Statement of John McKay
Former United States Attorney
For the Western District of Washington

Before the

Subcommittee on Intelligence, Information Sharing
And Terrorism Risk Assessment

Committee on Homeland Security
United States House of Representatives

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Good morning Madam Chair and members of the Homeland Security Subcommittee on Intelligence, Information Sharing and Terrorism Risk Assessment. I am John McKay, the former United States Attorney for the Western District of Washington. I am currently Professor from Practice, at Seattle University School of Law, where I teach *Constitutional Law of Terrorism* and *National Security Law*. I am pleased to appear before you to present information regarding "A Report Card on Homeland Security Information Sharing."

I had the privilege of testifying before the Subcommittee during it's hearings in the district of the ranking minority member, Mr. Reichert, in March of 2007 on the topic of law enforcement information sharing and warned that meaningful law enforcement information sharing was blocked by turf and failed coordination among federal agencies.
While local sheriffs and police chiefs have risen to the occasion in the implementation of the standards based exploitation of law enforcement information sharing, DHS, DOD and DOJ have missed a golden opportunity to make this possible on a national scale by funding and leading implementation of the Law Enforcement Information Exchange (LInX). As I reported to the Subcommittee:

> "I am convinced that the standards of senior executive law enforcement leadership, a cost efficient technology, and a fervent commitment to share all legally sharable law enforcement records is the recipe for successful information sharing among our 18,000 law enforcement agencies in our country. This is an effort which must be led from the most senior ranks of government, and one which must meet the operational needs of our sworn law enforcement officers and analysts who are on the front line every day attempting to find the proverbial needle in the haystack that might lead them to a terrorist support network, or to quickly capture a serial pedophile, random rapist or violent criminal. *Neither crime, criminals nor terrorists know any borders.* In fact, they now know how to exploit our geographical borders and bureaucratic jurisdictions to their own advantage. We need a new weapon in our fight to preserve our freedoms, and I believe we may have found such a weapon in the deployment of the LInX program."

Why Law Enforcement Information Sharing is Critical to our Security and Safety – and How We are Failing

In the aftermath of September 11, a consensus emerged that American law enforcement had to dramatically improve the sharing of law enforcement information among federal, state, and local agencies.

This consensus has led to the elevation of the concept of "information sharing" as an unquestioned priority in virtually every federal agency. Today, information sharing committees abound in federal departments and professional associations, and information sharing is used to justify the majority of the technical systems being budgeted and deployed in federal agencies.

"Offices of Information Sharing" have made their way into most law enforcement agencies, as have new job descriptions for information sharing officers and specialists. Information sharing committees within agencies are fast at work developing strategies, reviewing and revising policy, designing technical approaches, and studying vexing problems associated with security, privacy laws, and overcoming other traditional obstacles for effective information sharing. In short, the post 9-11 consensus has given the term 'information sharing" a prominent place in the management of federal law enforcement agencies.

Unfortunately, this near frenetic activity has not produced the results we all expected. Let me be more specific. The assumption following the events of September 11 was that the "stove-piped" character of American law enforcement would be transformed and that difficulties of sharing information among the approximately 20,000 independent police agencies in the United States would soon be overcome. It was also assumed that refusal of federal agencies like the FBI, DEA, ATF, and ICE to share their information with one another and with their state and local partners on matters of shared interest would give way.

A tradition of "need to know" would actually be replaced by a mutually agreed upon doctrine that emphasized the "need to share".

The assumption that the post 9-11 era would be characterized by a new term – transparency – has unfortunately proven to be unfounded. And efforts to make you and other members of Congress think otherwise is untrue and, in my view, unethical.

You have heard, and you will continue to hear federal officials and their supporters in associations boast of fusion centers, interdepartmental information sharing systems, national networks, and grant funds made available for regional information sharing systems.

I urge you to probe carefully the assertions that such initiatives are providing the expected transparency or enhancing law enforcement effectiveness. In my view, the initiatives have cost a lot of money, put lots of people to work, put new technologies into the public service, and given agency officials political cover with the illusion of progress, but have not produced meaningful information sharing and have had virtually no operational impact.

Despite their lofty claims, federal officials are misleading you if they have caused you to believe that fusion centers are actually "fusing" any data, that interdepartmental systems in DOJ, DHS, or DOD are integrating anything but inconsequential records, or that nationwide networks

like N-DEX and HSDN are systematically transporting data that is being used by state and local police departments.

If you accept these assertions at face value, you will be misinformed.

Those of us willing to honestly address this issue will conclude that "information sharing" has no clearly understood meaning, is poorly managed, and has been made overly complicated. From a national perspective, there is no concept of success, no agreed upon jurisdiction, no designated authority, no effective leadership. And despite the large sums of money being spent over the past decade and many, many promises, there remains no consensus on the way to proceed.

Let me quote from a June 2008 Status Report from the Government Accountability Office on the progress of federal Information Sharing Environment (ISE), which was mandated by the Intelligence Reform and Terrorism Prevention Act of 2004. The report was critical of the lack of progress in implementing the ISE, declaring that, "…the desired results to be achieved by the ISE…have not yet been determined".

This conclusion, which is entirely accurate, should not be acceptable to this Subcommittee seven years after 9/11 and four years after a law mandating information sharing.

Federal Efforts Fail to Focus on Strategic Planning and Coordination with State and Local Law Enforcement

Part of our challenge is the ISE focus on federal records, which does little to add to the information sharing capabilities of state and local police. From a national perspective, law enforcement information sharing should have two distinct, but related, objectives.

First, for state and local law enforcement, information sharing should eliminate problems associated with the limited jurisdictions and separate, incompatible record systems of most city and county police departments. The various departments all have different record systems and rarely permit one department unlimited access to another's records. But as every deputy sheriff and police officer knows, law enforcement files often contain otherwise innocuous records – parking tickets, associates, addresses, phone numbers – that don't show up on incident reports but often provide the critical information that solves the case. While some jurisdictions are taking steps to integrate their records, progress here is woefully slow and there is no prospect of a comprehensive solution for years.

Second, a national information sharing system should ensure that federal agencies have access to information maintained in state and local agencies that may be pertinent to terrorist threats and complex drug, organized crime, and fraud investigations. As I have said many times, evidence of a potential terrorist threat or organized criminal enterprise is far more likely to be found in the incidental contact with the 10,000 police officers in the state of Washington, than by the less than 150 FBI agents assigned to the Seattle Field Division.

This is no more clearly evidenced than by the fact that the Arlington, VA Police Department issued a speeding ticket to Hani Hanjoor, the pilot of flight #77 which attacked the Pentagon, six weeks prior to the 9-11 attack. The information collected by the Arlington Police, if automatically shared with the FBI, most probably would have alerted the FBI that a suspected Al-Qai'da operative was present only miles from our Capital and Seat of Government. Imaging the possibilities had we embarked upon a real commitment of law enforcement information sharing among all local, county, state and federal agencies.

From a national perspective, making state and local law enforcement records available to federal agencies is a critical component of 21st Century public safety. How could the stakes be any higher? What federal official would testify before this or some other committee to explain – after a devastating terrorist event – that information which might have prevented the attack was found, after the fact, in the files of a municipal police department. I'm sure you will agree that the scene would be ugly, the consequences profound, and the blame would be earned by all. Progress since September 11 has been minimal. And we are, I strongly believe, unnecessarily vulnerable.

Moreover, the gains to be made by synthesizing and systematically exploiting both federal **and** state/local data are clear to every federal agent and police officer I have spoken with on the subject. Yet they also share a profound pessimism that this will come about any time soon – a sentiment I find very sobering. The benefit that would accrue to U.S. national security in having police records integrated in a strictly controlled fashion with sensitive federal data and would be nothing short of remarkable.

Learning the Lessons of LInX

The one notable exception to this general assessment has been the strong contribution made by the Naval Criminal Investigative Service funding and deploying LInX to areas of U.S. Navy interest.

As the Committee is aware, I was an active leader in the development and early implementation of the LInX system. Prior to my 2007 dismissal as United States Attorney in Seattle, I worked with law enforcement agencies in the state of Washington to develop a comprehensive strategic plan to enhance our capacity to address terrorist threats, to more effectively attack a growing drug trafficking problem in the Pacific Northwest, and to address an emerging problem associated with criminal enterprises in my district. A key part of the strategy called for new and innovative approaches to sharing information among federal, state, and local law enforcement agencies in the Puget Sound area.

NCIS had also just completed a strategy that called for aggressive action to develop strategic partners and to share information in areas of NCIS interest and jurisdiction. Since the Seattle area, specifically Bremerton, Washington within the district of Subcommittee member Mr. Dicks, is home to the Pacific Nuclear Submarine Fleet it seemed natural that NCIS would become a key participant in an area information sharing effort. Keep in mind, at this time we had no settled technology, nor any specific approach. However, together with innovative local

law enforcement leaders such as then King County Sheriff Dave Reichert, we shared a commitment to improve our collective capabilities in the face of very real threats.

I was fortunate to work with a team that addressed all of the legal, policy, technical, and cultural obstacles that continue to limit information sharing efforts, and produced – in an unbelievable short time and for an incredibly low cost – an information sharing system that now serves as a model for regional intelligence systems.

The Northwest LInX project is an unqualified success, and has been critically examined and reviewed by all federal departments. It is now used by virtually all law enforcement agencies in the state of Washington and is producing examples of operational impact that would not otherwise have occurred. Moreover, five years later, the NCIS has deployed LInX to 13 states (26% of the nation), involving more than 500 agencies, and serving more than 10,000 users. It includes interfaces to DOJ and DHS systems and is piloting interconnectivity to N-DEX.

Five Standards of Successful Information Sharing

The key to the success of Northwest LInX was in clarifying the objectives of the project, directly addressing legal, policy, and cultural concerns, and developing and implementing clear program standards that were designed to ensure effectiveness. Technology is not the answer to the information sharing problem, but just one part of the solution. There are five standards which are essential for any program to work. Let me summarize them for you.

First, developing an information sharing project with the law enforcement community at the regional level requires ***strong leadership and effective governance***. While the decentralized system of local law enforcement has generally served our nation well, it is a serious obstacle for efforts that require close coordination, detailed oversight, and transparency. Law enforcement in any community involves federal, state, and local agencies each with different jurisdictions and different missions. The only entity with the jurisdiction, the authority, and the power to bring this disparate group together is the United States Attorney who, in my view, must function as the Chief Law Enforcement Officer for his or her District.

Leadership is not only personal, it must have structure, and we immediately decided that a formal body must be incorporated to provide authoritative decisions, to act on behalf of the member agencies, and to be accountable for the operation of the system. Part of the problem had been the lack of any organized entity to discharge the management responsibilities of this complex project. Organizing dozens of police agencies, designing a technical architecture, integrating their data, and executing the legal and policy documents required will simply not happen by itself.

The establishment of the LInX Governance Board is viewed by many, including DHS, as the critical success factor in the success of the LInX project. It has been the foundation of all nine LInX sites. And it has been the vehicle that ensures interdepartmental collaboration among federal officials, local chiefs and sheriffs, and the U.S. Attorney.

Second, in order for an information sharing system to "connect the dots", there must be dots to connect. There is currently no standard and minimal guidance about what records should be included in an information sharing system. Decisions are left to the discretion of the participating agencies. In Seattle, we viewed this as untenable – why have a system designed to prevent terrorism if agencies had the discretion to limit the data they chose to share? So we included a requirement in the LInX Charter – signed by the heads of all participating agencies – that ***requires the inclusion of "all legally sharable data"***. This ensures that the system will produce a composite record of any search that reflects all knowledge maintained by community.

Third, while this is not about technology, the technology is clearly an enabler. From an information sharing perspective, ***the system must be able to retrieve the needed records with a single search*** and ***produce an accurate composite picture in seconds that reflects the information maintained by all participants***, must ***provide the ability to exploit the data*** to discover otherwise unknown associations, and ***must instantly produce documents of interest to all participating agencies***. The technology is complex, and of course there are many considerations here. But from a project perspective – these three requirements should drive the performance of the system.

Fourth, to overcome the legitimate concerns of police officers to protect the integrity of their investigations, ***the system must be secure***. In initiating the LInX project, we believed that all participants and potential participants must have no concerns that data might be compromised. So the LInX system was designed to provide all necessary audit trails, system security that can meet TOP SECRET level security requirements, and physical security by housing and maintaining the system in the Seattle office of the FBI. It is my understanding that most of the LInX sites have followed this model and have housed the system in a secure federal facility. The effects of this have been clear - during the five years of LInX operations, not one report of compromised information has been reported.

Fifth, rigid oversight must be provided in the form of ***regular audits and evaluations*** to ensure that the system is reliable, performing as expected, and producing the anticipated impact. Put simply, we must have a system like LInX that helps us arrest the bad guys and catch terrorists.

These five project standards provide the foundation for the success of LInX and should serve as the basis for a national model under any name or administered by any agency or department. These standards were developed in an effort to directly address and overcome all of the traditional issues that were being cited to limit information sharing; the ability of NCIS to incorporate these five standards into their model Charter and to obtain the signatures of 500 Chiefs of Police who support the program clearly validates the correctness of this approach. I strongly suggest that this Subcommittee consider adopting these standards as the basis for a national plan and imposing these or similar standards as a condition for federal funding of information sharing systems in the future.

Federal Agencies and Departments Are Failing to Lead

Federal Agencies, with the exception of NCIS, have taken a totally different and ultimately ineffective approach to information sharing. Where the focus of the LInX program is on data maintained in specific communities, federal efforts have focused on process and technical standards, not operational outcomes that would positively impact our communities. This is understandable, though not forgivable, when one considers that DEA addresses drug trafficking, ICE illegal smuggling, ATF guns, FBI terrorism, organized crime, and fraud – and that their concern is specifically limited to areas within their mission responsibilities. The real shortcomings of the various federal efforts post 9/11 have been their predominant focus on process over operational concerns.

This is exactly the difference between the LInX program and every other LE information sharing efforts. The LInX program is a *partnership between federal, state, county and local agencies*, with clearly identified leaders, accountable for success or failure. Local leaders such as Los Angeles County Sheriff Lee Baca with whom I am proud to appear today are providing the real leadership in these efforts and underscore federal failures to lead and fund effective information sharing systems. Without federal leadership, clear accountability and a passion to achieve operational results, all such future endeavors by DHS or DOJ acting alone will achieve mediocre results, at best.

I have been able to identify no federal official or staff member who feels that it is his or her job to integrate the law enforcement records of local law enforcement, in spite of the universal understanding of the critical need to integrate and analyze these records for the security and safety of our homeland. In fact, senior executives in both DOJ and DHS have shunned this responsibility and have offered no coherent approach to solve these problems. No one has developed a plan or a strategy, or an approach, or even suggested standards like those in the LInX program. Today, the federal government is silent on the issue, in spite of an opportunity to provide the leadership that today, would have integrated most law enforcement records for analysis by security and intelligence agencies within the purview of this Subcommittee.

Toward a National Information Sharing System and a Meaningful Role for DHS

In 2004, I joined with four United States Attorneys to develop a white paper suggesting that the model we developed in Seattle be expanded to include other jurisdictions, and that the U.S. Attorneys from Hampton Roads, Jacksonville, Corpus Christi, and Honolulu join in a pilot program to assess the concept on a wider scale. Then Deputy Attorney General Jim Comey was intrigued by the issue, and after discussions with Gordon England, Dave Brant, and the heads of the DOJ law enforcement agencies, agreed to support the project. Mr. Comey issued definitive guidance on a pilot, specifically calling for the involvement of the FBI and other DOJ components.

FBI and DOJ staff came back with a counterproposal suggesting that DOJ should concentrate on integrating internal DOJ records first, before embarking on participating on project of sharing information with state and locals. The result – nearly four years later - is that *only very limited and highly screened information is being provided to state and local agencies through these systems*. These systems are so cumbersome that, where available, DEA and FBI

users are strong supporters and have become prolific users of the LInX system – to the exclusion of the DOJ information sharing systems.

In 2006, I was asked by the incoming DOJ Deputy Attorney General Paul McNulty to head a working group of U.S. Attorneys and to devise a plan for wider application of information sharing on a regional basis. My working group consisted of more than fifteen U.S. Attorneys interested in participating in an information sharing system for their districts. The resulting plan endorsed the LInX system and recommended significant roles for all three Departments and leading to the convening of a seminal meeting during the summer of 2006, of the Deputy Attorney General, the Deputy Secretary of Defense, and the Deputy Secretary of Homeland Security. While the plan met with the concurrence and "handshakes" of all participants, it was ultimately opposed by the DOJ and DHS staff and the effort lost the support of their Departments.

Following collapse of the interdepartmental effort, the Navy continued to pursue development in areas of its strategic interest. Over the next three years, new sites were initiated in New Mexico, the National Capital Region, North Carolina, and – just a week ago – in Southern California as Sheriff Baca will testify. And the demand for LInX throughout the country continues to grow.

In spite of the failure of DOJ, DHS and DOD to create an interdepartmental effort, the local successes of LInX has proved four things: 1) a transformational project can be implemented quickly and efficiently, 2) it can have tremendous impact, 3) it will not break the budget; and 4) no single department can do it alone.

I cite the LInX experience not merely because I was intimately associated with it, but because it has been widely acclaimed and has produced a near consensus among law enforcement officials that it provides a successful model for effective information sharing. Among other things, the LInX experience has proven that meaningful information sharing

- can have a substantial impact on crime and national security;
- is technologically feasible, and not expensive;
- should be funded federally;
- will require positive collaboration and cooperative management by the three Departments that share jurisdiction in this area – DHS, DOJ, and DOD.

As I said at the outset, in this environment, no one federal official admits responsibility for the development of a meaningful and effective law enforcement information sharing program or whether it happens in upstate New York, or Houston, or San Francisco, or Chicago. I have found no one in the federal government who cares sufficiently about this to assume responsibility for designing, funding, implementing and managing a national system – despite the clear value to the American people.

This Subcommittee and the Congress play a critical role in stimulating the leadership which has been lacking at DHS and the other departments who share the responsibility and the blame.

In my view, the Congress should clarify the jurisdiction issues by declaring that law enforcement information sharing is the joint responsibility of the three Departments, and that specific responsibility resides as follows:

1) DOD/ NCIS should assume responsibility to continue to extend its LInX program along the coastal US. The LInX approach to management, its technical approach, and governance process should be taken as the model for the rest of the country.

2) DOJ should reestablish the organizing and coordinating role of U.S. Attorneys that have been so critical to the success of the LInX program. DOJ should ensure that the FBI, DEA, ATF, USMS and BOP are full participants, and should explore new ways to involve sensitive federal data in these efforts. DOJ should identify 10 regional sites around the country in which it will assume the leadership role played by NCIS in the LInX projects. DOJ should assume the role of organizing information sharing governance processes in those regional sites in full coordination with DHS grant funding while leveraging the DOD expertise and lessons learned.

3) DHS should provide start up funding, technical support, and the restriction of grant funding only to those information sharing projects that will meet the LInX project standards. DHS agencies such as ICE, CBP, Secret Service, U.S. Coast Guard and others should fully participate in all sites. ICE has shown through its law enforcement leaders such as Seattle Division SAC Leigh Winchell that it plays a critical LE role in information sharing. ICE should assume the same leadership role for DHS as that played by NCIS in deploying the LInX projects. DHS will assume the role of coordinating the grants for, and the deploying of information sharing programs in those areas not addressed by NCIS.

4) The Congress should also authorize the creation of an Intergovernmental Governance Board – to support federal integration, networking, development and execution of a national plan. Different from the ISE, this would consist of the heads of federal law enforcement agencies, and would have as its primary objective, the full integration of law enforcement records of state and local law enforcement throughout the country. The Board would be led by the Director of a major federal law enforcement agency who would serve on a rotating basis for a two year assignment. The Governance Board should clarify definitions, roles and responsibilities, and develop a national implementation plan within 90 days of its establishment. The plan would seek to place LInX like information sharing projects throughout the country within a three year period, with at least five new regional projects funded for 2009. I do not believe that this type of aggressive leadership is taking place anywhere.

5) Congress should assure the standards of a national law enforcement information sharing program, while safeguarding the civil liberties and civil rights of all Americans. This would include incorporating the five LInX program standards as requirements for federal funding. Most importantly, the Committee should adopt the standard of “all legally sharable information” as a requirement for any federal

assistance. *Information sharing in this age should be viewed as "synthesizing and exploiting" all sharable data, thereby providing a composite record that does not otherwise exist*. This is perhaps the single most important attribute of information sharing systems and one that is not now in existence outside of the LInX program. This will greatly narrow the competing approaches to information sharing and begin to provide consistent guidance.

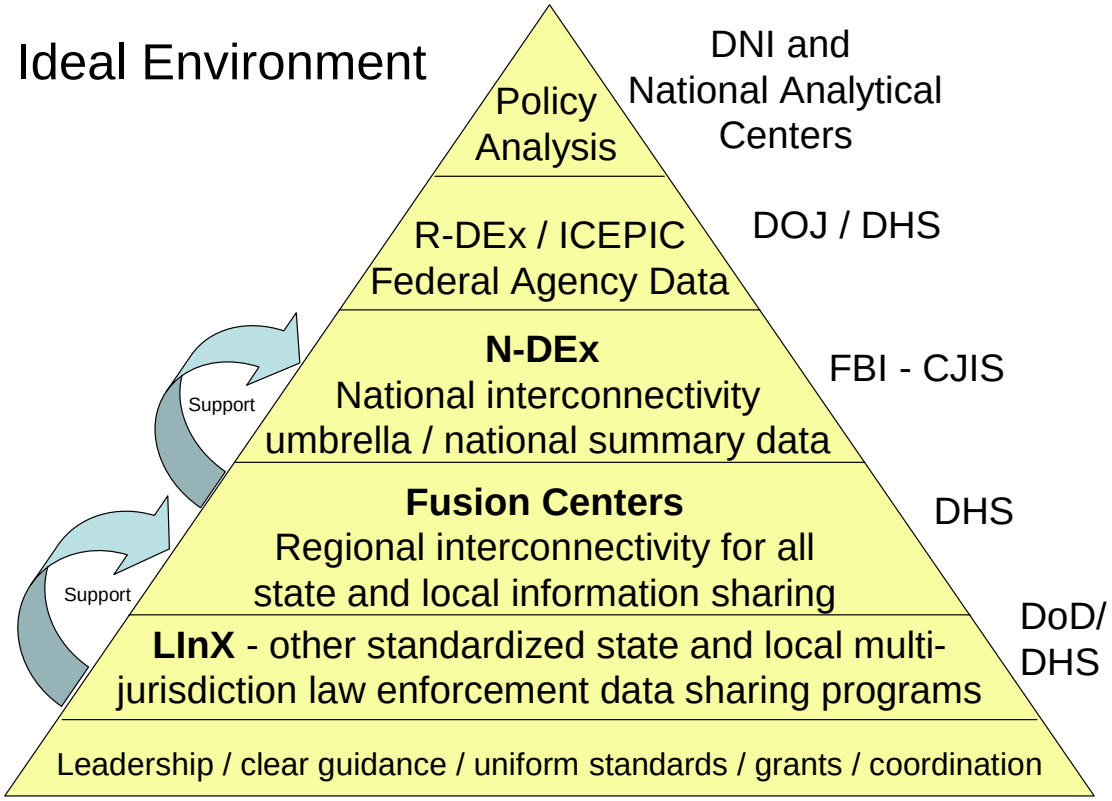
6) Finally, success breeds success. Take information sharing out of the Beltway meeting rooms and into the community. In 2009, begin funding programs in interior sites. Develop them as pilots to be refined over time. But realize that within 120 days of a decision to deploy a system, law enforcement in the community has been dramatically enhanced, crimes are solved that wouldn't otherwise be solved. Child predators are apprehended that would still be on the loose. Lives will be saved. Communities ranging from Syracuse to Houston, to Santa Clara County are ready now.

This Subcommittee will make a major contribution by addressing the lack of leadership on this issue and mandate the development of a national plan, minimal information sharing requirements, and funding some regional start up projects in 2009.

I am enormously proud of the many state and local leaders who have joined with a few brave federal compatriots to address an issue critical to the security and safety of our country. Now is the time for action. We are vulnerable to the attack of our enemies and the exploitive tactics of criminals. Congress will play a critical role in assuring these challenges are met.

Thank you, Madam Chair and Members of the Subcommittee for the opportunity to share my views with you today.

(Attachment: LInX Logic Model)


Ideal Environment
Policy Analysis
DNI and National Analytical Centers
R-DEx / ICEPIC Federal Agency Data
DOJ / DHS
N-DEx
National interconnectivity umbrella / national summary data
FBI - CJIS
Support
Fusion Centers
Regional interconnectivity for all state and local information sharing
DHS
Support
LInX - other standardized state and local multi-jurisdiction law enforcement data sharing programs
DoD/ DHS
Leadership / clear guidance / uniform standards / grants / coordination