **Homeland Security Law and Policy**

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APPENDIX C. LAW FIRM LOCATORS

There are a number of web based tools for locating an attorney. All are organized by specialty area, and then by other criteria.

"Attorney Locate" found at www.attorneylocate.com/descriptions.htm lists 91 Practice Areas from Administrative Law to Zoning, but does not include Homeland Security Law. See Appendix_, page _.It does not include National Security Law or Emergency Management/Preparedness either. This site is primarily designed for individual citizens seeking representation, however. It is expected that businesses would be the most likely entities to utilize a Web based search engine for counsel specializing in Homeland Security Law.

Martindale-Hubbell, one of the oldest and best know law firm directories, and one used by attorneys for "lawyer to lawyer" referrals, does not list Homeland Security among its Practice Areas. They list 61 different practice areas, found at www.martindale.com/firm/law.html. The site is designed to search for either lawyers or law firms, based on reported Area of Practice. See page _, at Appendix _.

Find Law Lawyer Directory claims on its website, http://www.lawyers.findlaw.com/ that it profiles "more than 1,000,000 lawyers and law firms" as well as international, corporate and government counsel. The site has an extensive list of "Legal Issues" (see Appendix_, p _) with 16 major topics areas, which are then divided into subcategories for easier searching. "Accidents & Injuries", for example, is a major Legal Issue, which then has 31 subcategories from Admiralty & Maritime Law" to "Wrongful

Death”. They do not list Homeland Security Law. The site claims the ability to search for counsel by both “Legal Issue” and by “Location”. When “Homeland Security” is typed in to the Legal Issue Locater, however, “Civil Rights” is the apparent default, as all firms retrieved practice civil rights, without any indication that the firm also practices Homeland Security Law. If the Location Locator is also used with the Legal Issue Locater, then all civil rights firms in that particular city are retrieved. For example, when “Homeland Security Law” and “Washington, DC” are inputted, a lengthy list of firms and attorneys practicing Civil Rights Law in the District of Columbia is retrieved. Viewing the “Profiles” of a random sampling of the identified listees, and then scrolling through the “West Practice Categories” reported by each firm , reveals lists of varying length, all containing at least one reference to “Civil Rights Law” but no references to “Homeland Security Law.” As noted elsewhere herein, Homeland Security Law is a denominated West Practice Category, however.

Lawyers.com, www.lawyers.com/ is a service provided by LexisNexis. The website features a “Quick Search” feature to search for lawyers and law firms, divided between “Personal Users” and “Business Users”. The feature permits a inquiry either by Area of Law, by Location, or by Name. After selecting either category, the user then has a pull down menu of areas, denoted as “Select a type of lawyer”. Under Personal Users the types of lawyers to be selected included: Admiralty Law, Appellate Practice, Aviation Law, Bankruptcy, Civil Rights,….. Under “Business Users” the choices of types of lawyers to select is much shorter, listing Banking and Finance, Bankruptcy, Business Enterprises, “Buying or Selling a Business”’ Debt and

Credit, Employment, Entertainment, General Business, Intellectual Property, Internet, Real Estate, “Starting a Business”, “Strategic Alliances”, Taxation and White Collar Crime. Most of the categories that could be selected for business users in need of a lawyer had subcategories that could be separately selected. None of the categories or categories included Homeland Security Law, however. The Quick Search feature also allows a browser to type in a specific area of law that was not contained in the previous pull down menu. A browser also must type in a specific location. After typing in the phrase “Homeland Security Law” and “Washington, DC” for the location, Lawyers.Com indicated “Your search for Homeland Security Law, Firms in Washington, District of Columbia found 0 listings.” A search for firms practicing Emergency Preparedness Law in Washington, DC, similarly found no results. A search for firms practicing Cyber Security Law also found no results. A search was then made for firms practicing “National Security Law” in Washington DC. Two firms were displayed. Of the two firms, however, one of the firms’ Profile stated that it was an “100% Federal Criminal Defense”. A final search using the search term “Risk Management and Insurance” provided one result where the firm listed as a practice area of law “Insurance and Risk Management.”

Under the “Find A Lawyer Advanced Search” finder, a browser is directed to answer 4 questions: Question 1.asked: “Show me a list of : (with circles to highlight) “Lawyers & Firms”’ “Lawyers Only”’ or “Firms Only”. In the test conducted, the first circle, “Lawyers & Firms” was darkened, reasoning that it would encompass the other two choices. Question 2.asked: “What type of lawyer are you looking for?” This test again used “Business Users,” again

reasoning that Businesses were more likely to search for a private attorney or law firm expressly for Homeland Security Law. Question #2 under Advanced Search had the same options to either select one of the pull down categories or to enter in an idiosyncratic description of a type of lawyer. As in the previous test, “Homeland Security Law” was again entered. Question #3 asked: “Where are you looking for a lawyer?” and at least a state had to entered. Washington DC was again entered. The fourth question asked “What language should the lawyer speak?” English was selected.

This test did have positive results with three individuals from three different firms listed. Each individual’s profile expressly included “Homeland Security Law” as a practice area.

APPENDIX D. SURVEY QUESTIONS RESULTS

APPENDIX I
Questions and Results

1.

- (Public Practitioners) Does your agency practice homeland security law or a related practice area?
- (Private Practitioners) Does your firm practice any aspect of Homeland Security Law?
- (Law Schools) Does your law school offer a course in Homeland Security Law?

Public Practitioners:

Yes	21	100%
No	0	0%
Total	14	100%

Private Practitioners:

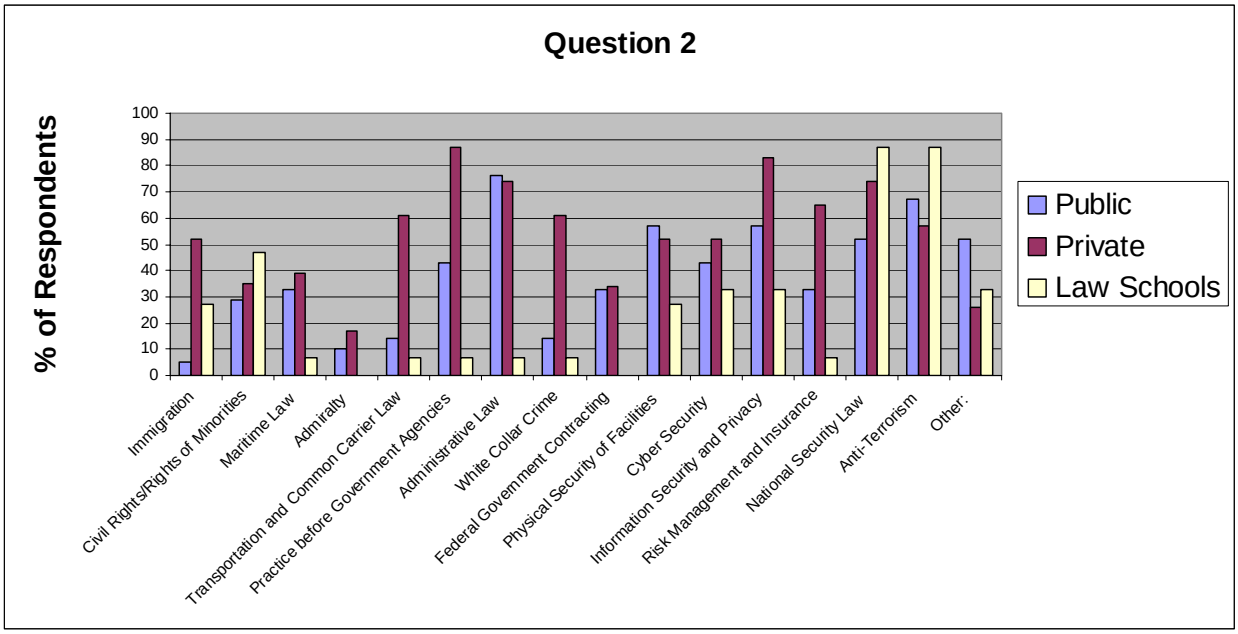
Yes	23	100%
No	0	0%
Total	23	100%

Law Schools:

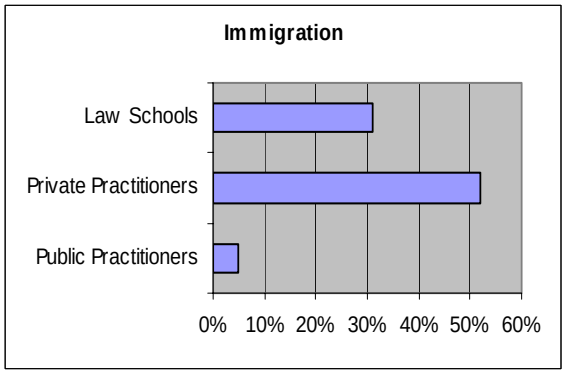
Yes	15	50%
No	15	50%
Total	30	100%

2.

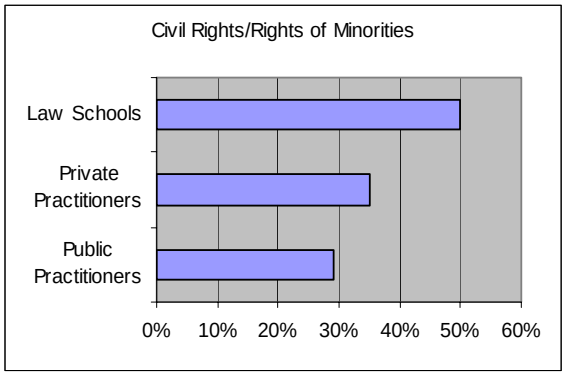
- (Public Practitioners) First, we ask that you identify the specialized areas of law your agency typically enforces or is directly engaged in that are part of Homeland Security Law?
- (Private Practitioners) First, we ask that you identify the specialized areas of law your firm typically includes in the practices of Homeland law?
- (Law Schools) We ask that you identify the specialized areas of law your school includes in your core course on Homeland Security Law?



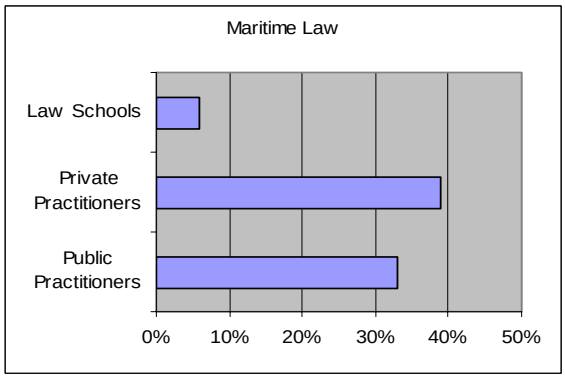
Immigration	Public Practitioners	1	5%
	Private Practitioners	12	52%
	Law Schools	5	31%



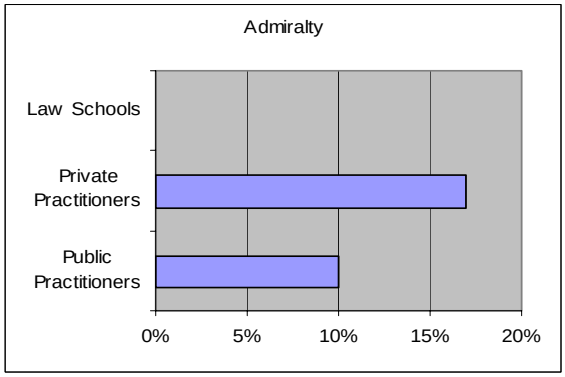
Civil Rights/Rights of Minorities	Public Practitioners	6	29%
	Private Practitioners	8	35%
	Law Schools	7	47%



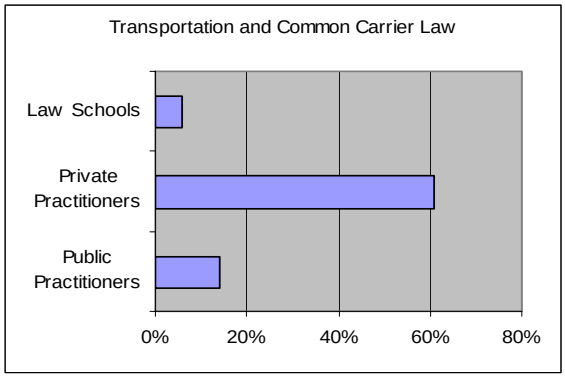
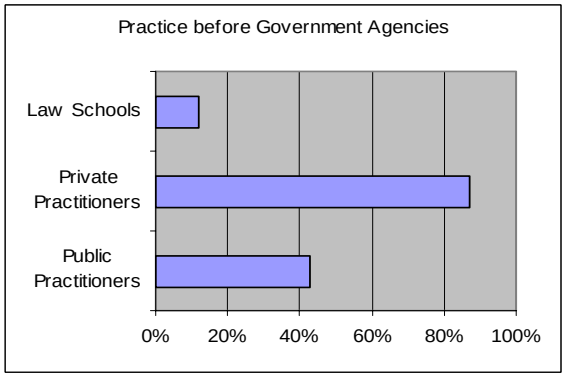
Maritime Law	Public Practitioners	7	33%
	Private Practitioners	9	39%
	Law Schools	1	%

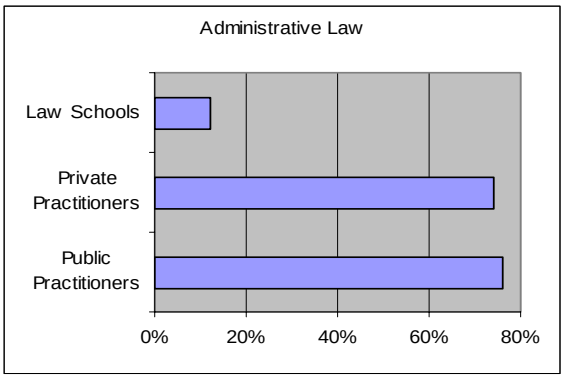


A**dmiralty**	Public Practitioners	2	10%
	Private Practitioners	4	17%
	Law Schools	0	0%

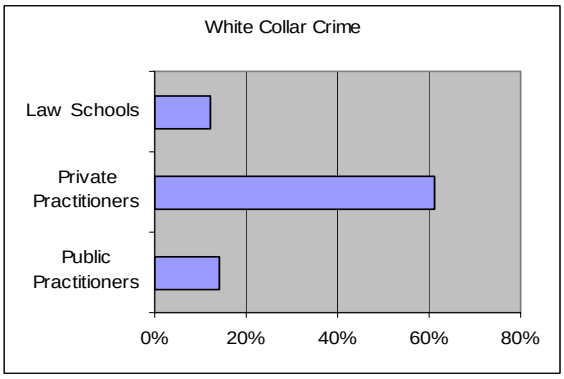


Transportation and Common Carrier Law	Public Practitioners	3	14%

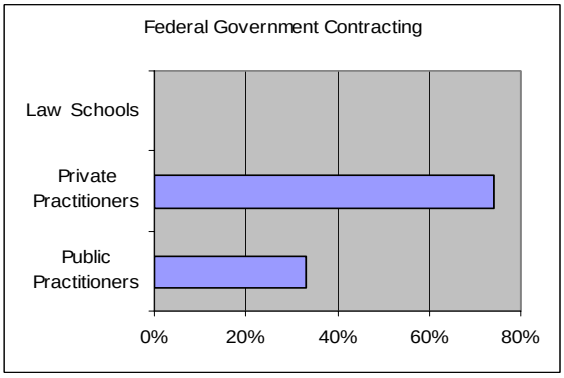
	Private Practitioners	14	61%
	Law Schools	1	6%
			
Practice before Government Agencies	Public Practitioners	9	43%
	Private Practitioners	20	87%
	Law Schools	2	12%
			
Administrative Law	Public Practitioners	16	76%
	Private Practitioners	17	74%
	Law Schools	2	12%



White Collar Crime	Public Practitioners	3	14%
	Private Practitioners	14	61%
	Law Schools	2	12%

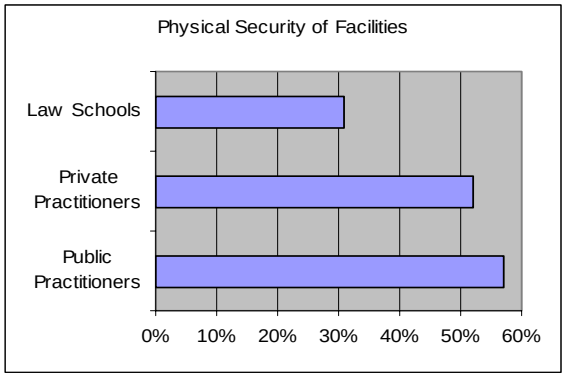


Federal Government Contracting	Public Practitioners	7	33%
	Private Practitioners	17	34%
	Law Schools	0	0%

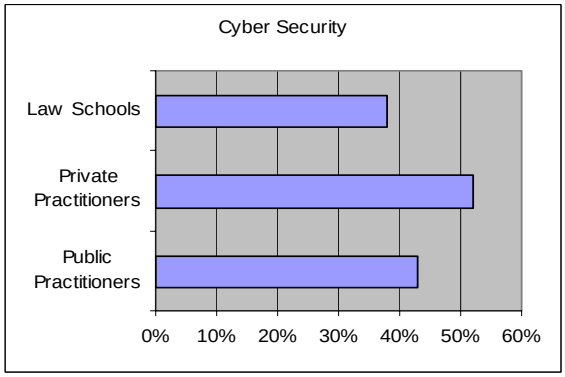


Physical Security of Facilities	Public Practitioners	12	57%

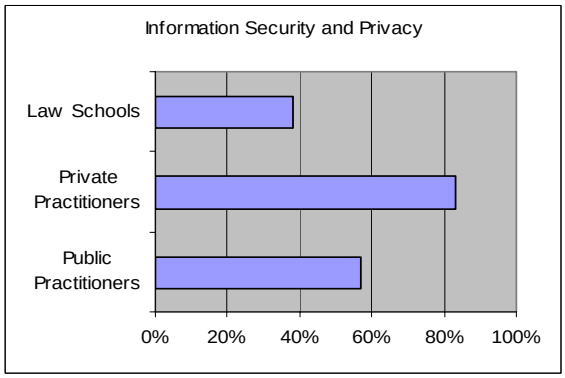
	Private Practitioners	12	52%
	Law Schools	5	31%



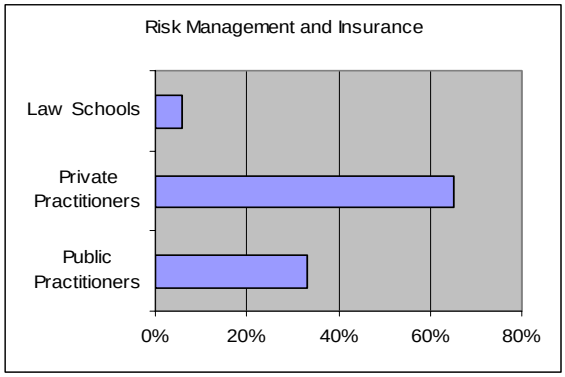
Cyber Security	Public Practitioners	9	43%
	Private Practitioners	12	52%
	Law Schools	6	38%



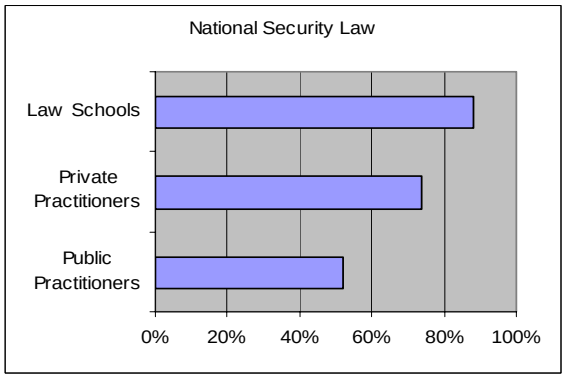
Information Security and Privacy	Public Practitioners	12	57%
	Private Practitioners	19	83%
	Law Schools	6	38%



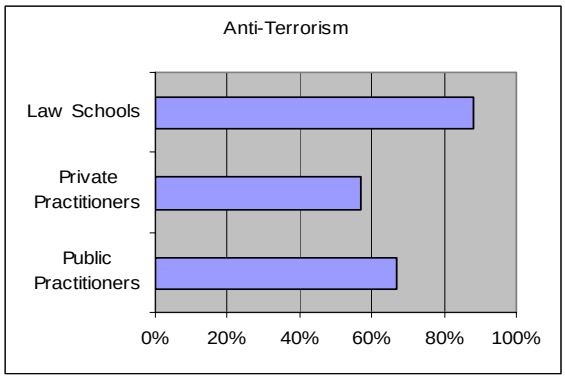
Risk Management and Insurance	Public Practitioners	7	33%
	Private Practitioners	15	65%
	Law Schools	1	6%



National Security Law	Public Practitioners	11	52%
	Private Practitioners	17	74%
	Law Schools	14	88%

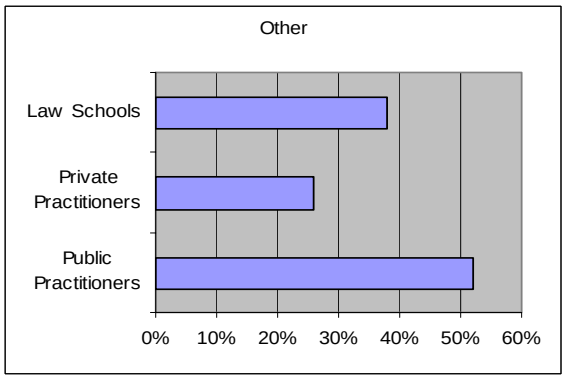


Anti-Terrorism			
	Public Practitioners	14	67%
	Private Practitioners	13	57%
	Law Schools	14	88%



Other

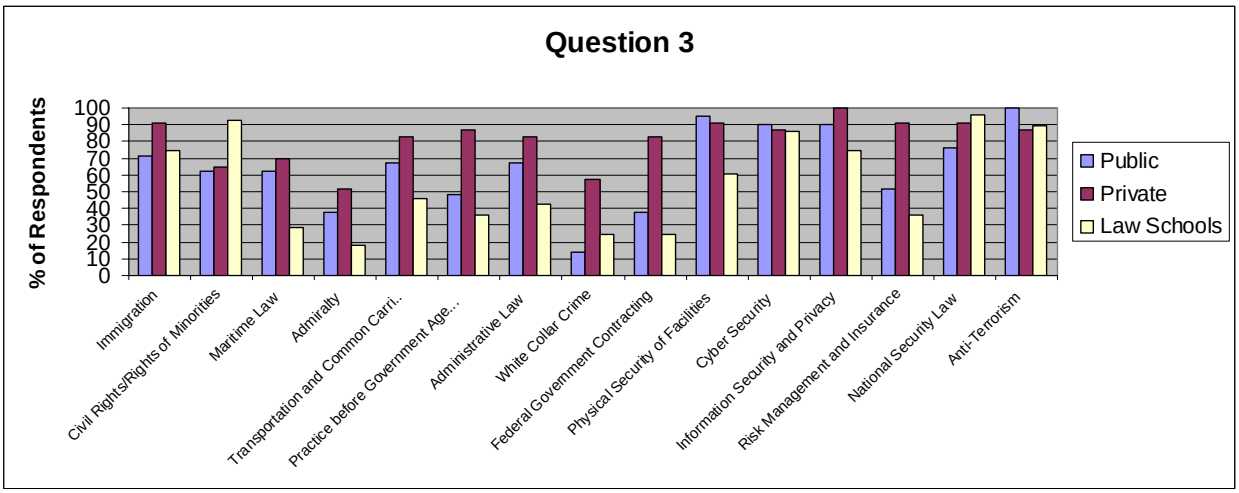
Public Practitioners	11	52%
Private Practitioners	6	26%
Law Schools	6	38%



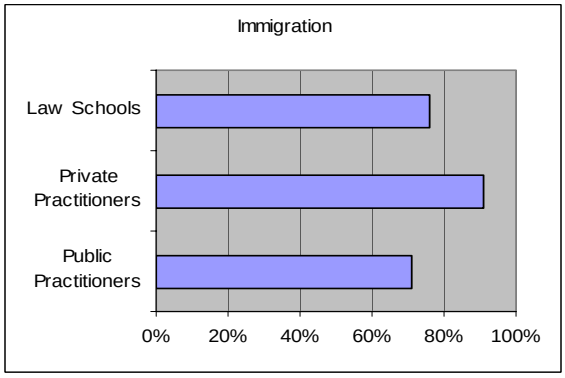
3.

- (Public Practitioners) Next, disregarding the limitations of existing personnel or funding, which areas of the law, in your opinion, should be considered in as part of Homeland Security Law, (whether or not enforced or engaged in by your agency)?
- (Private Practitioners) Next, disregarding the limitations of existing personnel, which areas of the law, in your opinion, should be considered in the practice of Homeland Security Law (whether or not offered by your firm)?
- (Law Schools) Next, disregarding any limitations, which areas of the law, in your opinion, should be

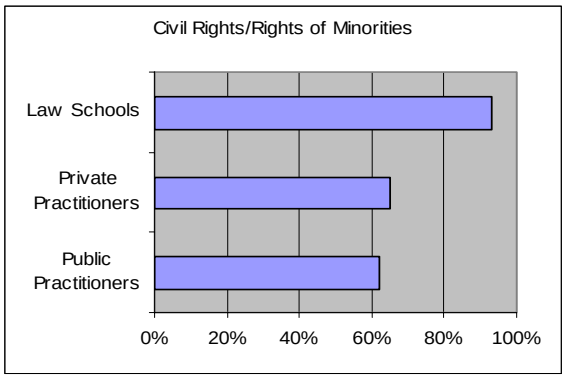
considered in a course on Homeland Security Law, (whether or not included in the course offered at your school)?



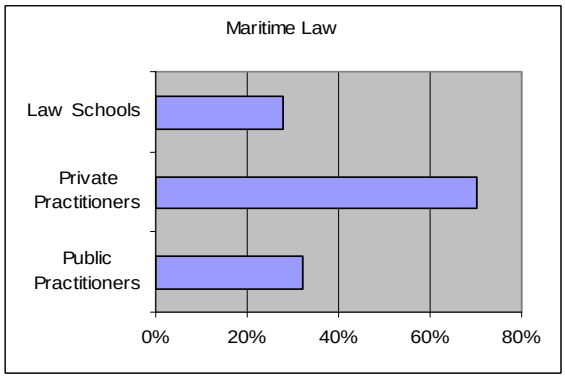
Immigration	Public Practitioners	15	71%
	Private Practitioners	21	91%
	Law Schools	22	76%



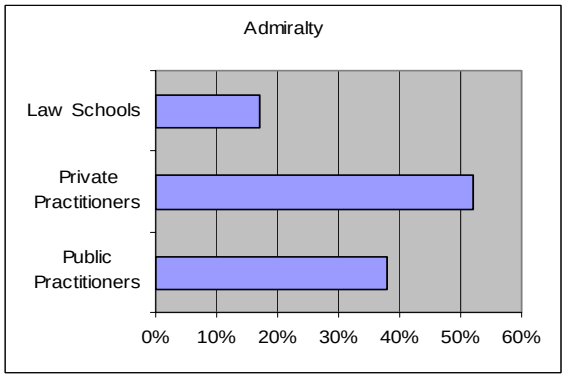
Civil Rights/Rights of Minorities	Public Practitioners	13	62%
	Private Practitioners	15	65%
	Law Schools	27	93%



Maritime Law	Public Practitioners	13	62%
	Private Practitioners	16	70%
	Law Schools	8	28%

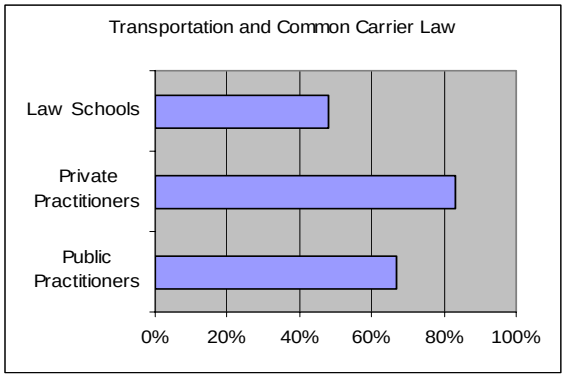


Admiralty	Public Practitioners	8	38%
	Private Practitioners	12	52%
	Law Schools	5	18%

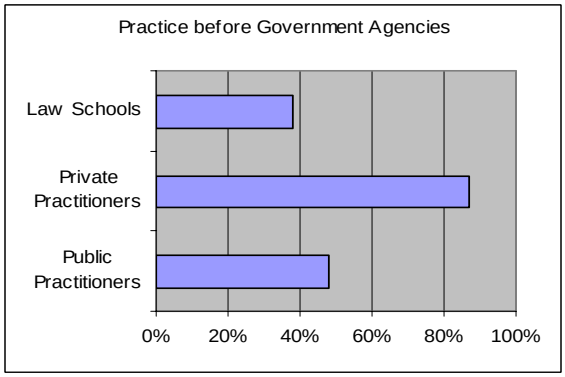


Transportation and Common Carrier Law	Public Practitioners	14	67%

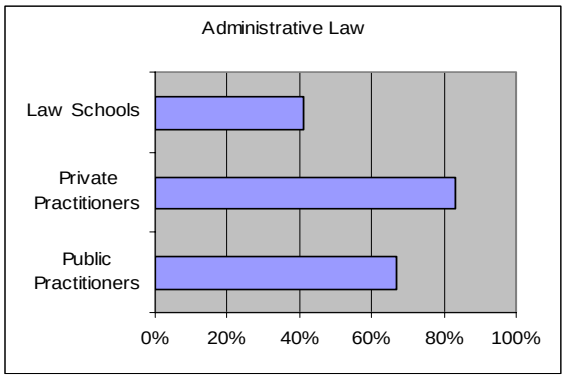
	Private Practitioners	19	83%
	Law Schools	14	48%



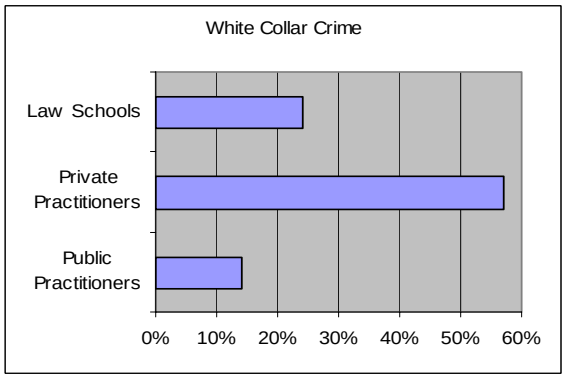
Practice before Government Agencies	Public Practitioners	10	48%
	Private Practitioners	20	87%
	Law Schools	11	38%



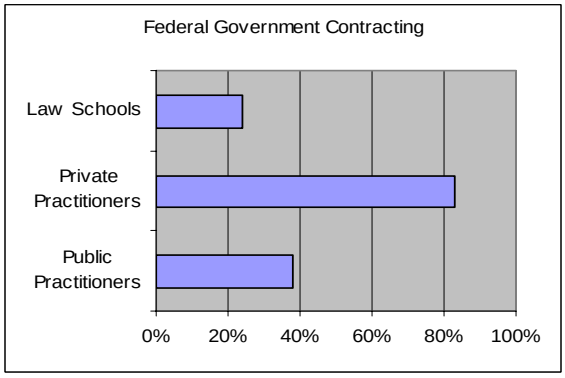
Administrative Law	Public Practitioners	14	67%
	Private Practitioners	19	83%
	Law Schools	12	41%



White Collar Crime	Public Practitioners	3	14%
	Private Practitioners	13	57%
	Law Schools	7	24%

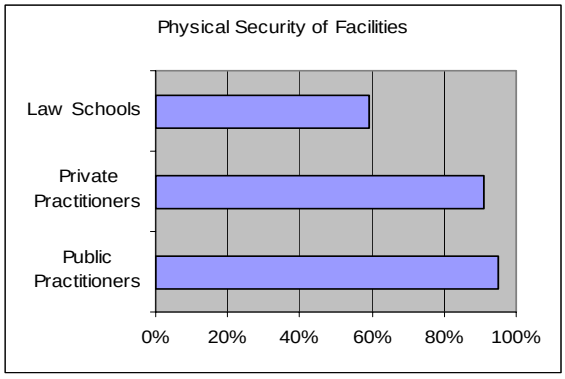


Federal Government Contracting	Public Practitioners	8	38%
	Private Practitioners	19	83%
	Law Schools	7	24%

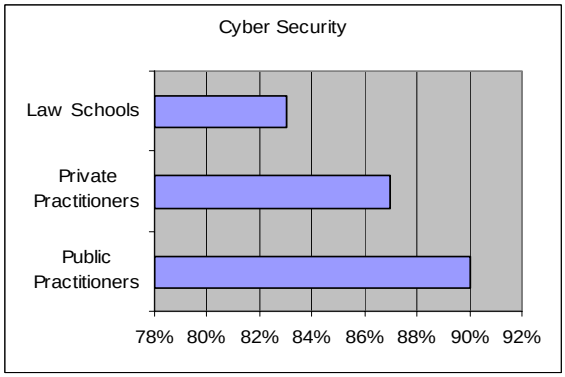


Physical Security of Facilities	Public Practitioners	20	95%

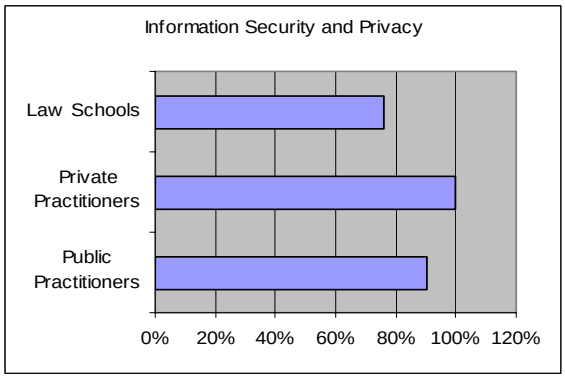
	Private Practitioners	21	91%
	Law Schools	17	59%



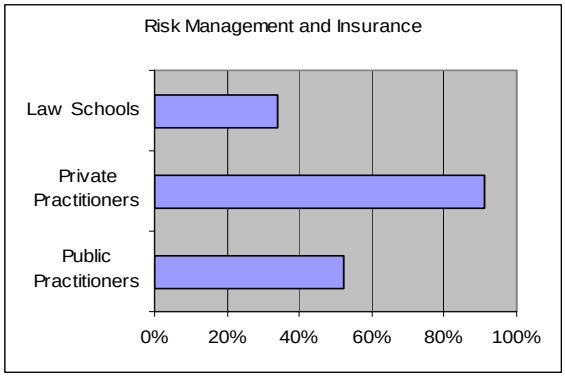
Cyber Security	Public Practitioners	19	90%
	Private Practitioners	20	87%
	Law Schools	24	83%



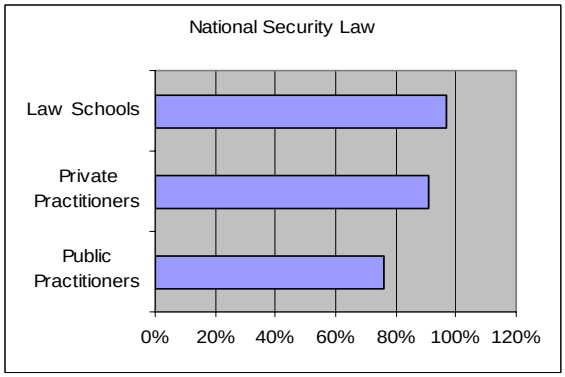
Information Security and Privacy	Public Practitioners	19	90%
	Private Practitioners	23	100%
	Law Schools	22	76%



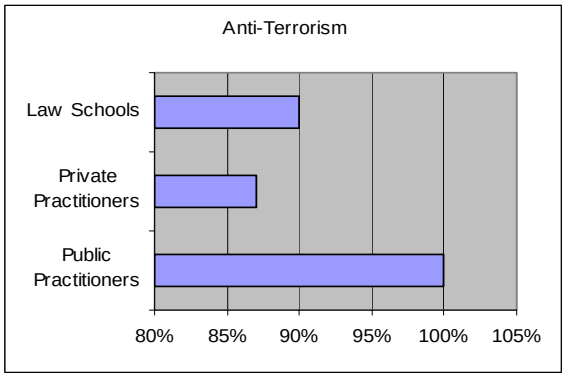
Risk Management and Insurance	Public Practitioners	11	52%
	Private Practitioners	21	91%
	Law Schools	10	34%



National Security Law	Public Practitioners	16	76%
	Private Practitioners	21	91%
	Law Schools	28	97%

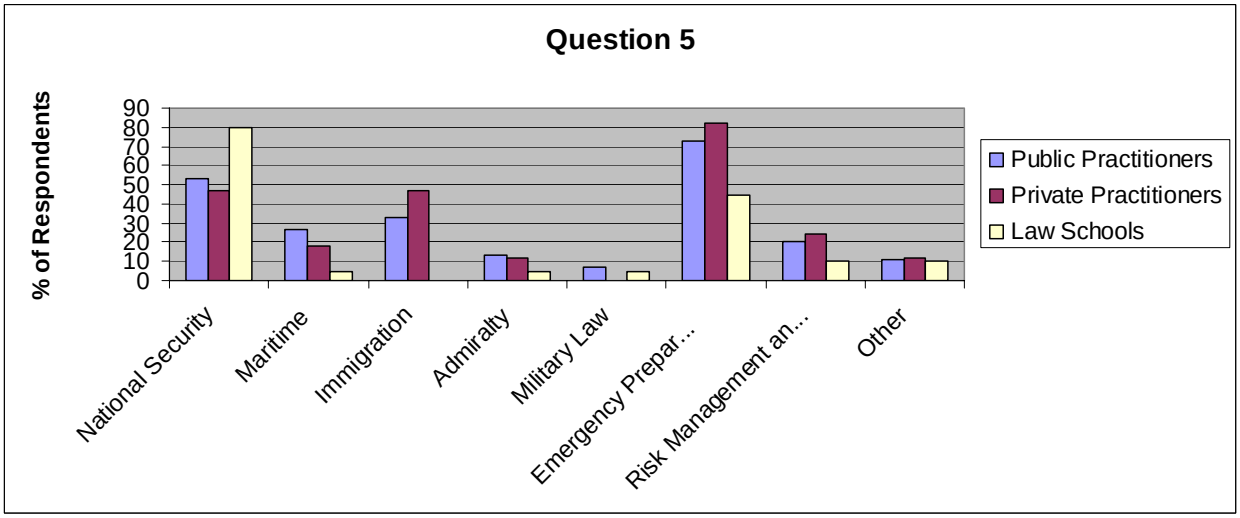


Anti-Terrorism	Public Practitioners	21	100%
	Private Practitioners	20	87%
	Law Schools	26	90%

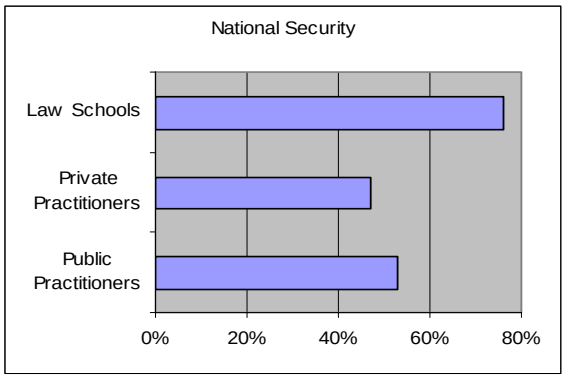


4. (All) Are there any other areas of law, in your opinion, that you would include within the practice area of Homeland Security Law, not included in the previous question? If so, please list them here.

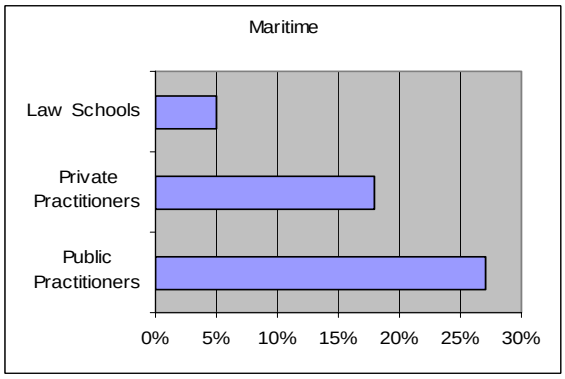
5. (All) Which of the following established practice areas, if any, would you consider displaced or subsumed by Homeland Security Law?



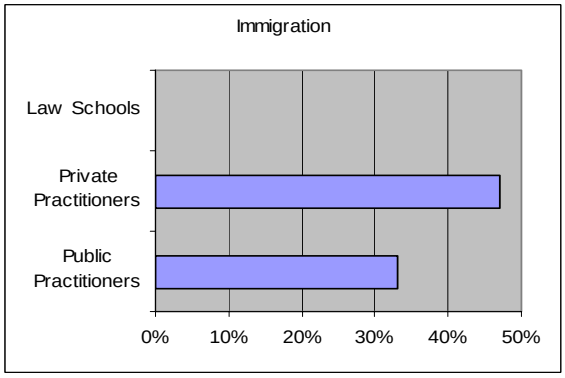
National Security	Public Practitioners	8	53%
	Private Practitioners	8	47%
	Law Schools	16	76%



Maritime	Public Practitioners	4	27%
	Private Practitioners	3	18%
	Law Schools	1	5%

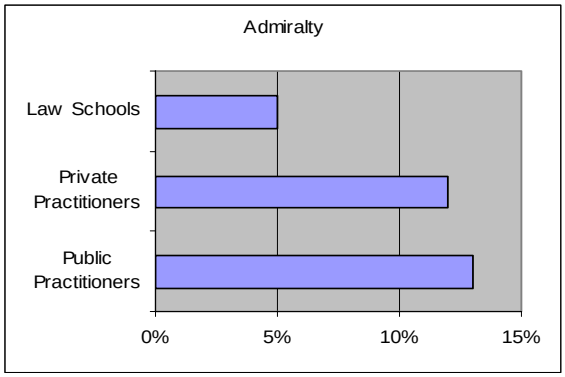


Immigration	Public Practitioners	5	33%
	Private Practitioners	8	47%
	Law Schools	0	0%

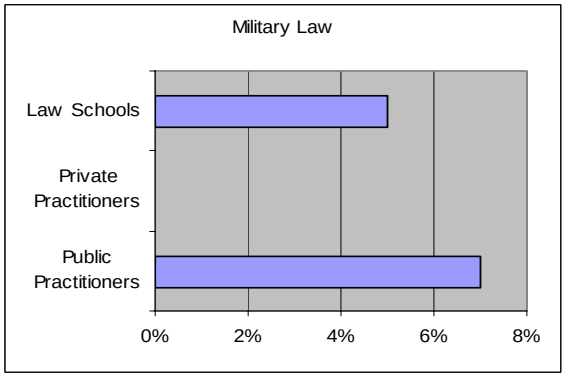


Admiralty	Public Practitioners	2	13%

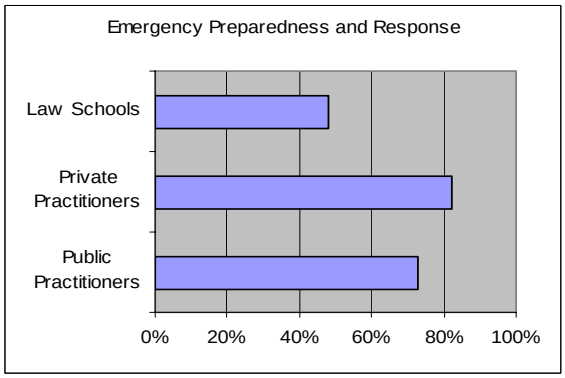
	Private Practitioners	2	12%
	Law Schools	1	5%



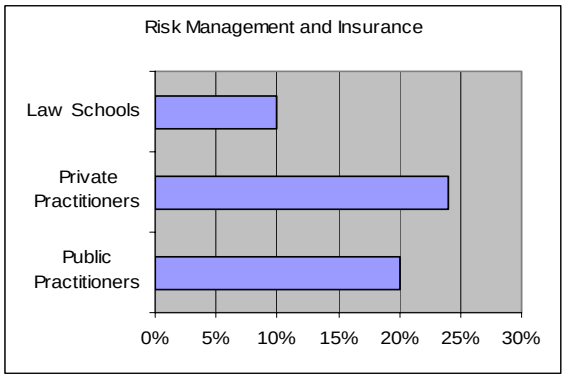
Military Law	Public Practitioners	1	7%
	Private Practitioners	0	0%
	Law Schools	1	5%



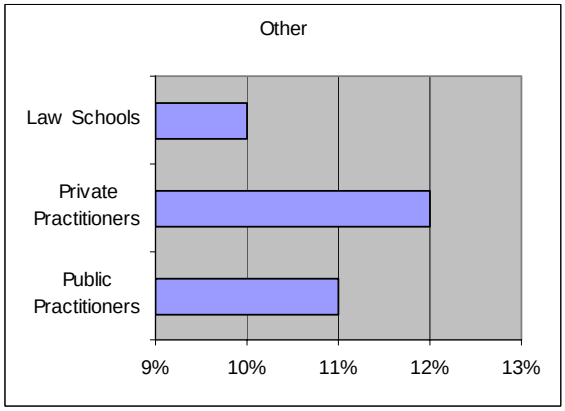
Emergency Preparedness and Response	Public Practitioners	11	73%
	Private Practitioners	14	82%
	Law Schools	10	48%



Risk Management and Insurance	Public Practitioners	3	20%
	Private Practitioners	4	24%
	Law Schools	2	10%



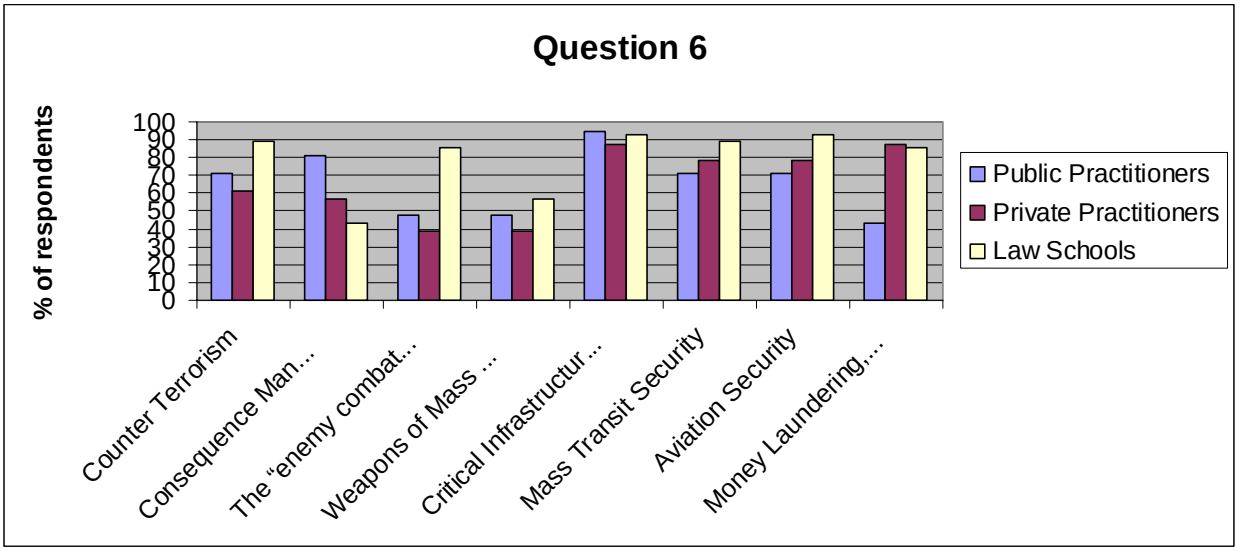
Other:	Public Practitioners	1	11%
	Private Practitioners	2	12%
	Law Schools	2	10%



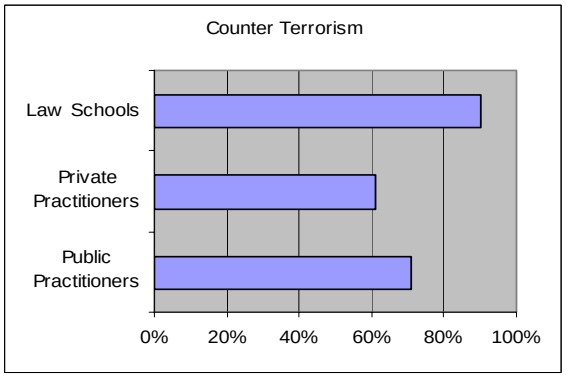
6.

- (Public Practitioners) Which of the following functional areas, in your opinion, should be included in a Continuing Legal Education course on Homeland Security Law?
- (Private Practitioners) Which of the following functional areas, in your opinion, should be included in a Continuing Legal Education course on Homeland Security Law?

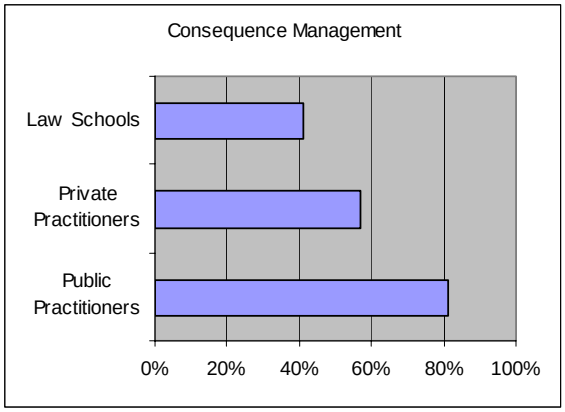
- (Law Schools) Which of the following functional areas, in your opinion, should be included in a course on Homeland Security Law?



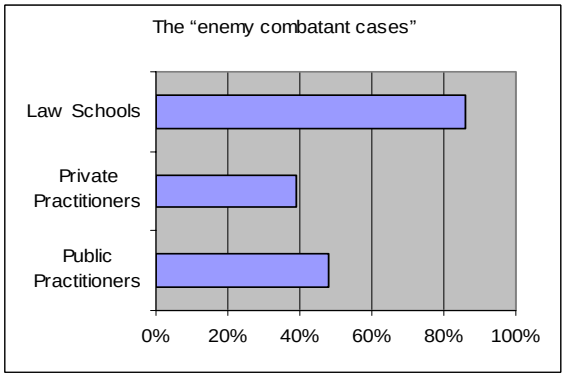
Counter Terrorism	Public Practitioners	15	71%
	Private Practitioners	14	61%
	Law Schools	26	90%



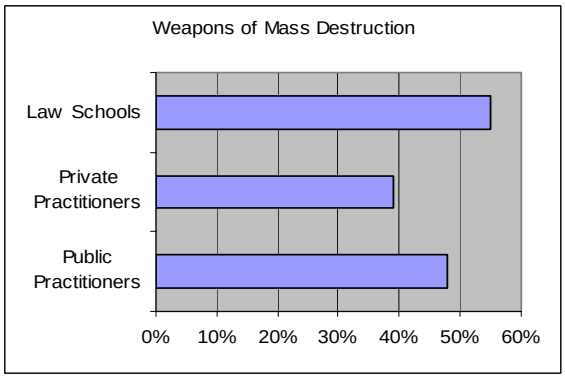
Consequence Management	Public Practitioners	17	81%
	Private Practitioners	13	57%
	Law Schools	12	41%



The "enemy combatant cases"	Public Practitioners	10	48%
	Private Practitioners	9	39%
	Law Schools	25	86%

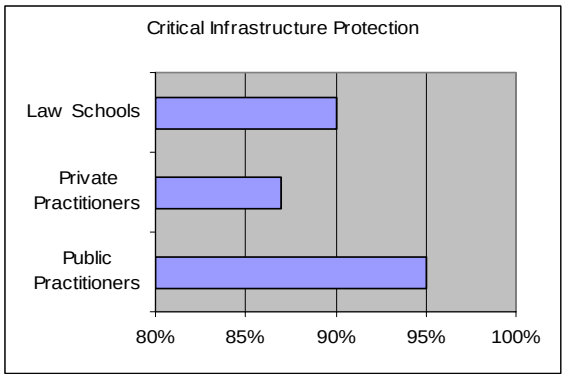


Weapons of Mass Destruction	Public Practitioners	10	48%
	Private Practitioners	9	39%
	Law Schools	16	55%

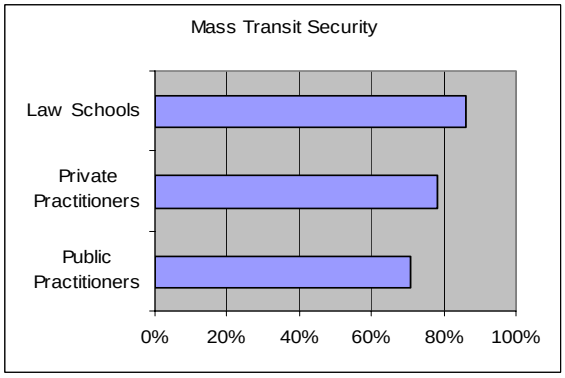


Critical Infrastructure	Public	20	95%

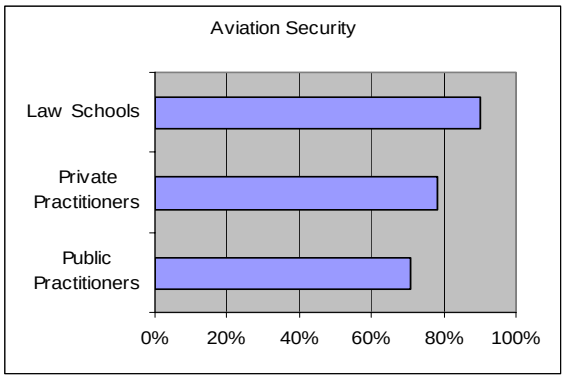
Protection	Public Practitioners	15	71%
	Private Practitioners	20	87%
	Law Schools	26	90%



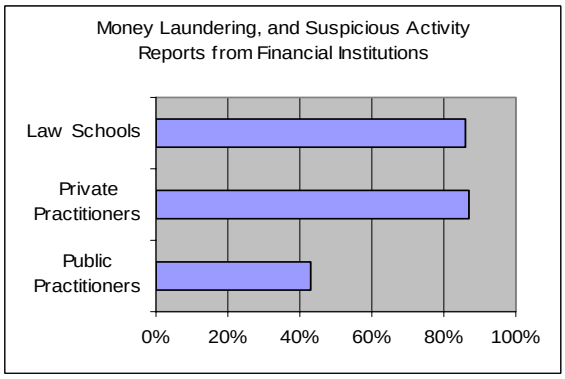
Mass Transit Security	Public Practitioners	15	71%
	Private Practitioners	18	78%
	Law Schools	25	86%



Aviation Security	Public Practitioners	15	71%
	Private Practitioners	18	78%
	Law Schools	26	90%

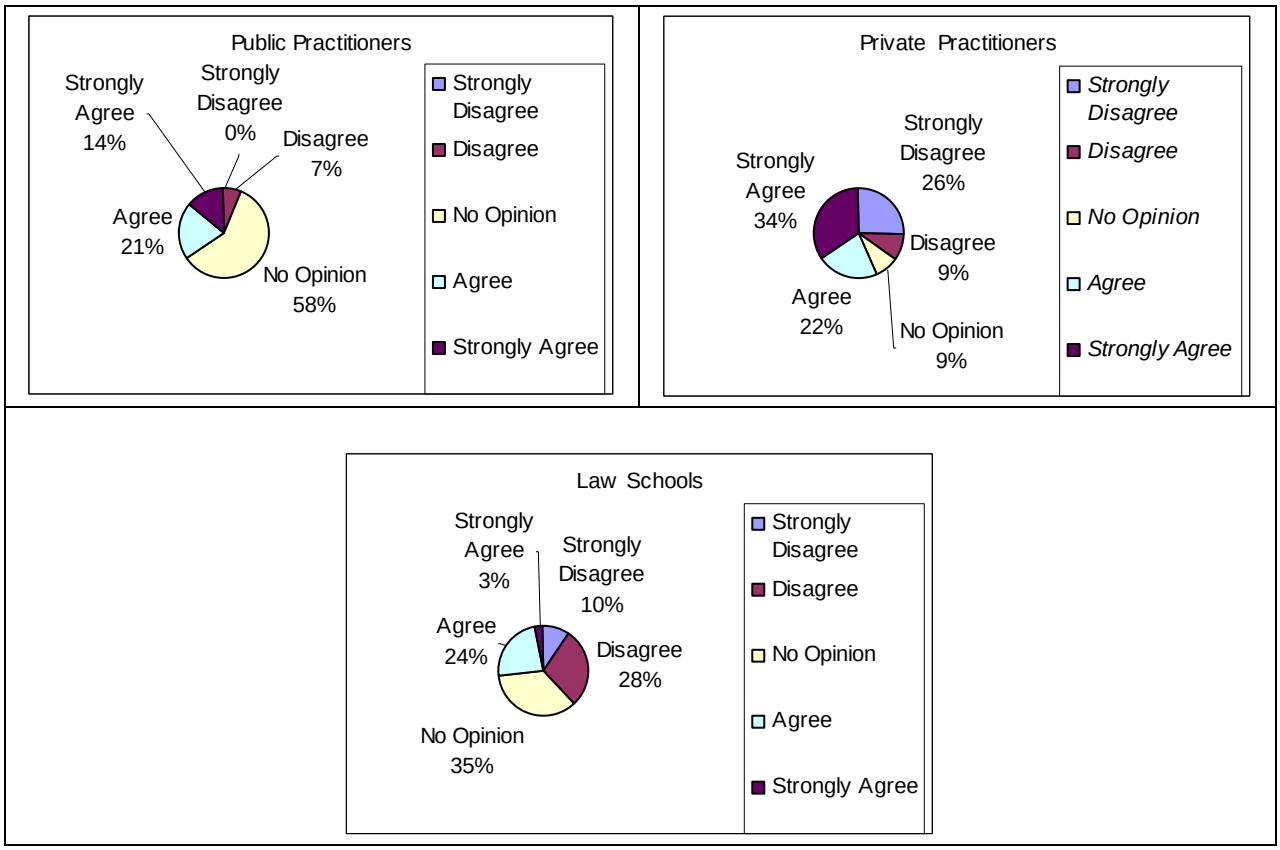


Money Laundering, and Suspicious Activity Reports from Financial Institutions	Public Practitioners	9	43%
	Private Practitioners	20	87%
	Law Schools	25	86%



7. (All) Are there any other functional areas, in your opinion, that you would include within the practice area of Homeland Security Law, not included in the previous question? If so, please list them here.

8. (All) Do you believe that Homeland Security Law should be a recognized Practice Area by the American Bar Association?

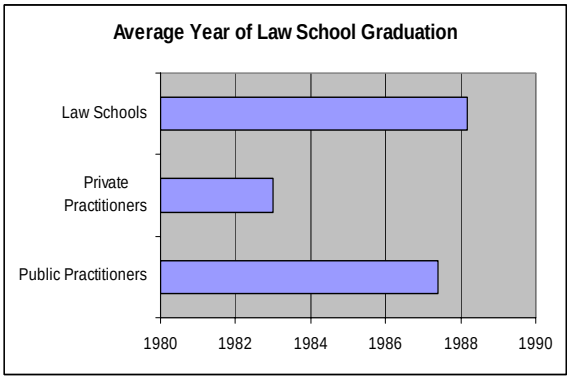


Strongly Disagree		
Public Practitioners	0	0%
Private Practitioners	6	26%
Law Schools	3	10%
Disagree		
Public Practitioners	1	5%
Private Practitioners	2	9%
Law Schools	9	30%
No Opinion		
Public Practitioners	11	52%
Private Practitioners	2	9%
Law Schools	10	33%

Agree		
Public Practitioners	6	29%
Private Practitioners	5	22%
Law Schools	7	23%
Strongly Agree		
Public Practitioners	3	14%
Private Practitioners	8	35%
Law Schools	1	3%
Totals		
Public Practitioners	14	100%
Private Practitioners	23	100%
Law Schools	30	100%

Demographic Questions

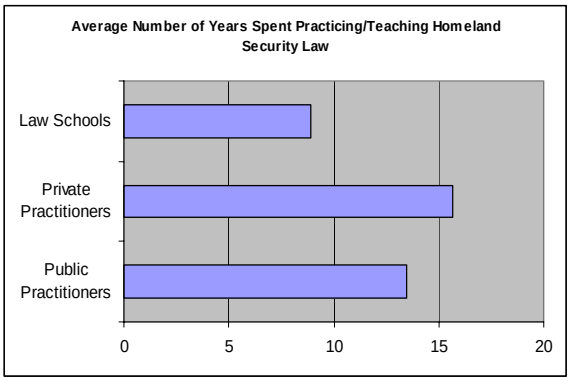
9. (All) Please indicate the year of your graduation from Law School?



Public Practitioners	Private Practitioners	Law Schools
1987	1983	1988

10.

- (Public Practitioners) Please indicate the number of years that you have been engaged in the practice of law in any of the areas listed in Question #1 above.
- (Private Practitioners) First, we ask that you identify the specialized areas of law your firm typically includes in the practices of Homeland law?
- (Law Schools) Please indicate the number of years that you have been engaged in the practice or teaching of law in any of the areas listed in Question #1 above.



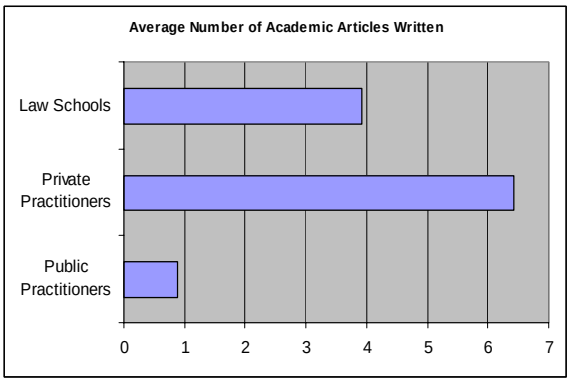
Public Practitioners	Private Practitioners	Law Schools
13	16	9

11. (All) Have you published any books, articles, or other learned works on Homeland Security?

Yes		
Public Practitioners	5	24%
Private Practitioners	13	57%
Law Schools	12	41%
No		
Public Practitioners	16	76%
Private Practitioners	10	43%
Law Schools	17	61%
Total		
Public Practitioners	21	100%

Private Practitioners	23	100%
Law Schools	29	100%

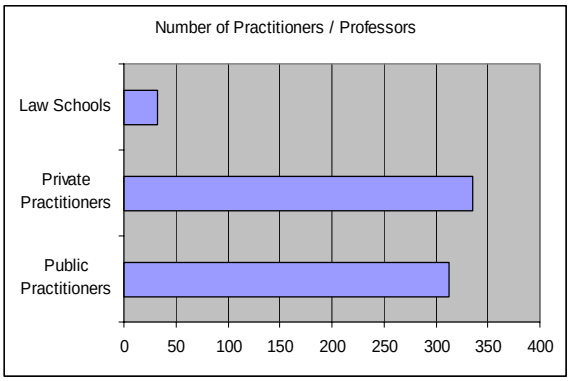
12. (All) If so, how many?



Public Practitioners	Private Practitioners	Law Schools
1	6	4

13.

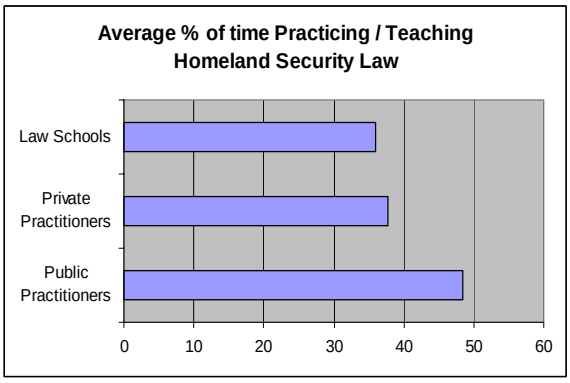
- (Public Practitioners) How many attorneys in your agency practice Homeland Security Law?
- (Private Practitioners) First, we ask that you identify the specialized areas of law your firm typically includes in the practices of Homeland law?
- (Law Schools) How many professor or instructors at your school teach Homeland Security Law?



Public Practitioners	21 respondents	313 HSL practitioners
Private Practitioners	23 respondents	335 HSL practitioners
Law Schools	25 respondents	32 professors

14.

- (Public Practitioners) On average, what percent of their practice is dedicated to homeland security law?
- (Private Practitioners) On average, what percent of their practice is dedicated to homeland security law?
- (Law Schools) On average, what percent of their teaching is dedicated to homeland security law?



Public Practitioners	Private Practitioners	Law Schools
48	38	36

15. (All) Please provide us with your email address, so that we may follow up with further questions, if needed. All information will remain confidential and will only be used for this survey research. We will also provide a link to the survey results, once completed.

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APPENDIX E. OTHER LAW SCHOOL RESOURCES

Many law schools had programs in National Security or Terrorism Law pre-existing the September 11, 2001, attacks. These schools may not offer a course expressly labeled as "Homeland Security Law" but the courses which they do offer overlap with "Homeland Security Law" as that term is recognized by our survey respondents.

Those schools and their programs include:

1)Center for National Security Law
University of Virginia School of Law
http://www.virginia.edu/cnsl/home.html

2)The Center on Law, Ethics, and National Security
Duke University School of Law
http://www.law.duke.edu/lens/

3) Center for Terrorism Law
St. Mary's University School of Law
http://www.stmarytx.edu/ctl/

4)Institute for National Security and Counterterrorism
Syracuse University School of Law
http://www.law.syr.edu/academics/centers/insct/

5)Stanford National Security and the Law Society,
Stanford Law School,Stanford University.
http://www.law.stanford.edu/experience/studentlife/organizations/nsls/

6)Jurist’s National Security Law; a page on the Jurist website devoted to legal issues developed by JURIST: The Legal Education Network™ Website directed by Professor Bernard J. Hibbitts, University of Pittsburgh School of Law.
http://jurist.law.pitt.edu/issues/issue_security.htm

7)University of the Pacific, McGeorge School of Law, publishes the Journal of National Security Law & Policy, http://www.mcgeorge.edu/jnslp/

APPENDIX F. SURVEY METHODOLOGY: SENSITIZING COMMUNICATIONS

The decision was made to send pre-survey emails to each potential respondent identified, reasoning that attorneys, with demands on their time, would particularly need to be sensitized to an email from an unknown sender requesting a block of their time[124]. The language for such a notice, sent in this case to the General Counsel of DHS:

> "Sir, please permit me to introduce myself. I serve as the Homeland Security Advisor for the state of Michigan, and, because of my previous 21 years in the MI Attorney General's Office, the last 6 years in the Executive Division, I am quite interested in the concept of a recognized practice area in Homeland Security law.
>
> I am currently a graduate student at the Naval Postgraduate School, Center for Homeland Defense and Security, working on my Master's thesis, sponsored by your agency. While the thesis is certainly an essential part of the coursework, it is intended to expand the body of knowledge associated with the emerging discipline, Homeland Security. In that thesis I hope to define the perceived scope of Homeland Security Law, by comparing the common perceptions of three groups: academicians who teach a course called "HS Law" or something related; those in large private firms that claim a firm practice area in HS Law or something related; and those in public practice who have been addressing legal questions in this area. I think you can easily see the need for and the importance of the contributions of

[124] It was estimated, through practice runs, that it would take approximately 15 minutes to complete the survey, and the potential respondents were so advised in the email. Most private law firms require their attorneys to bill their clients in units of time of 10 minutes or less. Since 15 minutes was a commercially significant block of time to a private practitioner, the need to sensitize the potential respondent to the time needed as early as possible was paramount. This time factor may be a contributing factor to the private law firms having the lowest rate of response.

public lawyers to this survey. While the survey responses will be kept confidential and anonymous, the survey recipients have to be known, as I am, in essence, seeking professional opinions.

I am writing to you as General Counsel to respectfully request a list of emails of public agency attorneys engaged in "Homeland Security Law" to whom I could forward my survey. I envision sending potential respondents an email message with an explanation of purpose very similar to this one, in the next 2 weeks, and advising that the survey will soon be online. I would then send a link to the survey to our members in a subsequent email, one week later. It would also be very helpful if you or your deputy could then respond with an email message encouraging their participation.

If you would like to discuss this further, or would like to review the survey questions prior to my sending out the survey, please advise. I hope you can encourage your group to participate and help in this effort to grow our area, academically and professionally.

Thank you, sir, for your time and anticipated assistance,
V/r,”

A similar sensitizing email was sent to all private attorneys who had listed “Homeland Security Law” as one of their areas of practice on the Westlaw attorney finder site:

Subject: Survey of Homeland Security Law - Private Law Firms

Please permit me to introduce myself. I serve as the Homeland Security Advisor for the state of Michigan, and I am currently a graduate student at the Naval Postgraduate School, Center for Homeland Defense and Security, working on my Master's thesis. I previously served in the MI

Attorney General's Office for 21 years, the last 6 years in the Executive Division as the Assistant Attorney General for Litigation.

While the thesis is certainly an essential part of the coursework, it is intended to expand the body of knowledge associated with the emerging discipline of Homeland Security. In the thesis I hope to define the perceived scope of Homeland Security Law, through the use of three similar surveys, by comparing the common perceptions of three groups: academicians who teach a course called "Homeland Security Law" or a related course; those in large private firms that offer a firm practice area in Homeland Security Law; and those in public practice who have been addressing legal questions in this area. Contingent on the survey results, of course, I hope to petition the ABA to recognize "Homeland Security Law" as a separate practice area.

I think you can easily see the need for, and the importance of, the contributions of private practitioners to this field and to this survey. While the survey responses will be kept confidential, the survey recipients have to be known, as I am, in essence, seeking professional opinions.

To create the pool of potential respondents for the private practitioner survey, I simply searched for all attorneys who designated Homeland Security as an area of practice in the Westlaw online directory. I am writing to you to respectfully request that you participate in the web based survey on the scope of Homeland Security Law. From test runs, it appears that it will not require more than 10-15 minutes to complete and return. I will be sending you, and all attorneys who were so listed on Westlaw, an email message with a link to the survey and an explanation of purpose very similar to this one, in the coming week. It is essential to the success of the survey and to assure valid and reliable participation by those in private practice, for you to participate.

If you would like to discuss this further, please advise. I hope I can count on you to participate and assist in this effort to determine the scope of "Homeland Security Law".

Thank you for your time and anticipated assistance,
V/r,

One week later, an email with the appropriate web link was sent:

Subject: Survey of Homeland Security Law - Private Law Firms

Previously, you were sent an email requesting your participation in a short survey of the scope of Homeland Security Law. This survey will serve as the basis for a Masters Degree thesis in Homeland Security at the Center for Homeland Defense and Security at the Naval Postgraduate School. The survey results and thesis will be shared with the Department of Homeland Security, which sponsors the program, and sent to the American Bar Association.

The survey consists of only 15 questions, and should not require more than 10-15 minutes to complete. Please take the time to participate, and to complete the survey.

Because the number of attorneys practicing Homeland Security Law is still limited, all participants are needed to assure a valid sampling.

I also respectfully request that you provide an email address so that I may follow up with interviews of selected individuals. The survey results will be made available at the time the thesis is approved. This survey received an exemption from the NPS Human Subjects Review Board because it only seeks the opinions of subject matter experts, and certain publicly available, but non-aggregated facts. Should you have any questions, please call me at 517.483.5833.

Please complete the survey by clicking on the link below:

http://www.zoomerang.com/survey.zgi?p=WEB225UNZXMBN9

Thank you,

The initial email sent to the law schools addressed a slightly different problem: not all Law Schools detail on their websites, either all course offerings or all professors for those course offerings. Every law school web

site did, however, provide am email address for the dean of the school. Therefore it was decided that the best approach would be to send an email to the Dean with an explanation of purpose of the survey, and notification that the survey link would be sent by email in one week. The email specifically requested the Dean to forward the survey link to any and all professors who taught a course called “Homeland Security Law” or a course in a related field. The lack of identification for the professor (unlike the practitioners) would be resolved by requesting an email address from the survey respondent. The notification email provided as follows:

> “Dean, please permit me to introduce myself. I serve as the Homeland Security Advisor for the state of Michigan, and I am currently a graduate student at the Naval Postgraduate School, Center for Homeland Defense and Security, working on my Master's thesis.
>
> While the thesis is certainly an essential part of the coursework, it is intended to expand the body of knowledge associated with the emerging discipline of Homeland Security. In that thesis I hope to define the perceived scope of Homeland Security Law, through the use of three similar surveys, by comparing the common perceptions of three groups: academicians who teach a course called "HS Law" or a related course; those in large private firms that claim a firm practice area in HS Law; and those in public practice who have been addressing legal questions in this area. I think you can easily see the need for and the importance of the contributions of academicians to this survey. While the survey responses will be kept confidential, the survey recipients have to be known, as I am , in essence, seeking professional opinions.
>
> I am writing to you as Dean of the school to respectfully request that you forward my survey

> to any and all professors at your school that offer a course in "Homeland Security Law" or any related course which covers Homeland Security Law. **I will be sending you, and the Deans of all other law schools in the U.S., an email message with a link to the survey, and an explanation of purpose very similar to this one, in the next week.** It is essential to the success of the survey, and to assure valid and reliable participation by the Academy, for you to forward this email and my subsequent email to the appropriate professors, and to, please, encourage their participation.
>
> If you would like to discuss this further, or would like to review the survey questions prior to my sending out the survey, please advise. I hope you can encourage your school to participate and assist in this effort to determine the scope of "Homeland Security Law".
>
> Thank you for your time and anticipated assistance,
> V/r,

The email pre notice was sent out on 9 November at 600pm EST. Only eleven email addresses were rejected as incorrect or otherwise undeliverable. The pre notice also resulted in sixteen responses from Deans or Professors acknowledging receipt and willingness to participate, by 12 November. On 13 November, the first business day after the pre notice was mailed[125], another set of responses of willingness to participate were received. For each such response, a short email thanking them and advising that the survey would be forthcoming within the week was sent in return.

[125] Assuming that Friday 10 November was a holiday.

INITIAL DISTRIBUTION LIST

1. Defense Technical Information Center
   Ft. Belvoir, VA

2. Dudley Knox Library
   Naval Postgraduate School
   Monterey, CA

3. Professor Christopher Bellavita
   Naval Postgraduate School
   Monterey, CA

4. Professor Michael Lawrence
   Michigan State University School of Law
   East Lansing, MI

5. Dr. Phil Schertzing
   Global Community Security Institute
   Michigan State University
   East Lansing, MI

6. Professor Amos N. Guiora
   Case Western Reserve University School of Law
   Cleveland, Ohio

7. Dr. Michael Greenberger
   University of Maryland – Baltimore
   Baltimore, MD

8. Mr. Richard Rector
   DLA Piper
   Washington, DC

9. Mr. Joseph Lipchitz
   Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
   Boston, MA

10. Mr. Robert Stephan
Assistant Secretary for Infrastructure Protection
Department of Homeland Security
Washington, D.C.