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# The Application Of The Administrative Procedure Act To Private--public Sector Partnerships In Homeland Security

Michael James Weiss

## STUDENT NOTE

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*Michael James Weiss* *

ABSTRACT

*Increasingly, the U.S. federal government is turning to the use of private-public sector partnerships ("PPP"), especially in the area of homeland security. Although these partnerships have numerous benefits, there are several problems that arise in their practice, particularly when they are used in homeland security.*

*This note will outline and detail these problems, including deputization, excessive congressional oversight, and management and accountability. In addition, this note will present solutions to resolving the issue of centralization. In other words, this note will advocate for a single agency that implements, manages, and creates rules for all PPPs within the Department of Homeland Security. Finally, this note will argue that not only is there a need for this one managing agency, but that the agency should be governed under the principals of the Administrative Procedure Act ("APA").*

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## I. INTRODUCTION

### A. *What is a Private-Public Sector Partnership?*

A private-public sector partnership ("PPP") is "a contractual agreement between a public agency (federal, state, or local) and a private sector entity."[1] In such partnerships, the assets of each party, both public and private are maximized for the public good.[2] The maximization occurs because these partnerships take the best features and attributes from both the private and public sectors in order to solve a single goal, or goals, in the most efficient manner.[3]

What separates PPPs from general government contracting with the private sector is that they provide more oversight of government officials.[4] In a PPP, there are better public managers that are more "attuned to communication with accountability oriented . . . metrics, goals, and expectations."[5] These officials are more "attuned" with communication accountability "language" which calls for specific performance of goals, expectations, and metrics.[6] In other words, the government partners in a PPP are more involved in the process of the planning and implementation of

[1] THE NATIONAL COUNCIL FOR PUBLIC-PRIVATE PARTNERSHIPS, http://www.ncppp.org/ppp-basics/7-keys/ (last visited Mar. 5, 2013) [hereinafter NCPPP]; *see also* Thomas A. Cellucci, *Innovative Public Private Partnerships: A Pathway to Effectively Solving Problems*, U.S. DEPARTMENT OF HOMELAND SECURITY, SCIENCE AND TECHNOLOGY DIRECTORATE, 4 (2011), *available at* http://www.dhs.gov/xlibrary/assets/st_innovative_public_private_partnerships_0710_version_2.pdf.

[2] *Id.*

[3] *Id.*

[4] PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 172 (2007).

[5] *Id.*

[6] Russell D. Howard, *Homeland Security and the New Terrorism*, HOMELAND SECURITY AND TERRORISM: READINGS AND INTERPRETATIONS 172 (2006).

programs.[7] Further, the relationship between the public and private partners is cooperative, where the government is involved in the process[8], rather than in a typical contracting relationship where the private company is subordinate to the public, government partners.[9]

The U.S. federal government uses these "agreements" and partnerships to "gain" advantages prevalent in the private sector, without all of the drawbacks.[10] These advantages could include specialized expertise or skill sets[11], better productivity[12], and more resources.[13] Neither the private nor the public sectors have all the answers, but by combining the two sectors together, more information, and funding, is available.[14]

B. *How Are Private-Public Sector Partnerships Used?*

The use of PPPs throughout the federal government is extensive. PPPs range from former Secretary of State Colin Powell's Global Development Alliance with private charities[15], to the cleanup of the Rocky Flats Nuclear Weapons Production Plant with the help of Kaiser-Hill, a private company.[16] PPPs are used not only used in time of limited economic resources[17], but when either a private or a public entity wants access to the other's resources. These resources are not limited to capital[18], but can include expertise, information, or even greater efficiency.[19] Hence, PPPs are a win-win for all parties involved.

i. Private-Public Sector Partnerships in Homeland Security

It is evident that PPPs are used throughout the federal government and public sector in every imaginable way. This note will focus specifically on the PPPs that exist and should exist in the Department of Homeland Security ("DHS"). The DHS is specifically suited to the use of PPPs because homeland security is always evolving, shifting, and changing. Homeland security encompasses the prevention of cyber-attacks, the growth of international

[7] *Id.*
[8] *Id.*
[9] VERKUIL, *supra* note 4.
[10] JOHN D. DONAHUE & RICHARD J. ZECKHAUSER, COLLABORATIVE GOVERNANCE: PRIVATE ROLES FOR PUBLIC GOALS IN TURBULENT TIMES 27-32 (2011).
[11] *Id.* at 35.
[12] *Id.*
[13] *Id.* at 36.
[14] *Id.* at 35-36.
[15] *Id.* at 122-24 .
[16] *Id*. at 66-67.
[17] NCPPP, *supra* note 1.
[18] *Id.*
[19] *Id.*

terrorism, and even natural disasters, and this wide-ranging subject matter lends itself perfectly to alliances between the government and the private sector.[20]

While the areas that homeland security encompasses are growing, DHS's budget is currently $59.9 billion for fiscal year 2014.[21] This may seem like an immense sum of money, but the reality is that this money must be stretched to cover some 240,000 employees and agents[22], and the protective services for U.S. citizens and residents (and their property) in all 50 states and over 75 countries around the globe.[23] This budget provides very limited resources for such a wide range of responsibilities. One way to deal with the conflict between a lack of resources and the ever-growing and ever-changing list of threats[24] that face DHS, is to turn to private-public sector partnerships.[25] The use of private-public sector partnerships may be the only solution to allow DHS cover the wide breadth of its duties and goals within its limited budget.[26]

### *C. Diagnosing the Problem*

#### i. Deputization

Despite the numerous advantages of PPPs, they are not flawless. The first problem is deputization. Deputization is a government process in

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[20] Quadrennial Homeland Security Review Report: A Strategic Report for a Secure Homeland, U.S. DEP'T OF HOMELAND SECURITY (Feb. 2010), *available at* http://www.dhs.gov/xlibrary/assets/qhsr_report.pdf.

[21] U.S. DEP'T OF HOMELAND SECURITY, BUDGET-IN-BRIEF: FISCAL YEAR 2014, *available at* http://www.dhs.gov/sites/default/files/publications/MGMT/FY%202014%20BIB%20-%20FINAL%20-508%20Formatted%20%284%29.pdf.

[22] Rick Nelson and Rob Wise, *Homeland Security at a Crossroads: Evolving DHS to Meet the Next Generation of Threats,* CENTER FOR STRATEGIC AND INT'L STUDIES (Feb. 1, 2013), http://csis.org/publication/homeland-security-crossroads-evolving-dhs-meet-next-generation-threats.

[23] *Id.*

[24] National Security Preparedness Group, *Tenth Anniversary Report Card: The Status of the 9/11 Commission Recommendations*, THE BIPARTISAN POLICY CENTER, 16-17 (Sept. 2011), *available at* http://bipartisanpolicy.org/library/report/tenth-anniversary-report-card-status-911-commission-recommendations.

[25] James Jay Carafano, Jena Baker McNeill, and Paul Rosenzweig, *Stopping the Chaos: A Proposal for Reorganization of Congressional Oversight of the Department of Homeland Security*, HERITAGE FOUNDATION ISSUE BRIEF No. 3046 (Nov. 4, 2010), *available at* http://www.heritage.org/research/reports/2010/11/stopping-the-chaos-a-proposal-for-reorganization-of-congressional-oversight-of-dhs.

[26] Thomas A. Cellucci, *Leveraging Public-Private Partnership Models and the Free Market System to Increase the Speed-of-Execution of High-Impact Solutions throughout State and Local Governments*, U.S. DEP'T OF HOMELAND SECURITY, 8 (Aug. 2011), *available at* http://www.dhs.gov/xlibrary/assets/st-leveraging-partnerships-for-state-and-local-governments-August2011.pdf.

homeland security where an individual or class of individuals assumes some or all of the official powers of a government agent.[27] In other words, a deputized agent acts in place of an actual government agent in the pursuit of government goals.[28] At its core, the idea of deputization is an excellent solution to a universe of limited resources, personal and material.[29] Deputization also allows government agents into places that they legally could not normally enter, such as private homes or offices.[30] However there is a major flaw in deputization, insofar as there is no oversight and accountability for the newly minted government agents.

ii. Excessive Congressional Oversight

The second major problem with PPPs is excessive congressional oversight.[31] Though some oversight is required legally and constitutionally mandated[32], as DHS is an executive department[33], oversight can still prove to be excessive. The problem of overreaching oversight is rooted in the multitude of committees that oversee the Department of Homeland Security.[34] The requirements that these committees place on DHS in terms of resources, time, personnel, and money spent on preparing for hearings and investigations is often excessive.[35] These activities are not only redundant, but they distract officials and staff from the true purpose of the DHS.[36]

iii. Management and Accountability

The final issue that will be discussed in this note is the improper management and accountability of PPPs in homeland security.[37] The current way PPPs are run in the Department of Homeland Security is scattered and disorganized.[38] There is no clear leadership or central authority to make these

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[27] Jon D. Michaels, *Deputizing Homeland Security*, 88 TEX. L. REV. 1435, 1442. (2010).
[28] *Id.*
[29] *Id*. at 1438.
[30] *Id.*
[31] Carafano, *supra* note 25.
[32] U.S. CONST. amend. I, § 8.
[33] 50 U.S.C. § 1803.
[34] Michael L. Koempel, *Homeland Security: Compendium of Recommendations Relevant to House Committee Organization and Analysis of Considerations for the House, and 109th and 110th Congresses Epilogue*, CONG. RESEARCH SERV. (2007), *available at* http://www.fas.org/sgp/crs/homesec/RL32711.pdf.
[35] National Security Preparedness Group, *supra* note 24.
[36] *Id.*
[37] David W. Gaffey, *Outsourcing Infrastructure: Expanding the Use of Public-Private Partnerships in the United States*, 39 PUB. CONT. L.J. 351, 369 (2010).
[38] U.S. DEP'T OF HOMELAND SECURITY, DEPARTMENT-WIDE RESOURCES (last visited Mar. 5, 2013), http://www.dhs.gov/sites/default/files/publications/Policy-PSO/pso-department-wide-

PPPs as efficient and effective as they can and should be.

D. *Solutions*

The solution to the problems presented in this note is to streamline and centralize the process of governing PPPs in DHS by bringing the myriad of programs and projects that utilize PPPs under one roof, governed by one central sub-agency of DHS. This program should be modeled after similar agencies already implemented in the United Kingdom and Canada, called Partnerships UK and Partnerships BC, respectively.[39] The details of these agencies, and how they provide a model for the governance of PPPs, will be discussed in Part II.

One element of including all PPPs under one roof is giving them a uniform code of regulation. This note proposes that the Administrative Procedure Act ("APA") act as the uniform code of regulation under a new partnership agency. The APA is legislation that allows Congress to endow government agencies with the ability to make rules that carry the force of law.[40] Applying the APA will allow PPPs to be uniform in their governance, oversight, accountability, and transparency. The APA will take a collection of randomly charted, organized, and relatively unaccountable government programs, and will make them streamlined, able to be supervised properly, and efficient by governing under a uniform code of rules and laws.

Part II of this note will describe the previously mentioned problems of deputization, excessive congressional oversight, and management and oversight. Part III will discuss solutions to these issues. Solutions will include the application of the Administrative Procedure Act and the use of the Partnerships UK and BC as models for an ideal agency. Part IV will also discuss the feasibility of these solutions and hurdles to implementation.

## II. ISSUES IN APA IMPLEMENTATION

A. *Deputization*

The first issue in APA implementation over DHS private-public partnerships is "deputization." Deputies and deputized agents are non-governmental actors that "exerci[se] some sovereign assistance, authority, or discretion far beyond what private individuals and organizations ordinarily are

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resources.pdf.

[39] PARTNERSHIPS UK, http://www.partnershipsuk.org.uk (last visited Apr. 7, 2013); *see also* PARTNERSHIPS BC, http://www.partnershipsbc.ca/index.php (last visited Apr. 7, 2013).

[40] *Oversight and Insight: Legislative Review of Agencies and Lessons from the States,* 121 HARV. L. REV. 613, 614-15 (2007).

permitted or expected to do."[41] Deputized agents have permeated the U.S. government—"today, seemingly no transaction, whether social, political, or economic, is comfortably beyond eye or earshot of the newly deputized national security apparatchiks."[42] These deputies range from the average citizen looking out for suspicious activity on his or her daily commute[43], to companies turning over their consumers' data and records to the federal government.[44] These arrangements are, in effect, PPPs as they leverage private and public resources together in the pursuit of the common goal of security. Deputized agents also appear in PPPs as agents who are deputized by the government to operate and accomplish the mission that the PPPs were set up for.

Activities of deputized agents range from turning over "reams of information,"[45] to the use of employees to "detect and report suspicious activities on the ground."[46] Since the September 11th terrorist attacks, even private citizens have become deputized agents as law enforcement, security, and intelligence agencies have called upon them to prevent future harm.[47]

There are numerous advantages to the use of deputies. The first advantage is that they are "force multipliers" in the efforts of homeland security.[48] The use of private actors allows homeland security agencies to have more eyes and ears on the ground, and thus gather more information than they normally could. Furthermore, they are advantageous and cost effective because average citizens tend to be more observant of their surroundings.[49] Programs that utilize deputized agents include the late Highway Watch initiative, which enlisted the use of truck drivers as a set of eyes on inter- and intrastate roads[50], to look for suspicious activities and crimes, such as terrorism, on national roadways.

Using normal citizens as deputized agents applies to PPPs because many

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[41] Michaels*, supra* note 27 at 1442.
[42] *Id.* at 1435.
[43] U.S. DEP'T OF HOMELAND SECURITY: IF YOU SEE SOMETHING, SAY SOMETHING PUBLIC AWARENESS CAMPAIGN (last visited June 25, 2013), http://www.dhs.gov/if-you-see-something-say-something-campaign.
[44] Glenn Greenwald and Ewen MacAskill,*NSA Prism Program Taps in to User Data of Apple, Google and Others*, THE GUARDIAN, June 6, 2013, http://www.guardian.co.uk/world/2013/jun/06/us-tech-giants-nsa-data.
[45] Michaels*, supra* note 27 at 1435.
[46] Id. at 1436.
[47] *Id.* at 1435.
[48] *Id.* at 1438.
[49] *Id.*
[50] *Highway Watch Going Out of Business*, TRUCKERTOTRUCKER.COM (Apr. 7, 2013, 3:37 PM), http://www.truckertotrucker.com/trucker/1/2008/05/Highway-Watch-Going-Out-of-Business.cfm.

of these partnerships are based on information-sharing arrangements between governments and private entities. The more casual access to private citizens, their property, and their information that comes from deputized agents can hugely benefit PPPs.[51] One such use of deputized citizenry in PPPs includes the famed "If You See Something, Say Something" campaign[52], which asks private citizens to report information of any suspicious activity to local law enforcement agencies.[53] Other programs enlist the use of private police and security services as a form of PPP. These programs are actually so prevalent that the number of private security officers outnumbers the amount of public police officers in the United States by a ratio three to one.[54]

Additionally, on a national level, DHS works with private companies, like the NASDAQ, to address cyber threats that may be harmful to these actors—this work includes the reciprocal sharing of threats that private actors discover.[55] Therefore, there is a great deal of private and protected information being spread to government actors in the pursuit of homeland security. This shared information may ultimately be for the benefit of private citizens in that it keeps them safe, however, there are still major privacy concerns over this shared information based on the lack of regulation over how this information is collected and then shared.[56]

An example of a more direct form of deputization that threatens the privacy of private individuals is the National Security Agency's PRISM program[57], which is a prominent PPP for homeland security that has recently received national media attention. This program collects data from electronic communication companies like Facebook and Google, as well as national cell phone providers for the purpose of national security and protection of U.S.

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[51] Paul Rosenzweig, *Public-Private Partnerships for Cybersecurity Information Sharing*, LAWFARE, (Sept. 2, 2012, 3:27 PM), http://www.lawfareblog.com/2012/09/public-private-partnerships-for-cybersecurity-information-sharing/.

[52] *The Department of Homeland Security at 10 Years: A Progress Report on Management: Hearing on the Challenges that Confront the Department, the Department's Success in Implementing the Recommendations of the Government Accountability Office's Biennial High Risk Series Update Before S. Comm. on Homeland Security and Governmental Affairs,* 112th Cong. (2013) (statement of Jane Holl Lute, Deputy Sec. of Dep't of Homeland Security), *available at* http://www.dhs.gov/news/2013/03/21/written-testimony-dhs-deputy-secretary-jane-holl-lute-senate-committee-homeland.

[53] *Id.*

[54] Kai Jaeger and Edward P. Stringham, *Private Policing Options for the Poor*, NATIONAL CENTER FOR POLICY ANALYSIS (Dec. 15, 2011), http://www.ncpa.org/pub/ba763.

[55] Lute, *supra* note 52.

[56] *Id.*

[57] Greenwald, *supra* note 44.

citizens.[58]

This program can be considered a PPP because it is used for the shared interest in the pursuit of not only national, but also cyber security. The program blurs the constitutional protections of internet users because, through a private partner (Google, etc.), it allows the U.S. government access to private data regarding internet users, like search histories and online conversations without warrants and without permission from the user. This program exemplifies the fears that exist surrounding PPPs and the use of deputized agents when the U.S. government uses a private partner to circumvent various protections that surround citizens' privacy. In other words, it is not unlike a police officer having a civilian go into a private home of another in order to take papers that belong to another private citizen.

PRISM highlights not only the potential problems with PPPs, but also showcases the difficulties with the use of deputized agents. The problem is that these deputized actors enter legal spaces and gaps that are not normally assessable to conventional government officials and agents.[59] This includes private spaces or homes that are protected by the Fourth Amendment of the U.S. Constitution,[60] a challenge to which is illustrated by *United States v. Katz*,[61] and other cases.

On the other hand, these deputized actors also have access to powers that normally are not granted to ordinary citizens, such as the power to report on their fellow citizens with similar creditability as that of a law enforcement officer.[62] In other words, private citizens assume the creditability in investigating and reporting incidents that would normally be bestowed upon law enforcement officers. This is a problem because it spreads the powers of law enforcement to a body of persons that lacks the legal authority—let alone the proper training or management—to implement DHS programs in a constitutionally acceptable manner.

Finally, there are spaces and situations in between private and public realms that also pose legal questions. These questions include the following: who has a duty to report suspicious conduct; who is allowed to report misconduct; and, when is a person considered a government actor. All of these ambiguities place the deputies in a state of "limbo."[63] These actors are found in "empowering, frustrating, and dangerous" states, "sometimes all at

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[58] *Id.*

[59] Michaels*, supra* note 27 at 1437-39.

[60] U.S. CONST. amend. IV, § 1.

[61] United States v. Katz, 389 U.S. 347 (1967) (holding that the Fourth Amendment protects persons and not places from unreasonable intrusion).

[62] Michaels*, supra* note 27 at 1452-53.

[63] *Id.* at 1453.

once."[64] In other words, many of these deputies do not know if they are government agents or not, let alone if there are regulated mechanisms to address abuses that they may carry out.[65] The deputized actors who participate in PPPs need better governance to prevent constitutional,[66] and other abuses. [67]

B. *Excessive Congressional Oversight*

The Homeland Security Act of 2002 ("HSA") provides that the U.S. House of Representatives and Senate have legislative oversight over the Department of Homeland Security.[68] While the oversight it is constitutionally mandated and necessary to maintain checks and balances over DHS[69], the problem is that the oversight has become too burdensome.[70]

Specifically, the U.S. House of Representatives and Senate have 108 different committees and subcommittees that have some oversight role over the Department of Homeland Security.[71] These committees range from the relevant House Homeland Security Committee to the less obviously relevant Select Committee on Aging.[72] In one year, some 3,900 briefings were brought to Congress, wherein it asked DHS to testify before various committees 285 times.[73] These oversight measures are estimated to have cost DHS thousands of man-hours, not to mentioned "tens of millions of dollars."[74] Although this oversight is necessary for such a large and expansive department like DHS, and is constitutionally mandated, the current system is excessive.[75]

According to Paul Schneider, the former Deputy Secretary of Homeland Security, within his first ten months on the job at DHS he was called to testify on Capitol Hill nine times.[76] Schneider explains that he spent many hours

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[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] Homeland Security Act of 2002, P.L. 107-296, 107th Cong. (2002).
[69] U.S. CONST. amend. I, § 8.
[70] Carafano, *supra* note 25.
[71] *Id.*
[72] Koempel, *supra* note 34.
[73] National Security Preparedness Group, *supra* note 24.
[74] Jessica Zuckerman, *Politics Over Security: Homeland Security Congressional Oversight In Dire Need of Reform*, THE HERITAGE FOUNDATION (Sept. 10, 2012), http://www.heritage.org/research/reports/2012/09/homeland-security-congressional-oversight-in-dire-need-of-reform#_edn3.
[75] U.S. DEP'T OF HOMELAND SECURITY, ORGANIZATION CHART (last visited Mar. 5, 2013), http://www.dhs.gov/xlibrary/assets/dhs-orgchart.pdf.
[76] Katherine McIntire Peters, *Congressional Oversight in Homeland Security*, THE GOVERNMENT EXECUTIVE (July 30, 2008), http://www.govexec.com/federal-

preparing for these hearings, and then was unable to spend time working on actual homeland security issues.[77] Further, because of the diversity of oversight committees, many of these hearings and testimonies can be extremely redundant and thus waste even more time.[78] According to one news report, DHS spent 66 work years responding to questions from Congress in 2009 alone.[79] Additionally, that same year DHS "answered 11,680 letters, gave 2,058 briefings and gave 2,058 briefings and sent 232 witnesses to 166 hearings."[80] This all cost American taxpayers some $10 million in one year.[81]

This issue is so serious that, in September 2007, Homeland Security Secretary Chertoff wrote a letter to then-Ranking Member of the House Homeland Security Committee.[82] This letter detailed "literally thousands of congressional requests – from many different committees and subcommittees for hearings, briefings, reports and other information – [that] consume a very significant amount of DHS senior leadership time, which must be balanced with meeting operational mission demands."[83]

In comparison, a 2004 whitepaper jointly authored by the Center for Strategic and International Studies and Business Executives for National Security showed that the Department of Defense, a significantly larger executive department than the Department of Homeland Security, reports to only 36 congressional committees or subcommittees, versus the 108 that manage the Department of Homeland Security.[84]

Homeland security is being muddled by this redundant accountability.[85] The multitude of congressional committees also preserves the fragmentation that the Department of Homeland Security was supposed to dissolve when the 22 agencies were brought together under the Homeland Security Act of 2002

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news/2008/07/congressional-oversight-of-homeland-security-comes-under-fire-again/27357/.

[77] National Security Preparedness Group, *supra* note 24.

[78] *Id.*

[79] *Homeland Security Department Overwhelmed by Congressional Oversight,* FOX NEWS, May 17, 2011, http://www.foxnews.com/politics/2011/05/17/homeland-security-department-overwhelmed-congressional-oversight/.

[80] *Id.*

[81] *Id.*

[82] National Security Preparedness Group, *supra* note 24.

[83] *Id.*

[84] A Whitepaper of the CSIS-BENS Task Force on Congressional Oversight of the Dep't of Homeland Security [hereinafter CSIS-BENS Whitepaper], *Untangling the Web: Congressional Oversight and the Department of Homeland Security*, CENTER FOR STRATEGIC AND INT'L STUDIES (Dec. 10, 2004), *available at* http://csis.org/files/media/csis/events/041210_dhs_tf_whitepaper.pdf.

[85] National Public Radio Staff [hereinafter NPR Staff], *Who Does Not Oversee Homeland Security?*, NAT'L PUB. RADIO, Jul. 10, 2010, http://www.npr.org/templates/story/story.php?storyId=128642876.

("HSA").[86] In other words, the multitudes of committees are counterintuitive to the purpose of the HSA.[87] This is because the HSA was drafted for the purpose of centralization, whereas the myriad of congressional committees is counterintuitive to this very idea.

There are many reasons for these legislative impediments, ranging from the fact that members of Congress like having the credentials of sitting on a Homeland Security Committee, to inter-committee "turf wars."[88] The problem is so severe that former Chairman of the Senate Homeland Security and Government Affairs Committee, Joe Lieberman, believed that reform could not come from the legislative branch because of how the Department of Homeland Security was formed.[89] DHS was not built from the ground up; rather it was built out of existing organs and offices.[90] These preexisting agencies and offices already had congressional committees overseeing them.[91] When DHS was created by merging preexisting agencies, members of Congress were hesitant to give up their powerful committee assignments.[92] Because Congress is hesitant to acquiesce its power over those agencies, a solution to the problem of over-governance of the DHS must come from the executive branch.[93]

C. *Management and Accountability*

Another major issue facing the future of private-public sector partnerships in homeland security relates to the command and control mechanisms for PPPs that will allow them to be properly managed and held accountable.[94] There seems to be a dichotomy between the governance style as it moves away from a "paramilitary-style, top-down structure,"[95] to network

[86] The Department of Homeland Security was formed by Homeland Security Act of 2002 in response to the September 11, 2001 attacks. From its inception it was designated as an executive department designated to prevent, minimize, and handle manmade and natural disasters. The 2002 legislation also brought 22 different agencies under the same department from a variety of several executive departments. *See* U.S. DEP'T OF HOMELAND SECURITY, *Creation of the Department of Homeland* Security, *available at* http://www.dhs.gov/creation-department-homeland-security.

[87] *Id.*

[88] NPR Staff, *supra* note 85.

[89] *Id.*

[90] U.S. DEP'T OF HOMELAND SECURITY, *supra* note 86.

[91] NPR Staff, *supra* note 85.

[92] *Id.*

[93] *Id.*

[94] Nathan E. Busch and Austen D. Givens, *Public-Private Partnerships in Homeland Security: Opportunities and Challenges*, 8 HOMELAND SECURITY AFFAIRS 10 (2012).

[95] *Id*.

governance.[96]

"Network governance" is the management of agencies and programs in a "flatter," less hierarchical form, which rejects the notion of one organ, person, or group having power over another.[97] Everyone is an equal player in network governance.[98] At the same time, as identified by Senator Joseph Lieberman, there needs to be someone in charge when dealing with both private and public actors.[99] Some authorities and policy makers advocate for the federal government to always be the ultimate authority in homeland security partnerships and contracting.[100] There seems to be an ongoing debate between legislators, government managers, and the private sector with no clear direction.[101] Hence, a major component to the private-public overlay is control.[102]

The final issue deals with accountability,[103] specifically who is reporting to whom, and who is able to testify on behalf of a specific PPP to Congress. Currently, these partnerships (especially in DHS) are scattered and governed by assorted councils, offices, and agencies.[104] The current structure makes this not just an issue of decentralized management, but also accountability that must be remedied.

## III. SOLUTIONS

### A. *Overview*

A solution to these problems is centralization. DHS should have a single agency that implements, manages, and creates rules for all PPPs within the department. Developing such an umbrella organization promises to be a challenge in this particular case because there are both private and public stakeholders who desire an equal place at the governing table. One way to ensure the equality of both the public and private stakeholders is to use a

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[96] *Id.*

[97] THE PROGRAM ON NETWORKED GOVERNANCE, http://www.hks.harvard.edu/netgov/html/index.htm (last visited Apr. 7, 2013).

[98] *Id.*

[99] Gregg Carlstorm, *DHS budget Begins 'Turnaround' Away From Contracting*, FEDERAL TIMES (Feb. 24, 2010, 1:33 PM), http://www.federaltimes.com/article/20100224/CONGRESS03/2240304/1055/AGENCY.

[100] *Id.*

[101] Stephen Losey, *TSA Halts Expansion of Privatized Airport Screening*, FEDERAL TIMES (Jan. 31, 2011, 6:00 PM), http://www.federaltimes.com/article/20110131/DEPARTMENTS03/101310303/1050/PERSONNEL04; *see also* Busch, *supra* note 94.

[102] Busch, *supra* note 94.

[103] *Id.*

[104] U.S. DEP'T OF HOMELAND SECURITY, DEPARTMENT-WIDE RESOURCES, *supra* note 38.

governance model similar to that of the late Partnerships UK and Partnerships BC, in the United Kingdom and British Columbia, Canada, respectively. Under these models, these agencies are set up to govern and oversee all PPPs in their specific area of governance.[105] In the words of the Partnerships BC website, it carries out the "planning, delivery and oversight of . . . projects."[106] It goes on to state that Partnerships BC uses relationships with both private and public partners in order to complete its mission.[107] This model includes an executive board[108], which has members from the relevant government body.[109] Additionally, there would be an advisory council that ensures that issues are discussed by the executive board.[110] In other words, the advisory council makes sure the office keeps to its mission.[111] Finally, like a private sector actor, the office issues annual reports and has corporate responsibility policies.[112]

This system is admirable and provides a great template for PPP governance in DHS. However, like all solutions, this one is not perfect. There are a number of issues that arise with the implementation of such a system, although there are ways to mitigate those problems.

A proposed framework would be as follows for the new umbrella agency. First, like Partnerships UK, it would have two boards of oversight: one advisory, and one of directors.[113] Both boards would include public and private sector representatives as members, to ensure that all stakeholders have input. Additionally, this board of directors would have oversight over a management team, which would consist of professional government bureaucrats. They would then report to and the CEO would be accountable to Congress, as well as the board of directors. Thus, DHS would adopt the accountability structure, at least partially, from Partnerships BC.[114] Finally, in light of the need for a unified liaison in times of emergency, the CEO will function as unified decision-maker just like any director or chief administrator in the federal government.[115]

These boards, as illuminated in the charters of Partnerships UK and

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[105] PARTNERSHIPS BC, http://www.partnershipsbc.ca/index.php (last visited Apr. 7, 2013).
[106] *Id.*
[107] *Id.*
[108] In the case of an American model, the government body would be the Department of Homeland Security.
[109] PARTNERSHIPS UK, GOVERNANCE AND BOARD, http://www.partnershipsuk.org.uk/Governance-and-Board.aspx (last visited Apr. 7, 2013).
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] PARTNERSHIPS BC, *supra* note 105.
[115] 42 U.S.C.A. § 1983 (1996).

Partnerships BC, should be kept, but with minor changes. One is to incorporate private partners on to the advisory board, ensuring that they have an equal stake at the table. Second, the board should have a chairperson that is appointed by the executive branch, much like any other administrator in the federal government, with the conventional congressional confirmation process. Another solution would be in the creation of a chief executive officer ("CEO"), not unlike that in Partnerships BC.[116] This position could be created under the appointment power of the U.S. Constitution.[117] Another choice could be to adopt the entire Partnerships BC model where there is a board of directors and a management team.[118] This allows the additional oversight based on criteria drafted by the board and the CEO, wherein CEO performance is evaluated.[119]

This note proposes that the Partnerships BC model should be adopted with both a CEO and board chair. This model will allow a point of contact that Congress can address in hearings, or any other oversight mechanism. The CEO is also crucial in creating a point person within DHS with absolute authority in times of emergency or crisis, a situation that is particularly important in a department like DHS that deals with some of the U.S.'s most serious emergencies.

This more centralized management of PPPs should be governed like any other agency under the APA.[120] This means that for purposes of oversight, Congress would call the head of each of these partnerships rather than Secretary of Homeland Security's office or the Secretary herself to testify.[121] The act of this transfer of power has a dual advantage. The first advantage is that it will create more central oversight of private-public partnerships by Congress, thus eliminating redundancy in congressional hearings, meetings, and testimony that waste resources.[122] The second advantage is that it creates a more centralized system to manage the PPPs themselves. Finally, this agency will be able to make rules like any other agency as provided under the APA. These rules will be passed in order to govern all the partnerships, specifically to allow proper planning, management, and operations of the PPPs.

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[116] PARTNERSHIPS BC, MANAGEMENT TEAM, http://www.partnershipsbc.ca/files-4/management-team.php (last visited Apr. 7, 2013).
[117] U.S. CONST. art. 2, § 2.
[118] PARTNERSHIPS BC, *supra* note 105.
[119] *Id.*
[120] Administrative Procedure Act (APA), 5 U.S.C. § 500 (1946).
[121] Administrative Procedure Act (APA), 5 U.S.C. § 552b (1946).
[122] CSIS-BENS Whitepaper, *supra* note 84.

B. *Deputization*

There needs to be some sort of accountability that governs deputies, and holds them accountable when problems arise, whether through abuse of constitutional rights or by corruption. To continue implementing deputized citizens under DHS, a program must be created in order to protect U.S. citizens from the potential abuses of these private, but deputized, actors. These abuses could include illicit entry into private homes,[123] or collection of personal communication through national telecommunication companies.[124]

Currently, this problem has been addressed in limited ways, such as in Executive Order 13636: Improving Critical Infrastructure Cybersecurity.[125] In this executive order, the executive branch acknowledged that the Chief Privacy Officer and the Officer for Civil Rights and Civil Liberties of the Department of Homeland Security should advise the Secretary of the Department of Homeland Security about possible issues with deputization, such as violations of civil liberties and unauthorized access to private realms.[126] Finally, even though the entire Department of Homeland Security has a Privacy Office, which is "responsible for evaluating Department programs, systems, and initiatives for potential privacy impacts, and providing mitigation strategies to reduce the privacy impact,"[127] there needs to be even more oversight specifically detailed to PPPs.

There are many internal controls, but not many specific avenues for a private citizen, actor, or organization to traverse.[128] There is also the issue of private actors, like a cable repairman who relays constitutionally protected information to government agents. Does the private party file a suit as outlined in 42 U.S.C. § 1983?[129] This statute states that a person whose constitutional rights are infringed upon by an actor under the color of law is entitled to seek injunctive relief those rights infringements.[130] The U.S. Supreme Court has ruled in some of these cases using 42 U.S.C. § 1983 as its basis, including *Barton Protective Services, Inc. v. Faber.*[131] In this case, mall

[123] Michaels, *supra* note 27 at 1444.
[124] Greenwald, *supra* note 44.
[125] Exec. Order No. 13636, 78 Fed. Reg. 33 (Feb. 19, 2013), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-02-19/pdf/2013-03915.pdf.
[126] *Id.*
[127] U.S. DEP'T OF HOMELAND SECURITY, ABOUT THE PRIVACY OFFICE, http://www.dhs.gov/about-privacy-office (last visited Apr. 7, 2013).
[128] U.S. DEP'T OF HOMELAND SECURITY, DHS PRIVACY OFFICE GUIDE TO IMPLEMENTING PRIVACY, http://www.dhs.gov/sites/default/files/publications/privacy/Reports/dhsprivacyoffice-guidetoimplementingprivacy.pdf (last visited Apr. 8, 2013).
[129] 42 U.S.C.A. § 1983 (1996).
[130] *Id.*
[131] *Barton Protective Servs., Inc. v Faber*, 745 So. 2d 968, 970 (Fla. Dist. Ct. App. 1999).

patrons sued Barton Protective Services, Inc. and police officers for malicious prosecution, false arrest, and violations of § 1983.[132] The patrons were successful in the suit on the ground that the private security forces were acting as deputized state actors, hence they were liable under state action theory.[133] This analysis was clear for those who are obviously acting as state actors, such as mall security officers[134], but what about the above-mentioned cable repairman? Does a private citizen file a § 1983 suit against the cable repairman for reporting suspicious activity in their private home, against the cable company for sending this information to law enforcement authorities, or the law enforcement agency itself?

This is where administrative law can be usefully applied to private-partnerships and their agents. In constitutional law, there is a mechanism called state action. State action is the principle by which anything done by a government that is an intrusion on a person's civil rights by a government agent or private actor under government orders, the intrusion must come from a governmental action.[135] This government action can be anything from a restrictive covenant to prevent certain behaviors, to judicial action to enforce constitutional protections.[136] These constitutional protections include the protection from warrantless search and seizure[137] and due process of law.[138]

This concept can be applied to deputies within private-public sector partnerships.[139] The government can use these deputies as "private proxies,"[140] who carry out government actions to expand the coverage and scope of counterterrorism activities.[141] The problem therein, though, is that these proxies can obtain information and enter spaces that normal government actors cannot.

In order to fill this gap in oversight and judicial "reining-in" of deputized actors, there needs to be a clearer definition of who is a government actor and when they are and are not functioning as a government actor. The best solution is to adopt the wiretap court model created under the Foreign Intelligence Surveillance Act of 1978 ("FSIA").[142] This 1978 legislation called for the use of a panel of three judges, which are appointed by the U.S. Supreme

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[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] Bryan A. Garner, BLACK'S LAW DICTIONARY 1538 (perm. ed. 2009).
[136] *Id.*
[137] U.S. CONST. amend. IV.
[138] U.S. CONST amend. V; U.S. CONST amend. XIV.
[139] Michaels, *supra* note 27 at 1461.
[140] *Id.* at 1463-64.
[141] *Id.*
[142] 50 U.S.C.A. §§ 1803-1805.

Court.[143] The purpose of this court is to deny or affirm applications for wiretaps.[144]

A similar court should be set up for the purposes of information exchanges between private and public partners within homeland security situations. This court should always meet when private information will be exchanged with public entities. The court should also rule if private actors are considered government agents. If the court confirms that a private actor is in fact a government agent, then such an agent should be subject to all the accountability statutes and rules concerning government agents including § 1983 claims. Though this may be a cumbersome undertaking, it is a necessary step in protecting the civil liberties and rights of U.S. citizens.[145]

C. *Excessive Congressional Oversight*

Current solutions that are being proposed to solve congressional oversight issues come from a variety of sources. One proposal is to streamline the myriad committees to a few, more specific, committees[146], or one larger committee.[147] Other proposals include making a joint committee, that is one with members from both the Senate and House of Representatives, who represent all of the committees that have authorization powers over the Department of Homeland Security.[148] The problem with these solutions is that they are creations and developments of the legislative branch. As detailed above, legislative programs are not easy to implement for a variety of reasons[149], which include, *inter alia*, congressional turf wars and the desire of members of Congress to hold on to their powerful committee seats. These impediments make legislative solutions less likely to succeed.

An alternative to legislative branch-based solutions, which could cut down on this congressional gridlock and excessive oversight, is the application of the Administrative Procedure Act ("APA"). Specific legislation would allow the creation of a stand-alone agency for PPPs to report to. This means that Congress would only have a single agency to oversee in the form of the oversight agency, instead of vastly complex agency it currently deals with. Numerous councils, panels, and committees that currently govern PPPs in the Department of Homeland Security would also be eliminated.[150] By creating an

[143] 50 U.S.C.A. § 1803.
[144] *Id.*
[145] *Id.*
[146] Carafano, *supra* note 25.
[147] CSIS-BENS Whitepaper, *supra* note 84.
[148] Carafano, *supra* note 25.
[149] *Id.*
[150] U.S. DEP'T OF HOMELAND SECURITY, NATIONAL INFRASTRUCTURE PROTECTION PLAN: PARTNERING TO

independent agency, a focal point for congressional accountability and related activities (such as official testimonies and hearings) would be created. Instead of multiple officers being hailed to Capitol Hill and constantly having to compile reports, there would only be one set officers and one set of staff reporting to Congress. The reasoning for this is that currently PPPs are being governed by a multitude of agencies, councils, and offices. Creating one centralized source of PPPs within DHS has several advantages. First, by placing PPPs under one agency, it takes power away from these vast agencies, councils, and offices. This means that when these oversight bodies are dissolved it will eliminate the multiple congressional oversight committees that currently have jurisdiction. Additionally, placing one organization in charge of PPPs will allow for proper expansion of the use of PPPs, and also proper regulatory oversight of these PPPs.[151]

This more centralized management of these partnerships should be governed like any other agency under the APA.[152] This means that Congress, for purposes of oversight, would call the head of each of these partnerships rather than the Secretary of Homeland Security's office, or the Secretary herself, to testify.[153] The act of this transfer of power has a dual advantage. The first advantage is that it will create more centralized oversight of private-public partnerships by Congress, thus eliminating redundancy in congressional hearings, meetings, and testimony, which wastes so many resources of time, personnel, and money.[154] The second advantage is that the transfer of power creates a more centralized system to manage the private-public sector partnerships themselves. Finally, this agency will be able to make rules like any other agency as provided under the APA.

D. *Management and Accountability Problems*

Not only does implementing the APA solve issues with congressional oversight, but it also rectifies management and accountability problems. By centralizing the governance of PPPs, management and accountability would be streamlined and centralized in order to implement DHS's goals.[155]

There are several facets of standardizing the use of PPPs.[156] The first is to

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ENHANCE PROTECTION AND RESILIENCY, 2009, *available at* http://www.dhs.gov/xlibrary/assets/NIPP_Plan.pdf.

[151] Gaffey, *supra* note 37.

[152] Administrative Procedure Act (APA), 5 U.S.C. § 500 (1946).

[153] Administrative Procedure Act (APA), 5 U.S.C. § 552b (1946).

[154] NPR Staff, *supra* note 85.

[155] Gaffey, *supra* note 37.

[156] *Id.*

promote the use and expansion of PPPs.[157] Promotion includes the education of the public, public actors, and private actors.[158] By allowing all players to know the benefits of using PPPs, their use will be expanded. Education will also allow partnerships to have a better understanding of the whole partnership and not just their own interests. This will allow better cooperation and participation on behalf of all parties.

Also, the specific umbrella agency should be tasked with creating rules for governance and oversight of these partnerships.[159] This means that this agency should function like any other government office or organ when it is empowered by the APA. In other words, this umbrella agency should be able to make rules that carry the force of law.[160] Also, this agency should be able to hold administrative hearings to address claims and disputes that arise from its conduct.[161] Finally, as David W. Gaffey points out, this office should have oversight over all of partnerships including "accounting, auditing, legal, and contract management oversight."[162] By adopting these principles, this umbrella agency will be able to govern private-public sector partnerships through their entire life span[163], including any challenges that the ever-changing nature of homeland security will create for it. [164]

This umbrella agency should be implemented through specific statutes made by Congress[165], not through agency made rules (from the Department of Homeland Security). It should be chartered, authorized, and empowered by the legislative branch even though it will operate under the auspices of DHS. It will therefore have legislative and executive recognition and control like any other constructed agency under the executive branch as empowered by the Constitution.[166] Therefore on paper this agency will look, act, function, and be overseen like the Federal Aviation Administration or any other executive agency.[167] By adopting this model, the new umbrella agency will be afforded

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[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] 5 U.S.C. 553 (1947).
[161] 5 U.S.C. 556 (1947).
[162] Gaffey, *supra* note 37.
[163] *Id.*
[164] U.S. DEP'T OF HOMELAND SECURITY, QUADRENNIAL HOMELAND SECURITY REVIEW REPORT, Feb. 2010, *available at*
http://www.dhs.gov/xlibrary/assets/qhsr_report.pdf.
[165] Alfred C. Aman Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law*, 28 FORDHAM URB. L.J. 1477, 1501 (2001).
[166] U.S. CONST. art. 1, § 8.
[167] FED. AVIATION ADMIN., A BRIEF HISTORY OF THE FAA,

greater legitimacy, less fragmentation, and one centralized authority, which Congress, the executive branch, and other regulatory bodies can oversee.[168]

## IV. BENEFITS OF APA IMPLEMENTATION

This plan for a centralized agency to manage all PPPs will solve the current issues in DHS. This is because it is a reform project that is not without precedent. The late Partnerships UK and Partnerships BC serve as precedents to this type of overhaul. Additionally, this is not a wholly new concept to the U.S. government, or even to DHS. Currently, DHS has initiatives that do similar, if not identical tasks. Initiatives like the "SECURE" (System Efficacy through Commercialization, Utilization, Relevance and Evaluation) Program and its "sister project" called "FutureTECH,"[169] streamline DHS's ability to acquire products, and implement policies and procedures from the private sector for its own uses.[170]

Although acquisition is not the same as a partnership for the purposes of this note, the concept of the interaction of federal and private actors is similar. On the other hand, some programs, like National Protection and Programs Directorate, Office of Infrastructure Protection, are not as scattered.[171] The National Protection and Programs Directorate, Office of Infrastructure Protection, is much more regulated, uniform in control mechanisms, and includes proper oversight mechanisms from the both the private and public sides.[172] The problem here, however, is that this program only covers a small percentage of the total PPPs under the auspices of homeland security.

Because there are vast numbers of agencies throughout the federal government that use the APA to draft, vet, and implement rules governing initiatives and that carry the force of law, the APA will prove effective in this vein. Therefore applying this ubiquitously used statute to DHS should pose less of a problem than creating an untried and untested means of solving this issue.

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http://www.faa.gov/about/history/brief_history/ (last visited Apr. 7, 2013).

[168] Aman, *supra* note 165.

[169] U.S. DEP'T. OF HOMELAND SECURITY, SYSTEM EFFICACY THROUGH COMMERCIALIZATION, UTILIZATION, RELEVANCE AND EVALUATION (SECURE), http://www.dhs.gov/secure-system-efficacy-through-commercialization-utilization-relevance-and-evaluation-program (last visited Mar. 5, 2013).

[170] Thomas A. Cellucci, *System Efficacy through Commercialization, Utilization, Relevance and Evaluation (SECURE) Program: Concept of Operation*, U.S. DEP'T. OF HOMELAND SECURITY, *available at*
http://www.dhs.gov/xlibrary/assets/secure_program_overview_and_concept_of_operations.pdf.

[171] U.S. DEP'T. OF HOMELAND SECURITY, NATIONAL PROTECTION AND PROGRAMS DIRECTORATE: OFFICE OF INFRASTRUCTURE PROTECTION STRATEGIC PLAN: 2012-2016 (Aug. 2012), *available at*
https://www.dhs.gov/sites/default/files/publications/IP%20Strategic%20Plan%20FINAL.pdf.

[172] *Id.*

Finally, the federal government, including DHS, has already followed this model in a limited fashion. This precedent can be found in the post-September 11th U.S. Coast Guard's program for port security.[173] This program was initiated soon after September 11th when U.S. government officials realized that more than 360 ports were vulnerable to terrorist attacks.[174] This is tremendously important as 95% of imports come into the United States come by sea, making them a focal point of the U.S. economy. [175]

As a result of these vulnerabilities, Congress passed the Marine Transportation Security Act in an attempt to secure the ports.[176] The monumental task of passing the legislation to secure the ports was assigned to the U.S. Coast Guard.[177] One of the major problems that the Coast Guard wanted to avert was slowing, stalling, or even stopping international maritime commerce at ports due to too stringent security measures.[178] The Coast Guard feared that there would be too many agencies and offices, and that they would "gum up" trade with too many checks and investigations.[179] Another consideration was the because of the diversity of ports and facilities there could be ports with different policies and practices, making one uniform plan impossible.[180] Therefore, some other solution had to be found.

As a result, under the APA, a series of meetings were held across the country as a form of standard review-and-comment sessions, as provided for in the statute.[181] Both stakeholders (port operators, etc.) and officials (federal government officials) brought to the table their own priorities and standards, which had to be met.[182] Eventually, they came together with a definitive plan that met the needs and wants of all the parties.[183]

The plan used established standards of security, which were issued and enforced by the Coast Guard and the U.S. government.[184] Private parties (the ports) enforced those standards, while their contractors (the ports' contractors) carried out the standards that were established.[185] In other words, the private actors implemented plans customized by the government—

[173] DONAHUE, *supra* note 10, at 64.
[174] *Id.* at 64-65.
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.*

the perfect example of a PPP.[186] There were some suspicions about the viability and efficacy of this plan[187]; however, subsequent independent studies, including those from the Government Accountability Office, have proved those suspicions to be unfounded. Those studies have shown that this PPP has been an effective means of homeland security.[188] Thus, this provides an example of a well-run PPP crafted using provisions of the APA.

## V. CONCLUSION

In conclusion, by turning to the use of PPPs the U.S. government will be able to address the ever-changing nature of homeland security.[189] These challenges can be addressed through the use of PPPs, but in their current incarnation these partnerships are not properly governed and managed. The problems that plague the current PPP system within the DHS include deputization, excessive congressional oversight, and improper management and accountability mechanisms. All of these problems can be solved with the application of an umbrella agency that manages all the PPPs under one office within the DHS, instead of the multitude of offices that currently do. Additionally, in order to even further standardize these PPPs they should all governed under rules formed by the APA.

[186] *Id.*
[187] *Id.*
[188] *Id*.
[189] Carafano, *supra* note 25.