Department of Homeland Security Reorganization: The 2SR Initiative

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Summary

The Department of Homeland Security (DHS) was mandated by the Homeland Security Act of 2002. The creation of DHS resulted in a reorganization of the executive branch on a scale not experienced since the establishment of the Department of Defense (DOD) half a century ago. Originally denominated the National Military Establishment at birth in 1947, DOD was given its current name and underwent the first of what would be a series of structural modifications through statutory amendments in 1949. A similarly complex organization, DHS was the product of legislative compromises, and it was anticipated that congressional overseers, as well as department officials, would monitor the management and operations of DHS with a view to adjusting its structure as conditions warranted. In this regard, Section 872 of the Homeland Security Act authorizes the Secretary of Homeland Security to reorganize functions and organizational units within DHS, subject to specified limits. In late January 2003, as components of DHS were being transferred to the department's operational control, President George W. Bush modified his original reorganization plan for DHS to reconfigure the functions of certain border security agencies into two new components—the Bureau of Customs and Border Protection and the Bureau of Immigration and Customs Enforcement—within the department's Border and Transportation Security Directorate.

In one of his first actions as Secretary of Homeland Security Tom Ridge's successor, Michael Chertoff, on March 2, 2005, the day before he was sworn in as Secretary, announced in testimony before the House Appropriations Subcommittee on Homeland Security that he was "initiating a comprehensive review of the Department's organization, operations, and policies." This effort, he said, would begin "within days." The results of that undertaking, which came to be known as the Second Stage Review or 2SR, were made public in mid-July. As Secretary Chertoff explained, 2SR involved the evaluation of a variety of operational and policy issues, and among those was "the DHS organizational structure, to make sure that our organization is best aligned to support our mission." However, no report on the 2SR process and reforms was issued. This report focuses primarily on the conclusions and proposals resulting from 2SR pertaining to organization and managerial lines of authority matters (H.R. 4009; S. 1866). Initial issues concerned the means for realizing the proposed 2SR reorganization; the efficiencies and effectiveness that would result with the proposed flatter, but more sprawling, restructuring; and how new leadership positions would be established, filled, compensated, and situated in the DHS hierarchy. Some aspects of these issues lingered for a while after the implementation of the 2SR plan on October 1, 2005. Approximately one year later, however, it appeared that Secretary Chertoff, exercising his reorganization authority, had largely realized his planned 2SR restructuring, although some legislative changes in this regard awaited finalization. This report will be updated as events warrant.

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Secretary of Homeland Security Michael Chertoff, on July 13, 2005, announced a six-point agenda for the Department of Homeland Security (DHS) designed to ensure that its policies, operations, and structures are best aligned to address potential threats to the nation, both today and in the immediate future.[1] This agenda resulted from what he called a Second Stage Review, or 2SR, which had been launched in early March, just after he assumed office, and had been conducted over the next three months. It involved, he said, "a systematic evaluation of the Department's operations, policies and structures." Indeed, as Secretary Chertoff explained, 2SR involved the evaluation of a variety of operational and policy issues, and among those was "the DHS organizational structure, to make sure that our organization is best aligned to support our mission." However, no report on the 2SR process and proposed reforms was issued. This report focuses primarily on the conclusions and proposals resulting from 2SR pertaining to organization and managerial lines of authority matters.

Background

DHS was mandated by the Homeland Security Act of 2002.[2] The creation of DHS resulted in a reorganization of the executive branch on a scale not experienced since the establishment of the Department of Defense (DOD) half a century earlier.[3] Originally denominated the National Military Establishment at birth in 1947, DOD was given its current name and underwent the first of what would be a series of structural modifications through statutory amendments in 1949.[4] A similarly complex organization, DHS was the product of legislative compromises, and it was anticipated that congressional overseers, as well as department officials, would monitor the management and operations of DHS with a view to adjusting its structure as conditions warranted. In this regard, Section 872 of the Homeland Security Act authorizes the Secretary of Homeland Security to reorganize functions and organizational units within DHS, subject to specified limits.[5] Secretary Chertoff made use of this authority to implement some of his 2SR plans. For a period of 12 months after the effective date of the Homeland Security Act, Section 1502 vested the President with temporary authority to prescribe a reorganization plan for DHS, and subsequent modifications of that plan. In late January 2003, as components of DHS were being transferred to the department's operational control, President George W. Bush modified his original reorganization plan for DHS to reconfigure the functions of certain border security agencies into two new components—the Bureau of Customs and Border Protection and the Bureau of Immigration and Customs Enforcement—within the department's Border and Transportation Security Directorate (BTS).[6]

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[1] U.S. Department of Homeland Security, "Secretary Michael Chertoff, U.S. Department of Homeland Security Second Stage Review Remarks," Ronald Reagan Building, Washington, DC (July 13, 2005), pp. 1-2, available at http://www.dhs.gov/dhspublic/display?theme=44&content=4597&print=true.

[2] 116 Stat. 2135; 6 U.S.C. § 101 et seq.; see (name redacted), "Organizing for Homeland Security," *Presidential Studies Quarterly*, vol. 33, Sept. 2003, pp. 602-624.

[3] See 61 Stat. 495 at 499.

[4] 63 Stat. 578. For an account of the creation of DOD and its early organizational refinement, see Paul Y. Hammond, *Organizing for Defense: the American Military Establishment in the Twentieth Century* (Princeton, NJ: Princeton University Press, 1961); Alice C. Cole, et al., *The Department of Defense: Documents on Establishment and Organization, 1944-1978* (Washington: GPO, 1978).

[5] 116 Stat. 2243; 6 U.S.C. § 452.

[6] See *Weekly Compilation of Presidential Documents*, vol. 39, Feb. 3, 2003, p. 136; U.S. Department of Homeland Security, "Border Reorganization Remarks by Secretary Ridge," Port of Miami, Miami, FL (Jan. 30, 2003), available at http://www.dhs.gov/dhspublic/display?theme=44&content=419&print=true; U.S. Department of Homeland Security, (continued...)

When it began operations, DHS was largely organized like a hand—the palm being the office of the Secretary/Deputy Secretary with the thumb and fingers being individual directorates for (1) management, (2) science and technology, (3) information analysis and infrastructure protection, (4) border and transportation security, and (5) emergency preparedness and response. In addition, however, approximately two dozen other units within the department, but not located within one of the directorates, reported directly to the Secretary. These included program entities, such as the United States Coast Guard and United States Secret Service, and units within the office of the Secretary, such as the Office of International Affairs and Office of State and Local Government Coordination, as well as some Assistant Secretaries. At the time of its creation, DHS had about 170,000 employees, only 18,000 of whom worked in the Washington, DC, area, indicating that the new department had a considerable field organization.

In one of his first actions as Secretary of Homeland Security Tom Ridge's successor, Michael Chertoff, on March 2, 2005, the day before he was sworn in as Secretary, announced in testimony before the House Appropriations Subcommittee on Homeland Security that he was "initiating a comprehensive review of the Department's organization, operations, and policies." This effort, he said, would begin "within days."[7]

The 2SR Initiative

In his July 13, 2005, remarks concerning the results of the 2SR initiative, Secretary Chertoff explained that the work of that effort had been conducted utilizing "18 action teams—involving more than 250 DHS staff—to evaluate specific operational and policy issues." The participants were asked "how would you solve a particular problem," and "how would you take the best solutions and implement them aggressively." He noted, as well, that those immediately directing the 2SR effort also "actively sought opinions from hundreds of public and private partners at the federal, state, local, tribal and international levels." From these deliberations and consultations the following six-point agenda resulted.

1. Increase preparedness, with particular focus on catastrophic events.

2. Strengthen border security and interior enforcement and reform immigration processes.

3. Harden transportation security without sacrificing mobility.

4. Enhance information sharing with our partners, particularly with state, local and tribal governments and the private sector.

(...continued)

"DHS Announces Border Security Reorganization," Washington, DC (undated), available at http://www.dhs.gov/dhspublic/display?theme=44&content=422&print=true; U.S. Department of Homeland Security," Border Reorganization Fact Sheet," Washington, DC (Jan. 30, 2003), available at http://www.dhs.gov/dhspublic/display?theme=43&content=4236&print=true.

[7] U.S. Department of Homeland Security, "Statement by Secretary of Homeland Security Michael Chertoff before the House Appropriations Homeland Security Subcommittee," Washington, DC (Mar. 2, 2005), available at http://www.dhs.gov/dhspublic/display?theme=45&content=4381&print=true; Chris Strohm, "New DHS Secretary Launches Total Review of Operations," *GovExec.com Daily Briefing*, Mar. 2, 2003, available at http://www.Govexec.com/dailyfed/0305/030205c1.htm.

5. Improve DHS stewardship, particularly with stronger financial, human resource, procurement and information technology management.

6. Re-align the DHS organization to maximize mission performance.

"In the weeks and months to come," said the Secretary, "the Department will launch specific policy initiatives in a number of key areas" relative to the six-point agenda.[8]

Reorganization Proposals

In his July 13, 2005, remarks concerning the results of the 2SR effort, Secretary Chertoff said that he had "concluded that some structural changes are needed at DHS to improve mission performance. Modest but essential course corrections regarding organization," he said, "will yield big dividends. Most can be accomplished administratively—a few require legislation." He then announced "organization changes that include four important areas of focus: ... (1) formation of a new, department-wide policy office; (2) significant improvements in how DHS manages its intelligence and information sharing responsibilities; (3) formation of a new operations coordination office and other measures to increase operational accountability; and (4) an important consolidation effort that integrates the Department's preparedness mission."[9] These initiatives are discussed below.

Policy

Secretary Chertoff "proposed creation of a central policy office led by an Under Secretary for Policy," which "will bring together our international affairs staff, a significant and new strategic planning capability, DHS-wide policy development assets, a senior policy advisor focused on refugee asylum policies, and enhanced private sector liaison resources. Collectively," he continued, "the Policy Directorate will strengthen the Department's ability to develop and plan vital policies." Such an office, he noted, "is not a new idea—it builds in part upon the foundational work of the Border and Transportation [Directorate] policy staff, which is to be folded into the new policy directorate."[10]

The authors of an August 17, 2004, Heritage Foundation report were among the first to propose an Under Secretary of Policy for DHS and a consolidation of the department's policy analysis and development offices under the direction of such an officer.[11] The recommendation was reiterated in more elaborate form in a December 13, 2004, *Heritage Special Report* on DHS reform.[12] At a January 26, 2005, hearing of the Senate Committee on Homeland Security and Governmental

[8] U.S. Department of Homeland Security, "Secretary Michael Chertoff, U.S. Department of Homeland Security Second Stage Review Remarks," pp. 2-3.

[9] Ibid., p. 6.

[10] Ibid., pp. 6-7.

[11] James Jay Carafano, Richard Weitz, and Alane Kochems, "Department of Homeland Security Needs Under Secretary for Policy," *Heritage Foundation Backgrounder No. 1788* (Washington: Aug. 17, 2004).

[12] James Jay Carafano and David Heyman, "DHS 2.0: Rethinking the Department of Homeland Security," *Heritage Special Report SR-02* (Washington: Dec. 13, 2004).

Affairs, the chair of the panel, Senator Susan Collins, observed that "there seemed to be unanimity on the need for an Under Secretary for Policy."[13]

Shortly after the Senate committee hearing, when the justification for the DHS Office of the Secretary and Executive Management budget request was unveiled, a proposed Office of Policy, Planning and International Affairs (OPPIA) was revealed. Headed by an Assistant Secretary, the new entity was to result from an expansion of the department's existing Office of International Affairs, and was described in the following terms.[14]

> The Office of Policy, Planning, and International Affairs will be responsible for both strategic policy development and oversight of all program policy efforts in the Department, including various economic, regulatory, legislative, foreign and policy analysis functions which are critical to forming Departmental policies. This office oversees the Policy Review Board, which evaluates, promotes, and tracks developing policies throughout the Department. The Policy Review Board will be the vehicle by which senior leadership within the Department can assess proposals for major policy initiatives, ensure these initiatives are consistent with strategic goals and priorities, enhance inter-departmental engagement in policy development and provide clear leadership on policy initiatives.[15]

House appropriators recommended $8.7 million for OPPIA, which the House subsequently approved.[16] Senate appropriators recommended $7.25 million for OPPIA, and indicated an expectation that it would assume the functions of the Operational Integration Staff, which assists the DHS leadership with coordination and integration of cross-organizational element missions, operational activities, and programs across the department's headquarters directorates and direct reporting agencies.[17] The Senate later approved this funding for OPPIA, but it did not appear that either DHS or House appropriators expected the new policy office to assume the functions of the Operational Integration Staff.

In compliance with Section 872 of the Homeland Security Act authorizing him to reorganize functions and organizational units within DHS, subject to specified limits,[18] Secretary Chertoff sent a July 13, 2005, letter to Congress "with notification of the reallocation of functions and the establishment, consolidation and alteration of organizational units within the Department of Homeland Security," and indicating he intended "to implement these changes on October 1, 2005."[19] He noted the effort to establish OPPIA under the leadership of an Assistant Secretary,

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[13] U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *Department of Homeland Security: The Road Ahead*, hearing, 109th Cong., 1st sess., Jan. 26, 2005 (Washington: GPO, 2005), p. 43.

[14] The Office of International Affairs was originally mandated by Section 879 of the Homeland Security Act (116 Stat. 2245; 6 U.S.C. § 459), and its responsibilities were expanded by the Secretary pursuant to his reorganization authority in Section 872 permitting him to allocate functions and alter organizational units within DHS (116 Stat. 2243; 6 U.S.C. § 452).

[15] U.S. Department of Homeland Security, *Department of Homeland Security: Office of the Secretary and Executive Management, Fiscal Year 2006 Congressional Justification* (Washington: n.d.), p. OSEM-2.

[16] U.S. Congress, House Committee on Appropriations, *Department of Homeland Security Appropriations Bill, 2006*, report to accompany H.R. 2360, 109th Cong., 1st sess., H.Rept. 109-79 (Washington: GPO, 2005), p. 5.

[17] U.S. Congress, Committee on Appropriations, *Department of Homeland Security Appropriations Bill, 2006*, report to accompany H.R. 2360, 109th Cong., 1st sess., S.Rept. 109-83 (Washington: GPO, 2005), pp. 9-11.

[18] See 116 Stat. 2243; 6 U.S.C. § 452; CRS Report RS21450, *Homeland Security: Scope of the Secretary's Reorganization Authority*, by (name redacted).

[19] U.S. Department of Homeland Security, letter from Secretary Michael Chertoff to the Honorable Christopher Cox, Chairman, Committee on Homeland Security, U.S. House of Representatives, Washington, DC, July 13, 2005, p. 2 (identical letter sent to other congressional leaders).

and indicated he had "also asked Congress for legislation that would elevate this Assistant Secretary to an Under Secretary within the Department." The Under Secretary would head the Directorate for Policy, when established. He also identified various "existing organizational units that ... will be relocated to this new centralized policy office, including the Office of International Affairs, the Special Assistant to the Secretary for Private Sector Coordination, the Border and Transportation Security Policy and Planning Office and elements of the Border and Transportation Security Office of International Enforcement, the Homeland Security Advisory Committee, and the Office of Immigration Statistics." He added that "a strategic policy planning office and a refugee policy coordinator will be established within the new policy apparatus."

Intelligence

In his July 13, 2005, 2SR remarks, Secretary Chertoff announced "that the Assistant Secretary for Information Analysis will be designated as the Chief Intelligence Officer," who "will head a strengthened Information Analysis division that will report directly to me," and "will ensure that intelligence is coordinated, fused and analyzed within the Department so that we have a common operational picture. It will also provide," he continued, "a primary connection between DHS and others within the intelligence community—and a primary source of information for our state, local, and private sector partners."[20]

When DHS was chartered with the Homeland Security Act of 2002, the Directorate for Information Analysis and Infrastructure Protection (IAIP) was vested, among other duties, with responsibility "[t]o access, receive, and analyze law enforcement information, intelligence information, and other information from agencies of the Federal Government, State and local government agencies (including law enforcement agencies), and private sector entities, and to integrate such information in order to (A) identify and assess the nature and scope of terrorist threats to the homeland; (B) detect and identify threats of terrorism against the United States; and (C) understand such threats in light of actual and potential vulnerabilities of the homeland."[21] However, several weeks after the Homeland Security Act was signed into law, this provision was undermined. In his 2003 State of the Union Address, President George W. Bush announced he was instructing the leaders of the Federal Bureau of Investigation (FBI), Central Intelligence Agency (CIA), DHS, and DOD "to develop a Terrorist Threat Integration Center [TTIC], to merge and analyze all threat information in a single location."[22] TTIC had the potential for at least paralleling IAIP if not usurping its role. A little over a year later, in an April 13, 2004, letter to Senators Susan Collins and Carl Levin jointly signed by Secretary of Homeland Security Tom Ridge, Director of Central Intelligence George J. Tenet, FBI Director Robert S. Mueller III, and TTIC Director John O. Brennan, the relationship between TTIC and IAIP was explained as follows.

> TTIC has the primary responsibility ... for terrorism analysis (except information relating solely to purely domestic terrorism) and is responsible for the day-to-day terrorism analysis provided to the President and other senior policymakers. ... IAIP has the primary responsibility for matching the assessment of the risk posed by identified threats and terrorist

[20] U.S. Department of Homeland Security, "Secretary Michael Chertoff, U.S. Department of Homeland Security Second Stage Review Remarks," p. 7.

[21] 116 Stat. 2146; 6 U.S.C. § 121(d)(1).

[22] *Weekly Compilation of Presidential Documents*, vol. 39, Feb. 3, 2003, p. 113.

> capabilities to our Nation's vulnerabilities [and] ... for providing the full range of intelligence support ... to the DHS Secretary, other DHS leadership, and the rest of DHS.[23]

The Intelligence Reform and Terrorism Prevention Act of 2004 transferred TTIC to the newly created National Counterterrorism Center (NCTC),[24] which was designated "the primary organization ... for analyzing and integrating all intelligence possessed or acquired by the United States Government pertaining to terrorism and counterterrorism, excepting intelligence pertaining exclusively to domestic terrorists and domestic counterterrorism," and, among other duties, conducting "strategic operational planning for counterterrorism activities, integrating all instruments of national power, including ... homeland security ... activities," and assigning "roles and responsibilities as part of its strategic operational planning duties to lead Departments or agencies, as appropriate, for counterterrorism activities that are consistent with applicable law."[25]

"Following the passage of the Intelligence Reform and Terrorism Prevention Act of 2004, the creation of the National Counter Terrorism Center (NCTC) and the Terrorist Screening Center (TSC)," it was observed in a recent report by the House Committee on Appropriations, "IAIP has seen the scope of its national intelligence mission reduced," and DHS was directed "to review the mission and functions of IAIP in light of the passage of the Intelligence Reform and Terrorism Prevention Act of 2004, the creation of the NCTC and the TSC, and provide a report ... on the future role IAIP will have in the intelligence community."[26] In a counterpart report, the Senate Committee on Appropriations concurred, and directed IAIP and DHS "to undertake a review of IAIP's resource requirements based on a comparative review of IAIP's intelligence responsibilities, as defined in the Homeland Security Act of 2002, with those following the passage of the Intelligence Reform and Terrorism Prevention Act of 2004" and submit the findings of this review to the committee.[27]

In his July 13, 2005, reorganization notification letter to Congress, Secretary Chertoff stated that "the Department has more than 10 different intelligence offices, including those in Customs and Border Protection (CBP), Transportation Security Administration (TSA), United States Coast Guard (USCG), and Immigration and Customs Enforcement (ICE)." The largest intelligence office, he noted, was in IAIP. To accomplish the department's intelligence and related functions more effectively, he proffered, "I will be elevating the Information Analysis resources, presently part of the Directorate of Information Analysis and Infrastructure Protection (IAIP), to be a stand-alone office reporting directly to the Secretary." He also indicated that "the Information Analysis unit should be a DHS-wide analytic entity that is empowered to coordinate activities and fuse information from all intelligence offices in DHS." Secretary Chertoff expressed his intent to designate the Assistant Secretary for Information Analysis as the Chief Intelligence Officer, and "the renamed Office of Intelligence and Analysis (IA) will provide intelligence information in support of the Department and will disseminate information and intelligence to our State and local partners."[28]

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[23] Letter from Secretary of Homeland Security Tom Ridge, Director of Central Intelligence George J. Tenet, FBI Director Robert S. Mueller III, and TTIC Director John O. Brennan to the Honorable Susan M. Collins and Carl Levin, United States Senate, Washington, DC, April 13, 2004.

[24] P.L. 108-458, Sec. 1092; 118 Stat. 3697.

[25] P.L. 108-458, Sec. 1021; 118 Stat. 3672.

[26] H.Rept. 109-79, p. 103.

[27] S.Rept. 109-83, pp. 83-84.

[28] U.S. Department of Homeland Security, letter from Secretary Michael Chertoff to the Honorable Christopher Cox, (continued...)

Regarding the relationship of the DHS Chief Intelligence Officer and IA with the larger intelligence community, Secretary Chertoff, testifying at a July 14 hearing of the Senate Committee on Homeland Security and Governmental Affairs, suggested that they would become better participants in the intelligence community by having more to contribute as a result of gathering and integrating intelligence from all of the department's components.[29] He reiterated that comment at a July 25 hearing of the House Committee on Homeland Security, saying:

> From our standpoint, our chief intelligence officer I think is going to have a couple of powerful tools in dealing with the rest of the community. First of all, that person will be able to speak for all of the intelligence components within DHS. And, second, that person is going to be able to bring to the table something that I don't think we have fully brought to the table, which is our own intelligence collection capability.[30]

At that same hearing, the Secretary also said the DHS Chief Intelligence Officer would be one of the two officials at DHS who would be part of the intelligence community, the other presumably coming from the U.S. Coast Guard. Asked if DHS would have a presence at the NCTC, he stated "I most definitely anticipate and want to have DHS play a role in NCTC," and indicated that for this to happen is "really just a question of finding the space and handling the logistics" at the NCTC facility.[31]

Operations

In his July 13, 2005, 2SR remarks, Secretary Chertoff indicated that, with the elimination of the BTS Directorate and vesting the Federal Emergency Management Agency (FEMA) with a more independent status within DHS, "seven primary operational components will have a direct line to the Secretary": the Transportation Security Administration (TSA), Customs and Border Protection Bureau (CBP), U.S. Secret Service (USSS), U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement Bureau (ICE), FEMA, and the U.S. Coast Guard (USCG). However, he continued—"to improve our ability to coordinate and carry out operations—we will establish a new Director of Operations Coordination," who "will work with component leadership and other federal partners to translate intelligence and policy into actions—and to ensure that those actions are joint, well-coordinated and executed in a timely fashion."[32]

Secretary Chertoff stated in his July 13, 2005, reorganization notification letter to Congress his intention to establish administratively within DHS an Office of Operations Coordination (OOC), headed by the Director of Operations Coordination, who will report directly to the Secretary. He explained that, in the original design of DHS, "the Directorate of Border and Transportation Security (BTS) was intended to perform much of the operational coordination role envisioned

(...continued)

pp. 2-3.

[29] Congressional Quarterly, "Senate Homeland Security and Governmental Affairs Committee Holds Hearing on Review or [sic] Department of Homeland Security Organization," unedited transcript (Washington: July 14, 2005), p. 14.

[30] Congressional Quarterly, "House Homeland Security Committee Holds Hearing on Review of Department of Homeland Security Organization," unedited transcript (Washington: July 25, 2005), p. 35.

[31] Ibid., pp. 13-14.

[32] U.S. Department of Homeland Security, "Secretary Michael Chertoff, U.S. Department of Homeland Security Second Stage Review Remarks," p. 7.

for" OOC, but noted that "BTS has authority over only a portion of the Department's major operational components, requiring additional coordination at the Secretary's level." Creating OOC "to facilitate the Secretary's coordination role will eliminate an inefficient, two-step process. Accordingly," he continued, "I have asked Congress for legislation that would eliminate the position of Under Secretary for Border and Transportation Security."[33]

Preparedness

The fourth and final structural realignment area discussed by Secretary Chertoff in his July 13, 2005, 2SR remarks concerned restructuring the department regarding its preparedness responsibilities. Calling DHS an "all hazards" department, he noted that this concept included "not only fighting the forces of terrorism, but also fighting the forces of natural disasters." The Secretary said he intended "to consolidate the Department's existing preparedness efforts—including planning, training, exercising and funding—into a single directorate led by an Under Secretary for Preparedness." Under this arrangement, he explained, FEMA, standing outside the new directorate, "will be a direct report to the Secretary—but it will now focus on its historic and vital mission of response and recovery." The new directorate "will support FEMA with training resources and will continue to rely on FEMA's subject matter expertise and the expertise of our other components in promoting preparedness," he said.[34]

The Secretary also indicated that he intended to appoint a Chief Medical Officer, who would be located within the new Preparedness Directorate. "This position," he said, "will be filled by an outstanding physician who will be my principal advisor on medical preparedness and a high-level DHS representative to coordinate with our partners at the Department of Health and Human Services, the Department of Agriculture and state governments." Secretary Chertoff had plans, as well, for another position within the Preparedness Directorate. "To centralize the coordination of the efforts to protect technological infrastructure," he announced, "we will create the new position of Assistant Secretary for Cyber and Telecommunications Security within the Preparedness Directorate."[35]

Elaborating in his July 13, 2005, reorganization notification letter to Congress, the Secretary explained that the "Administration's original vision for the Directorate of Emergency Preparedness and Response (EP&R) stressed the need for consolidating preparedness, response and recovery into a single directorate," but, he noted, DHS's preparedness programs "are presently spread among three separate components, complicating management of these functions." Consequently, he wrote, "I intend to separate preparedness resources from response and recovery and combine them in the IAIP Directorate, which will be renamed the Directorate for Preparedness." This reorganization, in the Secretary's view, would not require any congressional action. Under this arrangement, separating preparedness from response and recovery, portions of FEMA—the U.S. Fire Administration, "the hazardous materials training and assistance program, the chemical stockpile emergency preparedness program, the radiological

[33] U.S. Department of Homeland Security, letter from Secretary Michael Chertoff to the Honorable Christopher Cox, pp. 3-4.

[34] U.S. Department of Homeland Security, "Secretary Michael Chertoff, U.S. Department of Homeland Security Second Stage Review Remarks," p. 7.

[35] Ibid., pp. 7-8.

emergency preparedness program and the BioShield program"—would be transferred to the Preparedness Directorate.[36]

Discussing the proposed Preparedness Directorate, the relationship between it and FEMA, and the future of FEMA at a July 14 hearing of the Senate Committee on Homeland Security and Governmental Affairs, Secretary Chertoff said:

> ... the idea here is not to decouple the skills of FEMA from preparedness. It is to allow FEMA to pursue its core mission as a direct report to the secretary and then look to the preparedness directorate to draw on FEMA's skill set and the other skill sets in equal measure, in order to make sure it's covering the entire gamut of preparedness from prevention through response and recovery.[37]

A few days later, at a July 25 hearing of the House Committee on Homeland Security, the Secretary again turned to the new role envisioned for FEMA.

> What the restructuring proposes to do is to take out of FEMA a couple of elements that were really not related to its core mission, that were more generally focused on the issue of preparedness in a way that I think was frankly more of a distraction to FEMA than an enhancement to FEMA. ... [W]e want to make sure that FEMA was, as an operational agency, capable of focusing on its core mission, that it was a direct report to the secretary so that it gets the direct attention that it needs. And we wanted to make sure the leadership of FEMA was not torn between its need to focus on the FEMA role the additional, rather more strategic, preparedness functions, which [I] think that we are now seeking to unify and put together in a coordinated fashion.[38]

He also offered the following statement regarding the intent in creating the new directorate: "What our Preparedness Directorate will do is it will bring to the table all of these very critical functions which are part of preparedness efforts—prevention, protection and response and recovery." Reiterating, he said: "What I want to do is make sure that when we do preparedness policymaking, everybody is at the table."[39]

Turning to the role of the proposed Chief Medical Officer. The Secretary said:

> The idea with a chief medical officer is precisely to give us somebody who owns the entirety of this system, of response with respect to health issues. That would be prevention, protection and response and recovery, because in many cases, particularly dealing with biological threats, response and recovery is a very, very important element of our defense strategy. ... So he's going to be someone who's acutely aware of the interface between first responders and the health recovery system in the emergency type of environment ... someone who is going to apply the science of medicine and other scientific disciplines to the reality of dealing with a threat or a hazard in an emergency type of situation.[40]

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[36] U.S. Department of Homeland Security, letter from Secretary Michael Chertoff to the Honorable Christopher Cox, pp. 4-5.

[37] Congressional Quarterly, "Senate Homeland Security and Governmental Affairs Committee Holds Hearing on Review or [sic] Department of Homeland Security Organization," pp. 21-22.

[38] Congressional Quarterly, "House Homeland Security Committee Holds Hearing on Review of Department of Homeland Security Organization," p. 8.

[39] Ibid., p. 21.

[40] Ibid., p. 24.

Finally, the proposed Office of Cyber Security and Telecommunications (OCST), headed by an Assistant Secretary, would have two principal areas of responsibility: (1) the cyber security component "will be responsible for collecting, analyzing and coordinating access to information related to potential cyber terrorist threats and will coordinate Department-wide activities on cyber threats with cyber infrastructure"; (2) the telecommunications component "will also support telecommunications infrastructure to meet mission-critical national security and emergency preparedness communications needs for Federal, State, local and tribal governments as well as private industry."[41] OCST is a somewhat more elaborate version of a model recently proposed in the Department of Homeland Security Authorization Act for Fiscal Year 2006 (H.R. 1817) to better address cyber security threats and establishes a professionally attractive and authoritative leadership position for the entity.[42]

Other Entities

In addition to the four principal areas of structural realignment discussed in Secretary Chertoff's 2SR remarks of July 13, 2005, some other aspects of his planned reorganization of DHS have been revealed, but not always with details. For instance, in his July 13, 2005, reorganization notification letter to Congress, the Secretary indicated he was shifting the Federal Law Enforcement Training Center from BTS "to be a free standing entity reporting directly to the Deputy Secretary." Another entity, the Federal Air Marshal Service, "will be transferred from Immigration and Customs Enforcement to TSA effective October 1, 2005," the date Secretary Chertoff set for implementing his reorganization of the department. To better provide "timely and complete responses to Congressional reporting requirements and informational inquiries from Members of Congress and state and local elected officials," the Secretary planned to "merge the Offices of Legislative Affairs and those intergovernmental coordination resources of the State and Local Government Coordination and Preparedness Office" into a "new Office of Legislative and Intergovernmental Affairs (OLIA) ... headed by an Assistant Secretary who will report directly to the Secretary." The Office of Security, which initially reported to the Under Secretary for Management, but was then redirected in the spring of 2003 to report to the Deputy Secretary, would be returned to its original reporting status "in order to integrate security concerns more effectively with management functions across the Department."[43]

In congressional testimony shortly after his 2SR remarks of July 13, Secretary Chertoff offered some further comments on these and other new arrangements, as well as on some other new entities, within DHS. Appearing before the Senate Committee on Homeland Security and Governmental Affairs on July 14, he commented on the proposed relocation of the Office of the National Capital Region Coordination (ONCRC) to the Preparedness Directorate, with the result that ONCRC, instead of reporting directly to the Secretary, would report through the Under Secretary for Preparedness. Commenting that ONCRC's "function of preparedness for the Capital ... needs to be very closely linked with preparedness in general," the Secretary explained the relocation, saying:

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[41] U.S. Department of Homeland Security, letter from Secretary Michael Chertoff to the Honorable Christopher Cox, p. 5.

[42] U.S. Congress, House Committee on Homeland Security, *Department of Homeland Security Authorization Act for Fiscal Year 2006*, report to accompany H.R. 1817, 109th Cong., 1st sess., H.Rept. 109-71 Part 1 (Washington: GPO, 2005), pp. 71-73.

[43] U.S. Department of Homeland Security, letter from Secretary Michael Chertoff to the Honorable Christopher Cox, pp. 5-7.

> ... what this does is it enhancing [sic] the ability of the National Capital to participate in our preparedness planning and including the biopreparedness planning, using the perspective that he has, you know, drawn from the unique challenges that you face in this particular city, given the fact that it's the seat of government.
>
> So I actually don't view it as diminishing the role of that office, but actually as enhancing its ability to touch and influence many of the preparedness functions that we need to use that will be of direct significance to protecting the Capital of the country.[44]

Asked about a proposed Domestic Nuclear Detection Office (DNDO), the Secretary indicated that the new entity would report directly to him, thereby giving it "stature to attract people ... that would not just be DHS people, but would be senior people from Department of Energy and other interested departments." He said he had spoken with the Secretary of Energy about creating DNDO, and proffered that both of them were "very committed to making this work" and that "the president is personally interested in this as well."[45]

In testimony before the House Committee on Homeland Security on July 25, Secretary Chertoff commented briefly on plans to relocate the Federal Protective Service (FPS) and the Federal Air Marshal Service (FAMS). Concerning the first of these, he said: "I think part of the consideration of putting FPS in ICE was that FPS does have a law enforcement or police function, and ICE is a law enforcement organization." Regarding the latter, he indicated that "it was our judgment that particularly because we were going to move FAMS out of ICE and back to TSA, that would enable the leadership of ICE to focus a little bit more on FPS."[46]

Rejected CBP-ICE Merger

A reorganization proposal which did not materialize in Secretary Chertoff's 2SR plans was the suggested merger of the Bureau of Customs and Border Protection (CBP) and the Bureau of Immigration and Customs Enforcement (ICE). Recommended in the same *Heritage Special Report* of December 13, 2004, that championed an Under Secretary for Policy for DHS,[47] the proposal received some attention at a January 26, 2005, hearing of the Senate Committee on Homeland Security and Governmental Affairs on the future of DHS, but at least one expert witness went on record as opposed to the idea, and the acting DHS Inspector General, who testified at the hearing, was asked by the chair to do a study on the issue and report back to the committee.[48] The House Committee on Homeland Security also considered the matter, but came to no conclusion and, instead, included a provision in the Department of Homeland Security Authorization Act for Fiscal Year 2006 (H.R. 1817) requiring the Secretary to review and evaluate the current organizational structure of CBP and ICE and submit a report of findings and recommendations to Congress within 30 days after the enactment of the legislation.[49] At the time

[44] Congressional Quarterly, "Senate Homeland Security and Governmental Affairs Committee Holds Hearing on Review or [sic] Department of Homeland Security Organization," p. 24.

[45] Ibid., p. 33.

[46] Congressional Quarterly, "House Homeland Security Committee Holds Hearing on Review of Department of Homeland Security Organization," p. 31.

[47] Carafano and Heyman, "DHS 2.0: Rethinking the Department of Homeland Security," *Heritage Special Report SR-02*, pp. 15-16.

[48] U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *Department of Homeland Security: The Road Ahead*, pp. 39-43.

[49] H.Rept. 109-71 Part 1, p. 78.

the committee reported the authorization bill, Secretary Chertoff's 2SR initiative had been underway for two months.

In his July 14 testimony before the Senate Committee on Homeland Security and Governmental Affairs, Secretary Chertoff was asked about the CBP-ICE merger proposal. Taking the matter "very seriously" and acknowledging that he "actually met with the inspector general to get a sense, at least, of what he was finding" on the issue, the Secretary said, "I asked myself: What are the problems we're trying to cure here, and is there a way to cure them in a less drastic approach?" In brief, he concluded that the merger would have the result that the two entities "would simply have deputy assistant secretaries instead of assistant secretaries." Continuing, he said:

> What seemed to be important was to get them to operationally work together but to do it with the other components as well, with Coast Guard, for example, and with—even with infrastructure protection, and that's where having an operations and a planning and policy shop department-wide I think supplies the answer.
>
> When we sat down to talk about a border security strategy, what we needed to do was to build a plan that was comprehensive, that took us from the beginning of the process through the end, and that spanned, among other things, the role of CBP, ICE and Coast Guard. Putting together a tool that allows us to do that—which is what we've recommended—I think will address the problems that have been identified.[50]

The Secretary offered a very similar explanation at the July 25 hearing of the House Committee on Homeland Security. Saying "we actually took a very close look at this," and again acknowledging he "was privy to some of the factual findings that the inspector general made when we considered this," Secretary Chertoff offered "what our thinking was."

> First of all, part of our proposed restructuring involves having a common department-wide policy and planning shop and operations shop, which gives us not only the ability to unify operations and policy between CBP and ICE, but across the department, including, for example, Coast Guard, which often intersects with them as you get into maritime areas, and therefore should be part of the same coordination function.
>
> * * * * * * *
>
> It seemed to me that you are dealing with functionally different issues when you are dealing with CBP, which deals principally with inspection and with border patrol agents, and on the other hand you have your detention and removal folks and your investigators at ICE, and those are different functions.
>
> * * * * * * *
>
> So, given the upside of a merger, and considering the possible downside, including the huge cost that's involved any time you do a massive reorganization, I think it was our judgment that the case had not been made that a merger would cure the issues that have to be addressed. There is no question there are issues of coordination and finance that have to be

[50] Congressional Quarterly, "Senate Homeland Security and Governmental Affairs Committee Holds Hearing on Review or [sic] Department of Homeland Security Organization," pp. 15-16.

> addressed, and we are addressing them, but I think at this point I'm confident that what we're doing will remedy the existing problems.[51]

In mid-September, the *Washington Times* disclosed that a draft report, prepared by the DHS Inspector General at the request of Senator Susan Collins, chair of the Committee on Homeland Security and Governmental Affairs, recommended that CBP and ICE be merged into a single entity. The proposal contradicts the 2SR realignment plan of Secretary Chertoff, which calls for the two agencies two remain separate.[52]

Early Organizational Issues

Reorganization Authority

While the Secretary, in his July committee testimony, expressed his confidence that his 2SR reforms would "remedy the existing problems," other interested parties had raised issues concerning his plans, not the least of which concerned his means to achieve his reorganization ends. In concluding remarks at the July 14 hearing of the Senate Committee on Homeland Security and Governmental Affairs, Senator Susan Collins, the chair of the panel, made the following comment to Secretary Chertoff:

> ... as I review your plan, you are intending to make some truly fundamental changes to the department without requesting legislative authority to do so. Your list of legislative changes is very narrow.
>
> I think you're pushing the boundaries on that. And I hope you will work with the committee so that we can draft a more comprehensive reauthorization bill. I think many of the changes you're proposing really should be done by law and not just administratively. So, that's an issue we'll be pursuing with you.[53]

The issue underlying the comment made by Senator Collins involved Secretary Chertoff's interpretation of his reorganization authority. His interpretation was seemingly revealed in the text of a footnote in his July 13, 2005, reorganization notification letter to Congress, which stated: "Section 872 of the Homeland Security Act of 2002 provides *broad* reorganization authority and permits the Secretary to alter or consolidate existing organizational units, to establish new organizational units or to allocate or reallocate functions within the Department."[54] Senator Collins' comment suggested that she did not regard the reorganization authority conveyed at Section 872 to be broad in scope, or at least not as broad as the Secretary was asserting. Moreover, the expressed agreement with her closing comments by Senator Joseph Lieberman, the ranking minority member of the committee, appeared to imply that he, too, did not regard the Secretary's reorganization authority to be broad.[55]

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[51] Congressional Quarterly, "House Homeland Security Committee Holds Hearing on Review of Department of Homeland Security Organization," pp. 17-18.

[52] Jerry Seper, "Uniting Immigration Agencies Sought," *Washington Times*, Sept. 19, 2005, p. A4.

[53] Congressional Quarterly, "Senate Homeland Security and Governmental Affairs Committee Holds Hearing on Review or [sic] Department of Homeland Security Organization," p. 49.

[54] U.S. Department of Homeland Security, letter from Secretary Michael Chertoff to the Honorable Christopher Cox, p. 1 note (emphasis added).

[55] Congressional Quarterly, "Senate Homeland Security and Governmental Affairs Committee Holds Hearing on (continued...)

Section 872 of the Homeland Security Act (HSA) provides that the "Secretary may allocate or reallocate functions among the officers of the Department, and may establish, consolidate, alter, or discontinue *organizational units* within the Department, but only ... after the expiration of 60 days after providing notice of such action to the appropriate congressional committees, which shall include an explanation of the rationale for the action," and subject to certain limitations specified in the section. These limitations include no abolition of "any agency, entity, organizational unit, program, or function established or required to be maintained by the [Homeland Security] Act" or "by statute."[56] Noting that the term "organizational units" is not defined in the act, a CRS legal analysis of the section is instructive regarding its scope.

> [I]n applying canons of statutory construction to the HSA, it appears Congress intended an *organizational unit* to be something smaller than an agency or other statutorily created entity. In the limitation provision of §872(b)(1), for example, Congress placed the term *organizational units* after the terms *agency* and *entity*, but before the terms *program* and *function*. This placement suggests Congress may have intended an *organizational unit* to be smaller than an *agency* and *entity* on the general assumption that things of a higher order are named at the beginning of an enumeration and that Congress does not intend to be superfluous. In §471(b) of the HSA, Congress again suggests that an *organizational unit* may be a small administratively created structure. Section 471(b) authorizes the Secretary (through the President's Reorganization Plan) to reorganize the functions or organizational units *within* the Bureau of Citizenship and Immigration Services. Because the provision places an organizational unit *within* the Bureau, it appears Congress intended the term to be something smaller than a bureau.
>
> The definition of the term *organizational units*, in essence, affects the Secretary's authority to reorganize DHS. Because §872(a) only allows the Secretary to establish, consolidate, alter, or discontinue *organizational units* within the Department, it might be argued that the Secretary is only allowed to establish, consolidate, alter, or discontinue units smaller than an agency, entity, or bureau. An *office*, *advisory committee*, or *laboratory*, for example, might arguably qualify as something smaller than an agency, entity, or bureau. Changes to structures other than *organizational units* would apparently need to be categorized as a reallocation of *functions* among the officers of the Department or be conducted pursuant to new legislative action to avoid an unauthorized action. Nonetheless, because the term *organizational units* is not defined in the HSA or discussed in any relevant legislative history, the scope of the term is not completely clear.[57]

Increased Direct Reports

Secretary Chertoff contended that his reorganization of DHS would result in a "flattening" of the department.[58] However, his plan substitutes one hierarchical directorate, Policy, for another, BTS, and transforms another directorate, IAIP, into one for Preparedness. Furthermore, his restructuring results in some 27 lines of reporting to the Secretary/Deputy Secretary, instead of the previous 22 lines, with seven of these new lines coming from operating agencies. This new

(...continued)

Review or [sic] Department of Homeland Security Organization," p. 50.

[56] 116 Stat. 2243; 6 U.S.C. § 452 (emphasis added).

[57] CRS Report RS21450, *Homeland Security: Scope of the Secretary's Reorganization Authority*, by (name redacted) (emphasis in original).

[58] Congressional Quarterly, "Senate Homeland Security and Governmental Affairs Committee Holds Hearing on Review or [sic] Department of Homeland Security Organization," p. 38.

arrangement raises two issues which the minority members of the House Committee on Homeland Security articulated in a July 2005 report.

> While reorganization of operational functions is generally a good idea, if the Secretary's office is not structured in a way that will channel the oversight of all these agencies, a Secretary less able or influential than Secretary Chertoff may become overwhelmed.
>
> Additionally, such a "flatter" structure could lead to political staff in the Secretary's office having too much control over daily operations of law enforcement and screening agencies, such as ICE, CBP, and TSA.[59]

Other Concerns

This report, which commended Secretary Chertoff for undertaking 2SR, also reflected frustration with his failure to provide adequate details regarding his proposals, with the result that aspects of the roles of the Assistant Secretary for Cybersecurity and Telecommunications, the Chief Medical Officer, and the Chief Intelligence Officer were unclear and raised important questions.[60] It also expressed concern about the Preparedness Directorate, specifically that "the structure advocated by the Secretary may create harmful competition between infrastructure protection, cybersecurity, and first-responder needs."[61] The failure to merge CBP and ICE, as recommended by the December 2004 *Heritage Special Report*, was regarded to be "a mistake."[62] Similarly, the Secretary's failure to seek strengthened investigative powers for the DHS Privacy Officer, as well as a five-year term of office and authority to submit reports directly to Congress, was also viewed as "a mistake."[63] The report was critical of the Secretary, as well, for ignoring Government Accountability Office (GAO) and DHS Inspector General assessments supporting the elevation of "offices in the Management Directorate, which includes the Chief Procurement Officer (CPO) and the Chief Information Officer (CIO), and the Chief Financial Officer, to a level above the other directorates," and, thereby, strengthening their positions in the department's hierarchy.[64] Finally, the report noted that "Congress mandates that the Department of Defense (DOD) submit a Quadrennial Defense Review (QDR) every four years to focus on the strategic needs of the Pentagon for the next 20 years," and lamented that "Secretary Chertoff has not indicated he will put in place a long-term planning system like a QDR."[65]

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[59] Rep. Bennie G. Thompson, et al. (minority members), House Committee on Homeland Security, *Protecting America Against Terrorists: The Case for a Comprehensive Reorganization of the Department of Homeland Security* (Washington: n.d.), p. 7.

[60] Ibid., pp. 2-5.

[61] Ibid., p. 5.

[62] Ibid., p. 9.

[63] Ibid., pp. 9-10.

[64] Ibid., p. 10; see U.S. Department of Homeland Security, Office of the Inspector General, *Improvements Needed to DHS' Information Technology Management Structure*, OIG-04-29 (Washington: July 2004); U.S. Department of Homeland Security, Office of the Inspector General, *Major Management Challenges Facing the Department of Homeland Security*, OIG-05-06 (Washington: Dec. 2004); U.S. Government Accountability Office, *Department of Homeland Security: A Comprehensive and Sustained Approach Needed to Achieve Management Integration*, GAO Report GAO-05-139 (Washington: Mar. 2005); the Department of Homeland Security Financial Accountability Act of 2004 effectively modified the DHS CFO position so that this official reports directly to the Secretary, instead of through the Under Secretary for Management, with the result that CFO appears to hold co-equal status with, but not higher status than, the heads of the directorates (118 stat. 1275).

[65] Thompson, et al. (minority members), House Committee on Homeland Security, *Protecting America Against Terrorists: The Case for a Comprehensive Reorganization of the Department of Homeland Security*, pp. 12-13.

Early Leadership Issues

Secretary Chertoff's 2SR reorganization proposal also raised issues regarding the composition of the department's leadership. The proposal, as initially released, provided for the creation or organizational relocation of a number of leadership positions, but often did not specify the compensation level and appointment authority for these positions. It was unclear whether or not the Secretary had sufficient authority, without congressional action, to establish, and make appointments to, the top DHS leadership positions his proposal envisioned.

Under the Constitution, Congress establishes departments and agencies, and, to whatever degree it chooses, creates the offices and the internal organization of agencies. It may, for example, lay out a highly specified organizational framework, or it may delegate to the President or the agency head the creation of most positions and distribution of most functions, responsibilities, and authority. Usually, Congress establishes the top three or four levels of a department's hierarchy in law. By statutorily establishing leadership positions, Congress determines the shape of the leadership hierarchy for the department as well as a system of accountability to elected officials.

The Constitution also provides Congress with considerable discretion over which officers of the United States will be appointed by the President with the advice and consent of the Senate (PAS positions), and which may be appointed by the President alone (PA positions), the courts, or agency heads.[66] Congress has often created departmental leadership positions as PAS positions; this approach has several institutional advantages for Congress. For example, it often allows Senators to have a role in the selection of the nominee and in determining the fitness of the selected individual for the role to which he or she has been nominated. In addition, confirmation hearings provide Senators with an opportunity to conduct oversight over agencies and programs, and to extract a pledge that the nominee will appear before committees of Congress when summoned. This commitment may not be necessary, under most circumstances, to obtain testimony. An argument could be made that Congress has the authority to call most officers with operational duties, regardless of appointment status, before its committees. As a practical matter, however, the commitment obtained at the time of confirmation may make this process easier for Congress. Absent such a commitment, an Assistant Secretary, for example, may defer to an Under Secretary when requested to appear before a congressional committee.

In some cases, Congress has elected to assign appointment authority to the President alone. Most of the positions to which appointments are made in this way are in the White House Office. These are generally positions in close proximity to the President, whose incumbents are often privy to confidential policy discussions conducted by leaders of agencies in the Executive Office of the President. By and large, officials appointed in this manner act as advisers, rather than implementing the law. Although PA positions are unusual outside of that context, the Homeland

[66] The appointment process for federal government leadership positions is guided by the Constitution, which provides that "[the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments" (Article II, Sec. 2, cl. 2). In a 1976 opinion, the GAO Comptroller General presumably reasoned that this provision indicates that all officers of the United States are to be PAS positions unless Congress affirmatively delegates that authority (Comp. Gen. Dec. No. B-183012, 56 Comp. Gen. 137). With regard to which positions would be considered "Officers" under this clause, the Supreme Court has held that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed" above (*Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976)).

Security Act created seven such positions in the new department.[67] As a result, Congress may have less influence regarding the kinds of individuals appointed to fill these positions and the ways in which they address their responsibilities.

In other cases, Congress has assigned appointment authority to the Secretary. This kind of appointment has been particularly common for lower-level officers, and it gives the Secretary the greatest discretion. Although such an appointment is usually made with White House consent, congressional involvement may be minimal or nonexistent.

PAS Assistant Secretaries

The Homeland Security Act created up to 12 Assistant Secretary positions, with no specified functions, to which appointment was to be made by the President with the advice and consent of the Senate (PAS positions).[68] In general, the act provided that the statutory Assistant Secretaries are compensated at Level IV of the Executive Schedule.[69] From the time the department was established to the end of June 2005, the President had submitted nominations to Assistant Secretary positions with the following titles and organizational locations:

- Assistant Secretary for Immigration and Customs Enforcement (BTS);
- Assistant Secretary for the Transportation Security Administration (BTS);
- Assistant Secretary for Plans, Programs, and Budgets (S&T); and
- Assistant Secretary for Border and Transportation Security Policy and Planning (BTS).

Under Secretary Chertoff's reorganization proposal, the Assistant Secretary for Immigration and Customs Enforcement was to become a commissioner, compensated at Level III of the Executive Schedule, and the office holder was to report directly to the Secretary. Similarly, the Assistant Secretary for the Transportation Security Administration was to become a director, compensated at Level III of the Executive Schedule, and the office holder was to report directly to the Secretary. No change was announced then with regard to the Assistant Secretary for Plans, Programs, and Budgets. Secretary Chertoff indicated that the Border and Transportation Security Policy and Planning Office was to become part of the new OPPIA.

The new OPPIA initially was to be headed by an Assistant Secretary appointed through the advice and consent process—presumably one of the 12 available under the Homeland Security Act. The President submitted a nomination to this position on July 14, 2005, coincident with the rollout of the Secretary's 2SR proposal. Secretary Chertoff requested that Congress elevate this position to the Under Secretary level.[70] During the time the OPPIA would be headed by an Assistant

[67] Those positions were Director of the United States Secret Service, Chief Information Officer, Chief Human Capital Officer, Chief Financial Officer, Officer for Civil Rights and Liberties, Assistant Secretary for Information Analysis, and Assistant Secretary for Infrastructure Protection. (P.L. 107-296, §§ 103(e), 201(b), 702, 703, 704, and 705; 6 U.S.C. §§ 113(d) and 121(b).) The Chief Financial Officer was later converted to a PAS position (P.L. 108-330).

[68] P.L. 107-296, § 103(a)(8); 6 U.S.C. § 113(a)(8). Generally, where Assistant Secretary functions are not specified in statute, the President specifies functions or a title with each nomination to such a position. For at least one department (State), Congress has mandated that the President take this step (22 U.S.C. § 2651a(c)(3)).

[69] P.L. 107-296, § 1702(a)(4); 5 U.S.C. § 5315.

[70] U.S. Department of Homeland Security, letter from Secretary Michael Chertoff to the Honorable Christopher Cox, p. 2.

Secretary, this officer was to oversee the offices of several other Assistant Secretaries. It is unusual, however, to have an Assistant Secretary report to another Assistant Secretary.

The reorganization proposals also appeared to create several other Assistant Secretary positions, including:

- Assistant Secretary for Cyber Security and Telecommunications;
- Assistant Secretary for Grants and Training;
- Assistant Secretary for International Affairs;
- Assistant Secretary for Private Sector; and
- Assistant Secretary for Strategic Plans.[71]

Secretary Chertoff's reorganization proposal, as initially released, did not specify whether these proposed positions were to be among the 12 statutory Assistant Secretaries provided for in the Homeland Security Act. Alternatively, they might be created administratively. It would be unusual, however, for a Secretary to create administratively high-level positions with significant authority for implementing law.

PA Assistant Secretaries

The Homeland Security Act also established two additional Assistant Secretary positions to which appointment was to be made by the President alone.[72] The creation of Assistant Secretary positions as PA, rather than PAS, positions was a departure from prior practices in the other departments. The President, in his signing statement, endorsed the view that these positions were distinct from the positions discussed above, stating:

> The text and structure of the Act make clear that these two presidentially appointed Assistant Secretary positions were created in addition to the 12 unspecified Assistant Secretary positions, and the executive branch shall construe the relevant provisions accordingly.[73]

The two officials, the Assistant Secretary for Information Analysis and Assistant Secretary for Infrastructure Protection, were responsible for assisting the Under Secretary for Information Analysis and Infrastructure Protection in the discharge of his duties.

Under Secretary Chertoff's proposal, the Assistant Secretary for Infrastructure Protection was to report to the new Under Secretary for Preparedness.[74] The Secretary's proposal, as initially released, did not indicate what, if any, changes would be made to the authorities and responsibilities of this Assistant Secretary as a result of this new reporting arrangement, or whether such changes could be made under the Secretary's existing reorganization authority.

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[71] U.S. Department of Homeland Security, "Department of Homeland Security Organization Chart (proposed end state)," available at http://www.dhs.gov/interweb/assetlibrary/DHSOrgChart.htm.

[72] P.L. 107-296 § 201(b); 6 U.S.C. § 121(b).

[73] *Weekly Compilation of Presidential Documents*, vol. 38, Nov. 25, 2002, p. 2092.

[74] U.S. Department of Homeland Security, "Homeland Security Secretary Michael Chertoff Announces Six-Point Agenda for Department of Homeland Security," press release, available at http://www.dhs.gov/dhspublic/display?content=4598.

Secretary Chertoff's proposal was to elevate "the Information Analysis resources ... to be a stand-alone office reporting directly to the Secretary." The "renamed Office of Intelligence and Analysis (IA) [was to] provide intelligence information in support of the Department and [was to] disseminate information and intelligence to our State and local partners." The Secretary was to "designate the Assistant Secretary for Information Analysis as the Chief Intelligence Officer."[75] Consequently, the proposed change was to alter the organizational location, hierarchical level, responsibilities, and title of this office.

SES Assistant Secretaries

In addition to the Assistant Secretary positions authorized by the Homeland Security Act, at least two others have been administratively created within DHS as non-career Senior Executive Service (SES) positions.[76] SES positions are often created for program and other middle-level managers. These positions, Assistant Secretary for Public Affairs and Assistant Secretary for Legislative Affairs, have been filled through appointment by the Secretary of Homeland Security.

As previously noted, under Secretary Chertoff's reorganization proposal, a new Office of Legislative and Intergovernmental Affairs was to "assume those responsibilities presently charged to the Office of Legislative Affairs" and include the "intergovernmental coordination resources of the State and Local Government Coordination and Preparedness Office." The new office was to be headed by an Assistant Secretary for Congressional and Intergovernmental Affairs.

Other Proposed Positions

Secretary Chertoff's reorganization proposal was to create several other leadership positions. These included the Director of Operations Coordination, the Director of the Federal Emergency Management Agency (FEMA),[77] the head of the Domestic Nuclear Detection Office, and the Chief Medical Officer. The first three of these positions were to report directly to the Secretary, and the Chief Medical Officer was to report to the Under Secretary for Preparedness.

The proposal, as initially released, did not request that Congress establish these positions in statute, and the appointment authority and the compensation level were not specified. The President might elect to create one or more of these positions using existing statutory Assistant Secretary slots, in which case the affected position(s) would be appointed by the President with

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[75] U.S. Department of Homeland Security, letter from Secretary Michael Chertoff to the Honorable Christopher Cox, p. 3.

[76] U.S. Congress, House Committee on Government Reform, *United States Government Policy and Supporting Positions*, 108th Cong., 2nd sess., committee print (Washington: GPO, 2004), pp. 74-75.

[77] Before it became part of DHS, FEMA was headed by a director appointed by the President with the advice and consent of the Senate and compensated at Level II of the Executive Schedule (5 U.S.C. App. Reorganization Plan No. 3 of 1978, § 102). This position was not explicitly transferred to the new department by the Homeland Security Act, however, and the act provided that except "as otherwise provided in this Act, whenever all the functions vested by law in any agency have been transferred pursuant to this Act, each position and office the incumbent of which was authorized to receive compensation at the rates prescribed for an office or position at level II, III, IV, or V, of the Executive Schedule, shall terminate" (P.L. 107-296 § 1513; 6 U.S.C. 553). It could be argued, therefore, that the FEMA director position was to be terminated at that time. FEMA information sometimes refers to Michael Brown, Under Secretary for Emergencies, Preparedness, and Response, as the Director of FEMA (e.g., http://www.fema.gov/news/newsrelease.fema?id=17223). It is unclear whether this usage of the title of "director" indicates that DHS has determined that the original position continued to exist after the transition.

the advice and consent of the Senate and compensated at Level IV of the Executive Schedule. Alternatively, the Secretary might create the positions administratively as SES positions. As previously noted, however, it would be unusual for a Secretary to create administratively high-level positions with significant authority for implementing law.

Congress and Prescribing the DHS Leadership Hierarchy

Secretary Chertoff's 2SR reorganization proposal, as initially released, prompted many questions regarding the organization of the department leadership. Among other things, some 27 officials who were to report directly to the Secretary were to be compensated at different levels and appointed in different ways, and this situation could lead to some confusion concerning the organization's hierarchy. For example, would an Assistant Secretary for Intelligence and Analysis be on equal organizational footing with an Under Secretary for Management?

Responding to a July 22, 2005, letter from President George W. Bush proposing FY2006 budget amendments reconfiguring DHS budget accounts to support Secretary Chertoff's 2SR reorganization plan for the department,[78] conferees on the DHS appropriations bill, "[f]or the most part," accepted these amendments and, thereby, tacitly approved much of the Secretary's reorganization plan for the department. [79] The following were among the changes so endorsed:

- Abolishing the Under Secretary for Border and Transportation Security (BTS) and merging BTS functions into other DHS components;[80]
- Dividing the Information Analysis and Infrastructure Protection Directorate (IAIP) into Analysis and Operations (IA in the Secretary's earlier discussions?) and a Preparedness Directorate, and transferring all state and local grants and associated activities to this new directorate;[81]
- Transferring the Federal Air Marshal Service (FAMS) from Immigration and Customs Enforcement (ICE) to the Transportation Security Administration (TSA);[82]
- Expanding the functions and responsibilities of the Office of Policy (a modified version of OPPIA, which may subsequently be statutorily transformed into a directorate headed by an Under Secretary) by transferring the Special Assistant to the Secretary-Private Sector and the Office of Immigration Statistics to it;[83]
- Transferring the Office of Security to the Management Directorate;[84]

[78] U.S. White House Office, letter to the Speaker of the House of Representatives, Washington, DC, July 22, 2005, accompanied by U.S. Office of Management and Budget, "Estimate No. 10, 109th Congress, 1st Session," transmitted by Joshua B. Bolton, Director, Washington, DC, July 21, 2005.

[79] U.S. Congress, Committee of conference, *Making Appropriations for the Department of Homeland Security for the Fiscal Year Ending September 30, 2006, and for Other Purposes*, report to accompany H.R. 2360, 109th Cong., 1st sess. H.Rept. 109-241 (Washington: GPO, 2005), p. 30.

[80] Ibid.

[81] Ibid., pp. 30, 40, 41, 63.

[82] Ibid., p. 30, 55.

[83] Ibid., pp. 30, 31.

[84] Ibid., pp. 32, 37.

- Transferring the functions and resources of the Office of State and Local Government Coordination and Preparedness (OSLGCP) to the Office of Legislative Affairs to create the new Office of Legislative and Intergovernmental Affairs (OLIA);[85]
- Reconstituting portions of the Information Analysis and Infrastructure Protection (IAIP) Directorate as a new Preparedness Directorate, headed by an Under Secretary, and transferring the Office of National Capital Region Coordination (ONCRC), the U.S. Fire Administration and Training, infrastructure protection and information security functions, and elements of OSLGCP to it, and establishing the Office of Chief Medical Officer within it, as well,[86] and
- Conducting a Quadrennial Homeland Security Review similar to the Pentagon's QDR and submitting the results to the congressional appropriations and homeland security committees.[87]

The House agreed to the conference report on October 6 on a 347-70 vote; the Senate completed action on the report the following day, clearing the DHS appropriation bill (H.R. 2360) for the President's signature on October 18, 2005.[88]

Later Organizational Issues

Despite major controversy regarding the FEMA response and recovery effort following Hurricane Katrina, attempts to investigate and evaluate that effort, and uncertainty concerning how much of the 2SR reorganization could be unilaterally implemented without congressional action, Secretary Chertoff, with little public notice, proceeded with the October 1, 2005, implementation of his 2SR plan. While some aspects of the early organizational and leadership issues remained, new concerns also have arisen.

Effecting Reorganization

Some confusion surrounds the manner in which the 2SR reorganization was effectuated. In his July 13, 2005, letter to Congress providing "notification of the reallocation of functions and the establishment, consolidation and alteration of organizational units within the Department of Homeland Security," Secretary Chertoff indicated he was restructuring DHS pursuant to Section 872 of the Homeland Security Act, and set an October 1, 2005, implementation date.[89] Some have questioned how much of his 2SR plan the Secretary could realize using this authority. A DHS October 18 press release concerning the department's $2.4 billion appropriations increase for FY2006, however, contended that the "FY2006 Homeland Security Appropriations Act adopts many of the organization changes proposed in the 2SR process."[90] This statement is disingenuous

[85] Ibid., p. 32.

[86] Ibid., pp. 32, 63, 70.

[87] Ibid., p. 35.

[88] P.L. 109-90; 119 Stat. 2064.

[89] U.S. Department of Homeland Security, letter from Secretary Michael Chertoff to the Honorable Christopher Cox, p. 2.

[90] U.S. Department of Homeland Security," DHS Receives $2.4 Billion Increase for 2006 Appropriations," press release, Washington, DC (Oct. 18, 2005), p. 2, available at http://www.dhs.gov/dhspublic/
(continued...)

not only for what it purports—that the allocation of funds for an entity serves to charter or establish that component—but also for ignoring the explanations of the appropriators. The conference committee report on the DHS appropriations provided the following comment.

> Since March 2005, the Department of Homeland Security (DHS) has been conducting an internal review of its policies, operations and organizational structure, known as the "Second Stage Review." On July 13, 2005, the Department announced a major reorganization that reflects the findings of this review. A budget amendment was submitted on July 21, 2005, requesting the *appropriations structure* be modified for fiscal year 2006 to reflect this reorganization proposal. For the most part, the conferees have complied with these requests. The conferees concur with the Department's decision to abolish the Office of the Under Secretary for Border and Transportation Security (BTS); BTS functions have been merged into other offices and component agencies throughout the Department. The conferees have agreed to split the Directorate of Information Analysis and Infrastructure Protection into two new components—Analysis and Operations and the Preparedness Directorate—and move all State and local grants and associated activities to the new Preparedness Directorate. The conferees concur with the Secretary's recommendation to transfer the Federal Air Marshals to the Transportation Security administration. Finally, the conferees have included and expanded the roles and responsibilities of the Office of Policy.[91]

Later in their report, when considering the Office of the Under Secretary for Border and Transportation Security, the conferees agreed "to provide no funding for this appropriation, as proposed in the Secretary's organizational restructuring plan submitted on July 13, 2005, which abolished the Office of the Under Secretary for Border and Transportation Security (BTS)."[92] The Secretary, however, does not appear to have any authority to abolish BTS. Established by Section 401 of the Homeland Security Act, BTS would seemingly require a statutory pronouncement to be eliminated.

FEMA Status

Shortly after he began implementing his 2SR plan, Secretary Chertoff announced changes regarding some of FEMA's operations—contracting and procurement arrangements, communications capabilities, ability to handle disaster-assistance calls and disperse aid, and staffing levels—which were seen to be less than adequate in the aftermath of the agency's Hurricane Katrina response. He remained committed, however, to his plan to make FEMA a stand-alone entity within DHS focusing on response and recovery efforts.[93] FEMA would work with, but not be part of, the new Preparedness Directorate. In the aftermath of Hurricane Katrina, legislation has been introduced to remove FEMA from DHS and restore its status as an independent agency (S. 1615, H.R. 3656, H.R. 3659, H.R. 3685, H.R. 3816); and another proposal would counter some aspects of the 2SR reorganization, including divesting FEMA of its planning and preparedness responsibilities (H.R. 4009). In early November, Secretary Chertoff

(...continued)

display?theme=43&content=4894&print=true.

[91] H.Rept. 109-241, p. 30 (emphasis added).

[92] Ibid., p. 41.

[93] Chris Strohm, "Homeland Security Chief Plans to Retool FEMA," *GOVEXEC.com Daily Briefing*, Oct. 21, 2005, available at http://www.govexec.com/story_page.cfm?articleid=32612&printerfriendlyVer=1&.

indicated he planned to restructure FEMA to operate efficiently like a modern distribution company with the ability to track and locate supplies for emergency response.[94]

CPB-ICE Merger?

The mid-November release of the DHS inspector general's (IG's) report assessing and supporting the merger of CPB and ICE into a single agency brought into the open a heated dispute within the department over the advisability of the merger, the accuracy and analytical rigor of the report, and the Secretary's organizational authority. The IG's assessment of the merger had been requested by Senator Susan Collins, chair of the Committee on Homeland Security and Governmental Affairs, during a January 2005 hearing.[95] Secretary Chertoff and other senior DHS officials have resisted the recommendation, but there is support for the merger within Congress.[96]

Chief Intelligence Officer

Appearing before a subcommittee of the House Committee on Homeland Security on October 19, 2005, Charles Allen, the newly named DHS Chief Intelligence Officer and a veteran CIA official, indicated that he had "the Secretary's mandate to integrate all of the Department's intelligence capabilities, not just those in the Office of Intelligence and Analysis," which he heads. This means, he explained, "the Secretary is counting on me to marshal all the intelligence and information in Homeland Security's component agencies and deliver it to him in a way he can use to make timely, risk-based decisions about how to deploy the Department's human and material resources." In furtherance of this objective, Allen said he would be implementing an intelligence integration plan, which his staff had prepared in conjunction with the Secretary's 2SR effort, and planned "to establish a Homeland Security Intelligence Council as my principal forum for discussing intelligence issues of Department-wide significance, developing a Departmental intelligence strategic plan, and driving intelligence component integration." The council, which he would chair, "will consist of key intelligence officials from the various DHS operating components," he proffered. Allen also told subcommittee members that "DHS intelligence must become fully involved in the Intelligence Community and the National Intelligence Program," which, in his view, meant "being a valued contributor to the overall intelligence effort and a trusted recipient of national intelligence information from other agencies." Indeed, he viewed this undertaking—"securing our place in the Intelligence Community"—as not only a priority, but also a challenge.[97]

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[94] Greta Wodele, "DHS Chief See FEMA Operating Like a Successful Business," *GOVEXEC.com Daily Briefing*, Nov. 4, 2005, available at http://www.govexec.com/dailyfed/1105/110405cdpm2.htm.

[95] U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *Department of Homeland Security: The Road Ahead*, p. 43.

[96] U.S. Department of Homeland Security, Office of the Inspector General, Office of Inspections and Special Reviews, *An Assessment off the Proposal to Merge Customs and Border Protection with Immigration and Customs Enforcement*, OIG-06-04 (Washington: Nov. 2005); Stephen Losey, "Pressure Builds to Merge 'Dysfunctional' ICE with CPB," *Federal Times*, Oct. 31, 2005, p. 13; Chris Strohm, "Homeland Security, IG Battle Over Proposed Merger," *GOVEXEC.com Daily Briefing*, Nov. 11, 2005, available at http://www.govexec.com/story_page.cfm?articleid=32798&printerfriendlyVers=1&; Jerry Seper, "Senate Puts Chertoff on Notice," *Washington Times*, Nov. 14, 2005, p. A4; Chris Strohm, "Homeland Security, IG Dispute Impact of Merging Agencies," *GOVEXEC.com Daily Briefing*, Nov. 15, 2005, available at http://www.govexec.com/story_page.cfm?articleid=32817&printerfriendlyVers=1&.

[97] U.S. Department of Homeland Security, prepared statement of Charles Allen for House Committee on Homeland Security, Subcommittee on Intelligence, Information Sharing, and Terrorism Risk Assessment, Washington, DC (Oct. (continued...)

Chief Medical Officer

Appearing before a subcommittee of the House Committee on Homeland Security on October 27, 2005, Jeffrey W. Runge, the newly named DHS Chief Medical Officer (CMO), a physician, and recent head of the National Highway Traffic Safety Administration, indicated his office was developing a strategic plan to assist with identifying and "filling gaps in the Department's medical readiness." It was his view that "the DHS Medical Office needs to be a data-driven, science-based organization that brings cutting-edge science, technology, and intelligence to bear on the Department's policy-making." He anticipated the appointment of a Deputy Chief Medical Officer and three Associate Chief Medical Officers in his organization.[98]

Also testifying at the same subcommittee hearing was Jeffrey A. Lowell, former senior medical affairs advisor to the Secretary of Homeland Security and current professor of surgery and pediatrics at the Washington University School of Medicine in Saint Louis, MO. Discussing his review of the medical and health assets, activities, resources, and capabilities of the new DHS, he said he "found that the Department of Homeland Security lacked a clearly-defined and unified medical capability to support its mission of preventing, protecting, responding to, and recovering from major terrorist attacks or natural disasters." While applauding Secretary Chertoff's decision to establish a CMO within DHS, he recommended creating an Office of Medical Readiness, headed by a CMO with more clearly defined duties and responsibilities, which he specified in his testimony. He concluded, saying that "DHS must re-evaluate and refine the medical component of its mission; design, develop, and realign medical response capabilities within the Department, under the direction of its Chief Medical officer, and collaborate with HHS and other Federal partners to ensure the seamless integration of medical preparedness and response capabilities at the Federal, Regional, State, and local levels."[99]

Another witness, David Heyman, senior fellow and director of the Homeland Security Program of the Center for Strategic and International Studies, commented on the existing need "for the government to clarify authorities and national leadership roles for biodefense by establishing and empowering a lead executive." In this regard, he posed the question of "what specific role will the CMO play." It was his own belief, he said, that, "if you consider the breadth of responsibilities, however, that his role should be more one of a *Chief Health Officer* than a medical officer, as he must help guide the Department in far more than medical advice, to include for example navigating health care systems, understanding disease surveillance, or advising on waste disposal, sanitation and decontamination." He then outlined "four specific areas where clear leadership is needed today." Thus, he appeared to indicate that the role of the CMO extended beyond providing medical advice, and should impart leadership (1) in providing sound scientific, medical, and public health advice; (2) in developing greater situational awareness of both biological threats and health care preparedness or vulnerabilities; (3) in integrating federal, state, local, and private sector elements in the development and implementation of a national strategy to protect against

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19, 2005), pp. 2-4, 7, available at http://hsc.house.gov under "Hearings and Markups-Witness Testimony."

[98] U.S. Department of Homeland Security, prepared statement of Jeffrey W. Runge for House Committee on Homeland Security, Subcommittee on Management, Integration, and Oversight, Washington, DC (Oct. 27, 2005), p. 2, available at http://hsc.house.gov under "Hearings and Markups-Witness Testimony."

[99] Prepared statement of Jeffrey A. Lowell, Professor of Surgery and Pediatrics, Washington University School of Medicine, for House Committee on Homeland Security, Subcommittee on Management, Integration, and Oversight, Washington, DC (Oct. 27, 2005), pp. 2-3, 5, available at http://hsc.house.gov under "Hearings and Markups-Witness Testimony."

biological events; and (4) in establishing and leading outreach efforts to educate citizens on preparing for, and protecting their health during, catastrophic health emergencies.[100]

Later Leadership Developments and Issues

As the 2SR initiative has been rolled out, a number of leadership changes have been implemented through the confirmation process and administration actions. Questions remain, however, regarding the statutory basis for, and congressional role in appointments to, new leadership positions.

By the end of the first session of the 109th Congress, nominees had been confirmed for two new positions at DHS. George W. Foresman was confirmed to be the Under Secretary for Preparedness on December 17, 2005. The President's nominee to be the first Assistant Secretary for Policy, Stewart A. Baker, was confirmed on October 7, 2005. Legislation to establish a similar position at the under secretary level had been introduced, but not enacted.[101]

As proposed by Secretary Chertoff, the position of Assistant Secretary for Information Analysis had been moved from the former Directorate for Information Analysis and Infrastructure Protection to the Office of Intelligence and Analysis, a stand alone office reporting directly to the Secretary. The position, which was established by the Homeland Security Act,[102] is now referred to by DHS as the Chief Intelligence Officer. Charles E. Allen was appointed to the position on September 18, 2005.[103] Inasmuch as this position has been moved to an organizational location directly below the Secretary, Congress might elect to clarify the responsibilities and authority associated with the position. Under the provisions of the act, appointments to the position are to be made by the President alone, and the incumbent is to "assist the Under Secretary for Information Analysis and Infrastructure Protection in discharging the responsibilities of the Under Secretary under" the act. However, this under secretary no longer exists, as such, and its successor position, the Under Secretary for Preparedness, does not appear to have authority over the Assistant Secretary for Information Analysis (Chief Intelligence Officer). The change in the hierarchical location of this assistant secretary might also lead Congress to reassess the process for making appointments to the position to determine whether or not advice and consent should be required in the future.

Of the five newly created assistant secretary positions, only one had been identified as an advice and consent position by the end of the session. The Assistant Secretary for Grants and Training was to be the same individual as the Executive Director of the Office of State and Local Government Coordination and Preparedness.[104] The nomination of Tracy A. Henke to the executive director position, which was already a statutory PAS position, was pending as the Senate adjourned, and it was to be held over to the second session.

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[100] Prepared statement of David Heyman, Senior Fellow and Director of the Homeland Security Program, Center for Strategic and International Studies, for House Committee on Homeland Security, Subcommittee on Management, Integration, and Oversight, Washington, DC (Oct. 27, 2005), pp. 5, 7-10, available at http://hsc.house.gov under "Hearings and Markups-Witness Testimony."

[101] See, for example, S. 1866 and H.R. 4009.

[102] P.L. 107-296, § 201(b); 116 Stat. 2145. Codified at 6 U.S.C.121.

[103] Telephone conversation with DHS representative, Dec. 22, 2005.

[104] Telephone conversation with DHS representative, Dec. 22, 2005. The executive director position was established by P.L. 107-296, § 430(b), 116 Stat. 2191. Codified at 6 U.S.C. 238.

Of the four remaining newly created assistant secretary positions, three were being established as non-career SES positions. The individuals selected to fill these positions had previously been with DHS in other capacities. Alfonso Martinez-Fonts, Jr., who had been serving as Special Assistant for the Private Sector, was appointed to be Assistant Secretary for Private Sector on October 2, 2005. On the same day, Cresencio S. Arcos, who had been serving as Director of the Office of International Affairs, was appointed as Assistant Secretary for International Affairs. Robert Stephan, who had been appointed by the President to serve as Assistant Secretary for Infrastructure Protection, was to be appointed by the Secretary to be Assistant Secretary for Strategic Plans in January 2006. There appeared to be no plans to fill the former position after it was vacated by Stephan. With regard to the status of the last of the newly created assistant secretary positions—the Assistant Secretary for Cyber Security and Telecommunications—no appointment had been made by the end of the first session. News accounts suggested that the appointment had been held pending the completion of the FY2006 DHS appropriations process and might be forthcoming thereafter.[105]

Statutory provisions and administrative actions during the evolution of the DHS, including those stemming from the 2SR initiative, have effectively created three categories of assistant secretaries: those presidentially appointed with advice and consent of the Senate; those presidentially appointed without advice and consent; and those appointed by the Secretary, also without the input of the Senate. Although not without precedent, this broad and varied usage of the assistant secretary title is unusual across other departments. It is not clear whether or not assistant secretaries from each of these three categories will be given the same level of policymaking authority and responsibility. As a result of the different appointment processes, however, the three types of assistant secretaries may have differing stature within the department and within the government at large. In addition, those who are subject to Senate confirmation are likely to undergo greater scrutiny in the selection process and to be more accountable to Congress during their tenure. As a condition of Senate confirmation, most nominees make a commitment "to respond to requests to appear and testify before any duly constituted committee of the Senate." Appointees who are not subject to Senate confirmation are under no such obligation, although they may nonetheless do so.

Of the four other proposed positions, two were filled by permanent appointments and one continued to be held by an acting official. The Chief Medical Officer position, newly created as a non-career SES position, was filled on September 4, 2005, when Secretary Chertoff appointed Jeffrey W. Runge.[106] This office, which is located in the newly created Preparedness Directorate, was to be staffed with four new Associate Chief Medical Officers.[107] On September 4, 2005, the Director of the Nuclear Detection Office, also established as a non-career SES position, was filled by Vayl Oxford, who had previously served in other capacities in the Science and Technology Directorate at DHS. R. David Paulison continued to serve as the Acting Director of FEMA. The status of the last of the four positions—the Director of Operations Coordination—could not be determined.

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[105] Greta Wodele, "Homeland Security Mulls Cyber Czar Nomination," *GOVEXEC.com Daily Briefing*, Oct. 21, 2005, available at http://www.govexec.com/story_page.cfm?articleid=32619.

[106] Telephone conversation with DHS representative, Dec. 13, 2005.

[107] U.S. Department of Homeland Security, prepared statement of Jeffrey W. Runge for the House Committee on Homeland Security, Subcommittee on Management, Integration and Oversight, Washington, DC (Oct. 27, 2005), available at http://hsc.house.gov under "Hearings and Markups-Witness Testimony.

As the post-2SR leadership structure of DHS becomes clear, Congress may elect, in its oversight role, to evaluate the distribution of authority and accountability, as well as the leadership selection and appointment process. Based on that evaluation, it may consider codifying existing arrangements or alternative arrangements.

Legislation

H.R. 4009, the Department of Homeland Security Reform Act of 2005, introduced October 6, 2005, by Representative Bennie G. Thompson for himself and 12 cosponsors, and referred to the Committees on Homeland Security, Intelligence, and Transportation and Infrastructure. The proposal would implement some aspects of Secretary Chertoff's plan for reorganizing DHS as a result of his 2SR initiative, but also contains provisions that are contrary to that plan. Set out below is a summary of the principal provisions of the bill.

- Requires the Under Secretary for Policy to conduct a comprehensive examination of DHS to be known as a Quadrennial Homeland Security Review, and to determine human resource capabilities and requirements, organizational structure, innovation and improvement plans, intelligence and information and information analysis capabilities and resources, infrastructure capabilities and resources, and budget and technology resources, capabilities, and requirements;
- Establishes an Office of Intelligence and Analysis headed by a Chief Intelligence Officer, with specified responsibilities and appointed by the President, with the existing Assistant Secretary for Information Analysis being transformed into the Chief Intelligence Officer position;
- Abolishes the Information Analysis and Infrastructure Preparedness (IAIP) Directorate;
- Directs the Secretary of Homeland Security to establish an intra-agency task force on the protection of unclassified, but security-relevant information provided by the private sector, to be composed of the Chief Intelligence Officer, general counsel, Special Assistant to the Secretary-Private Sector, officer for civil liberties and civil rights, Privacy Officer, and other appropriate DHS personnel, and to determine (1) what kind of private sector information is security-relevant, but unclassified; (2) how such information should be controlled; and (3) the significance of such information for national security; and to propose a policy to encourage the sharing of unclassified, but security-relevant, information between the private sector and the government;
- Redesignates the Emergency Preparedness and Response (EP&R) Directorate as the Preparedness and Response Directorate and the Under Secretary for Emergency Preparedness and Response as the Under Secretary for Preparedness and Response;
- Establishes an Assistant Secretary for Preparedness, appointed by the President, to perform the functions of the Office for State and local Government Preparedness and Coordination (OSLGPC) and other specified responsibilities;
- Assigns the Under Secretary for Preparedness and Response primary responsibility for oversight and coordination of federal programs for, and

relationships with, state, local, and regional authorities in the National Capital Region;

- Establishes within the Preparedness and Response Directorate a Military Liaison with specified responsibilities and appointed by the President;
- Abolishes the Office of State and local Government Coordination and Preparedness (OSLGCP), the Office for Domestic Preparedness, and the Office of National Capital Region Coordination;
- Establishes a Director of the Federal Emergency Management Agency (FEMA), who shall be an Assistant Secretary within the Preparedness and Response Directorate, and appointed by the President, with Senate confirmation, from among individuals having extensive background in emergency or disaster-related management to serve a term of five years; establishes a Deputy Director of FEMA, who shall be appointed by the Director and shall be a career federal service employee;
- Establishes a Chief Medical Officer within the Preparedness and Response Directorate, with specified responsibilities, who shall be an Assistant Secretary;
- Provides a sense of Congress that the Bureau of Customs and Border Protection (CBP) and Bureau of Immigration and Customs Enforcement (ICE) should be merged into a single operational unit within DHS;
- Strengthens the investigative authority of the Privacy Officer primarily by the provisions of subpoena power; prescribes for the Privacy Officer a term of five years; and provides for direct reports to Congress by the Privacy Officer concerning the performance of his or her responsibilities;
- Abolishes the Under Secretary for Management and transfers the functions of that position to the Secretary;
- Prescribes that the Chief Financial Officer, Chief Information Officer, and Chief Human Capital Officer shall exercise joint authority, with the component agency heads of DHS, over the financial, information, and human capital officers, respectively, in the component agencies and entities of DHS;
- Establishes a Business Transformation Officer within DHS, who shall report to the Secretary or another officer as directed by the Secretary, to develop an overarching management integration strategy with recommendations and performance goals for DHS;
- Allows DHS employees, DHS contractor or subcontractor employees, or other employees of companies working in homeland security areas to file a complaint with the Department of Labor (DOL) in the event of retaliation against such an employee for reporting a national or homeland security concern to his or her employer, the Government Accountability Office (GAO), a government agency, or Congress; if DOL does not act on the complaint within six months from its filing, the employee can bring a case in federal district court for relief; requires judgement in favor of the employee if the government prevents the case from being heard due to an assertion of the "state secrets" privilege; and makes retaliation against whistle blowers a crime punishable by ten years in prison;

- Establishes an Office of Tribal Security within DHS, headed by a Director, with specified responsibilities, who shall report to the Secretary;
- Establishes in the Preparedness and Response Directorate a National Cybersecurity Office, headed by an Assistant Secretary for Cybersecurity , and Telecommunications, with specified responsibilities and appointed by the President;
- Establishes in the Preparedness and Response Directorate an Assistant Secretary for Physical Infrastructure Security, with specified responsibilities and appointed by the President;
- Establishes an Under Secretary for Policy, appointed by the President with Senate confirmation; and
- Establishes within DHS a program for the secure handling of ammonium nitrate.

S. 1866, the Homeland Security Policy Act of 2005, introduced October 7, 2005, by Senator Susan Collins for herself and Senator John Warner, and referred to the Committee on Homeland Security and Governmental Affairs. The legislation amends the Homeland Security Act to establish an Under Secretary for Policy in the Department of Homeland Security.

Appendix A. 2SR Initiative Chronology

March 2, 2005 -	Secretary of Homeland Security-designate Michael Chertoff, in testimony before the Subcommittee on Homeland Security of the House Committee on Appropriations, announced that he was initiating a comprehensive review of the organization, operations, and policies of the Department of Homeland Security (DHS).
July 13, 2005 -	Secretary of Homeland Security Michael Chertoff announced a six-point agenda for DHS, which resulted from a Second Stage Review or 2SR that he had initiated, and was designed to ensure that the department's policies, operations, and structures are best aligned to address potential threats to the nation, both today and in the immediate future.
July 14, 2005 -	Secretary of Homeland Security Chertoff testified before the House Committee on Homeland Security regarding his reform agenda for DHS resulting from 2SR.
-	Secretary Chertoff testified before the Senate Committee on Homeland Security and Governmental Affairs regarding his reform agenda for DHS resulting from 2SR.
July 19, 2005 -	Secretary Chertoff testified before the Senate Committee on Commerce, Science, and Transportation regarding his reform agenda for DHS resulting from 2SR.
July 22, 2005 -	President George W. Bush transmitted to Congress FY2006 budget amendments reconfiguring DHS budget accounts to support Secretary Chertoff's organization restructuring plan for the department.
July 25, 2005 -	Secretary of Homeland Security Chertoff testified further before the House Committee on Homeland Security regarding his reform agenda for DHS resulting from 2SR.
Sept. 29, 2005 -	The conference committee report on DHS appropriations for FY2006, as produced in the Congressional Record, indicated that, "[f]or the most part," the conferees had accepted the July 22 budget amendments proposed by President Bush and, thereby, tacitly approved much of Secretary Chertoff's 2SR reorganization plan for DHS.
Oct. 1, 2005 -	Secretary Chertoff began the implementation of his 2SR reorganization of DHS at the beginning of the new fiscal year.
Oct. 6, 2005 -	Representative Bennie G. Thompson introduced H.R. 4009, the Department of Homeland Security Reform Act of 2005, implementing some aspects of Secretary Chertoff's plan for reorganizing DHS as a result of his 2SR initiative; the bill was referred to the Committees on Homeland Security, Intelligence, and Transportation and Infrastructure.
Oct. 7, 2005 -	Senator Susan Collins introduced S. 1866, the Homeland Security Policy Act of 2005, amending the Homeland Security Act to establish an Under Secretary for Policy in the Department of Homeland Security; the bill was referred to the Committee on Homeland Security and Governmental Affairs.

Appendix B. Glossary

2SR	Second Stage Review
BTS	Border and Transportation Security Directorate
CBP	Customs and Border Protection Bureau
CIA	Central Intelligence Agency
CIO	Chief Information Officer/Chief Intelligence Officer
CPO	Chief Procurement Officer
DHS	Department of Homeland Security
DNDO	Domestic Nuclear Detection Office
DOD	Department of Defense
EP&R	Emergency Preparedness and Response Directorate
FAMS	Federal Air Marshal Service
FBI	Federal Bureau of Investigation
FEMA	Federal Emergency Management Agency
FPS	Federal Protective Service
GAO	Government Accountability Office
HSA	Homeland Security Act of 2002
IA	Office of Intelligence and Analysis
IAIP	Information Analysis and Infrastructure Protection Directorate
ICE	Immigration and Customs Enforcement Bureau
NCTC	National Counterterrorism Center
OCST	Office of Cyber Security and Telecommunications
OLIA	Office of Legislative and Intergovernmental Affairs
ONCRC	Office of the National Capital Region Coordination
OOC	Office of Operations Coordination
OPPIA	Office of Policy, Planning, and International Affairs
PA	Presidentially appointed position
PAS	Presidentially appointed, Senate confirmed position
QDR	Quadrennial Defense Review
SES	Senior Executive Service
TSA	Transportation Security Administration
TSC	Terrorist Screening Center
TTIC	Terrorist Threat Integration Center
USCG	United States Coast Guard
USCIS	United States Citizenship and Immigration Services
USSS	United States Secret Service

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