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Executive Branch Reorganization and Management Initiatives: A Brief Overview

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Summary

This report provides a brief overview of recent executive branch reorganization actions and related management initiatives. It reviews the relevant plans and preparations of President-elect Barack Obama as the new Administration transitions to assuming management of the executive branch. Briefly examined, as well, are the organization and management efforts of the most recent regimes. President George W. Bush came to office from a campaign which had emphasized efficiency in government, particularly through the use of information technology, but revealed no plans for executive branch reorganization. The Clinton Administration had conducted an active effort at "reinventing government," spearheaded by a National Performance Review (NPR) announced shortly after the 1993 inauguration. The NPR produced a series of reports proposing various organizational and operational reforms.

A number of major NPR recommendations were awaiting implementation when the 1994 congressional elections resulted in Republican majority control of both houses of the 104th Congress. Republican congressional leaders had unveiled a *Contract With America* reform plan in late September 1994. Its core principles regarded the federal government as being too big, spending too much, being unresponsive to the citizenry, and perpetuating burdensome regulations. At the conclusion of the 104th Congress, both the President and Republican congressional leaders could claim some victories in downsizing government, but no department was eliminated, and only a few small agencies were abolished.

Following his 2001 inauguration, President Bush announced plans to address a number of management problems in the federal government. Then, in the aftermath of the September 11, 2001 (9/11), terrorist attacks, the organization of the federal government for maintaining homeland security and combating terrorism became a major consideration for both the President and Congress. Establishment of the Office of Homeland Security in October 2001 as a coordinating entity was an important first step, followed by the creation of a Department of Homeland Security during the final weeks of the 107th Congress. Oversight of the initial operations of the new department was a primary matter for the 108th Congress, which, in the closing months of 2004, implemented many of the recommendations of the national commission which had investigated the circumstances of the 9/11 attacks.

At the outset of the 110th Congress, President Bush did not indicate any plans for major reorganization within the executive branch. However, the restoration of presidential reorganization plan authority appeared to remain of interest to the Bush Administration, but no congressional action was taken in that regard. Similarly, the recommendations of the HELP Commission to overhaul the organization and management of the foreign assistance program (H.R. 1, H.R. 1684, S. 4, S. 547) remained on the legislative agenda as the 100th Congress came to a close. This report will be updated as events warrant.

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Most Recent Developments

While neither Senator John McCain nor Senator Barack Obama, the principal contenders for the presidency, indicated any plans for reorganizing the executive branch if elected (see below), some independent views in this regard began to appear prior to the national party conventions. Businessman Stanton Anderson and attorney Herb Fenster, finding it "doubtful than an executive branch organized to fulfill the needs of a population of 80 million (1900) or 150 million (1950) can effectively serve a population of 300 million (2000) or 570 million (2100)," called for a comprehensive review of the structure and components of the executive branch.

> Each departmental and agency function and the interactions (or lack thereof) among them needs review. There is no single shortcut to correcting organizational sprawl. Each piece, function and role must be examined.

To conduct this review and examination, they proposed, "A joint commission with membership from the three branches, nongovernmental organizations, public service organizations, industry and academia should be created by the next president." They added, however, that "candidates running for the presidency should begin to discuss the need for a complete reorganization of the federal government."[1]

While neither Senator McCain nor Senator Obama revealed any reorganization plans during the presidential campaign, both alluded to program reviews with a view to efficiency, economy, and effectiveness. When accepting the nomination to be the presidential candidate of the Democrats, Obama pledged to "go through the federal budget, line by line, eliminating programs that no longer work and making the ones we do need work better and cost less — because we cannot meet 21st century challenges with a 20th century bureaucracy." To some observers, this undertaking was reminiscent of the mission of the National Performance Review (NPR) launched during the Clinton Administration: "Creating a government that works better & costs less." Moreover, serving as advisers to the Obama campaign were David Osborne, the author of *Reinventing Government* and one of the architect's of the NPR, and John Kamensky, the former deputy director of the NPR.[2]

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[1] Stanton Anderson and Herb Fenster, "Executive Reorganizing," *Washington Times*, July 23, 2008, p. A22.

[2] Robert Brodsky, Alyssa Rosenberg, and Tom Shoop, "Obama Calls for End of '20th Century Bureaucracy'," *GovExec*, Aug. 29, 2008, available at [http://www.govexec.com/story_pagwe_pf.cfm?articleid=40842&printerfriendlyvers=1].

McCain also called for "top-to-bottom reviews of all federal programs to weed out failing ones." The Office of Management and Budget (OMB) is seen as a vehicle for conducting such reviews.[3] When accepting the Republican nomination for President, he called for changing "the way government does almost everything."

> From the way we protect our security to the way we compete in the world economy, from the way we respond to disasters to the way we fuel our transportation network, from the way we train our workers to the way we educate our children. All these functions of government were designed before the rise of the global economy, the information technology revolution and the end of the Cold War. We have to catch up to history, and we have to change the way we do business in Washington.

He also said "my administration will set a new standard for transparency and accountability."[4] Several days later, his vice presidential running mate, Alaska Governor Sarah Palin, indicated that "government reform" was one of three areas she would focus on, with McCain's agreement, during his presidency.[5]

In terms of institutional changes, it was reported, several weeks prior to his becoming President-elect, that Obama "would likely create a national technology czar with broad authority to develop policy, elevating high-tech issues to the cabinet level in a major recalibration of the government's approach to regulating the communications sector."[6] That prospect was reiterated after the election, with much speculation about the role of such a czar, where the office would be located, and who would be appointed to fill the position.[7] Candidate Obama also indicated he would reestablish the National Space Council (1988-1993), which was chaired by the Vice President and was located within the Executive Office of the President (EOP).[8]

Among other EOP institutional changes reportedly under consideration among transition assistants for President-elect Obama are a National Energy Council, possibly located in the Office of Policy Development, to meld climate change and

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[3] Elizabeth Newell, "The Reformer," *Government Executive*, Sept. 2008, p. 20.

[4] Tom Shoop, "McCain Pledges to Attack Bureaucracy, Limit Government," *GovExec*, Sept. 5, 2008, available at [http://www.govexec.com/story_page_pf.cfm?articleid=40893&printerfriendlyvers=1].

[5] Juliet Eilperin, "Priorities: Palin's List Includes Energy," *Washington Post*, Sept. 16, 2008, p. A4.

[6] David Hatch, "Tech Czar Might Rule Policy Under Obama," *CongressDaily AM*, Sept. 10, 2008, available at [http://www.nationaljournal.com/congressdaily/print_friendly.php?ID=cda_20080910_6421].

[7] Kim Hart, "Role of Federal Tech Czar to Be defined by Obama," *Washington Post*, Nov. 14, 2008, p. A2.

[8] William J. Broad, "Presidential Candidates' Positions on An Array of Issues in Science," *New York Times*, Sept. 16, 2008, p. D3.

energy policy;[9] an Office of Urban Policy;[10] and possibly transferring the functions of the Homeland Security Council to another entity, although a similarly speculated fate for the National Economic Council appears unlikely with the designation of former Secretary of the Treasury Lawrence H. Summers to head that panel.[11]

In announcing his choice of Peter R. Orszag, former director of the Congressional Budget Office, to lead the Office of Management and Budget (OMB), President-elect Obama indicated that the federal program review that he had pledged to perform as a candidate would be conducted by Orszag and OMB, the objective being to eliminate programs that do not work.[12]

Background and Analysis

For well over a century, the structure and program responsibilities of the federal executive branch, including all of the departments and agencies, were determined by Congress. In the aftermath of World War I, however, with the rise of the new public administration profession and growing sentiment for attaining efficiency and economy in government, came efforts to strengthen the President's management ability. In 1932, the Chief Executive was statutorily authorized to issue executive orders proposing reorganization within the executive branch for purposes of reducing expenditures and increasing efficiency in government.[13] A reorganization order became effective after 60 days unless either house of Congress adopted a resolution of disapproval. When President Herbert Hoover submitted 11 different reorganization orders in 1932, all were disapproved by the House of Representatives on the grounds that his newly elected successor, Franklin D. Roosevelt, might have different reorganization ideas.

President Roosevelt did submit a number of reorganization orders pursuant to a revised and extended version of the 1932 statute, which expired automatically in 1935. Some major actions taken in these orders included creating procurement and disbursement divisions in the Treasury Department, establishing an enlarged National Park Service in the Interior Department, and making the Farm Credit Administration an independent agency.

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[9] Ceci Connolly and R. Jeffrey Smith, "Obama Positioned to Quickly Reverse Bush Actions," *Washington Post*, Nov. 9, 2008, p. A16.

[10] Al Kamen, "In a New Administration, Some Brand-New Jobs?" *Washington Post*, Nov. 11, 2008, p. A17.

[11] Karen DeYoung, "Naming National Security Team Will Be a Priority for Obama," *Washington Post*, Nov. 19, 2008, p. A8.

[12] Dan Eggen and Michael A. Fletcher, "Obama Offers Recovery Proposals," *Washington Post*, Nov. 26, p. A3.

[13] 47 Stat. 413.

Congress subsequently mandated a similar arrangement in a 1939 statute.[14] Once again, the objective was to achieve efficiency and economy in administration. A presidential reorganization plan, submitted to Congress, became effective after 60 days unless both houses of Congress adopted a concurrent resolution of disapproval. In his initial reorganization plan, President Roosevelt created the Executive Office of the President, an enclave for entities immediately assisting the Chief Executive.

Such reorganization authority, renewed periodically a dozen times between 1945 and 1984, with slight variation, remained available to the President for nearly half a century. At different junctures, qualifications were placed upon its exercise. For example, reorganization plans could not abolish or create an entire department, or deal with more than one logically consistent subject matter. Also, the President was prohibited from submitting more than one plan within a 30-day period and was required to include a clear statement on the projected economic savings expected to result from a reorganization.

Modification of the President's reorganization plan authority was made necessary in 1983 when the Supreme Court, in the *Chadha* case, effectively invalidated continued congressional reliance upon a concurrent resolution to disapprove a proposed plan.[15] Under the Reorganization Act Amendments of 1984, several significant changes were made in the reorganization plan law.[16] Any time during the period of 60 calendar days of continuous session of Congress following the submission of a reorganization plan, the President might make amendments or modifications to it. Within 90 calendar days of continuous session of Congress following the submission of a reorganization plan, both houses must adopt a joint resolution (which, unlike a concurrent resolution, becomes law with the President's signature — a central issue in the *Chadha* case) for a plan to be approved. This amendment, however, continued the President's reorganization plan authority only to the end of 1984, when it automatically expired.[17] Neither President Ronald Reagan nor President George H. W. Bush requested its reauthorization. President William Clinton also did not seek its renewal, although his National Performance Review recommended this course of action in September 1993.[18]

The National Strategy for Homeland Security, released by President George W. Bush in July 2002, recommended the restoration of reorganization plan authority to allow reconfiguring portions of the executive branch to better combat terrorism and maintain homeland security.[19] In his FY2003 budget message, President Bush had

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[14] 53 Stat. 561.

[15] *INS v. Chadha*, 462 U.S. 919 (1983).

[16] 98 Stat. 3192.

[17] See 5 U.S.C. 901-912 (1988).

[18] U.S. Office of the Vice President, *From Red Tape to Results: Creating a Government that Works Better and Costs Less, Report of the National Performance Review* (Washington: September 7, 1993), p. 161

[19] U.S. Office of Homeland Security, *National Strategy for Homeland Security* (Washington:
(continued...)

indicated that his Administration would "seek to re-institute permanent reorganization authority for the President to permit expedited legislative approval of plans to reorganize the Executive Branch."[20] However, no draft legislation was subsequently offered in this regard. When the National Commission on the Public Service presented its report in January 2003, one of its recommendations was to give the President "expedited authority to recommend structural reorganization of federal agencies and departments."[21] Congressional interest in possibly restoring the President's reorganization plan authority was evidenced with an April 3, 2003, hearing on the matter by the House Committee on Government Reform, but soon faded.[22]

In the absence of reorganization plan authority, the President may propose executive branch reorganizations to be realized through the constitutionally prescribed legislative process. The Departments of Energy, Education, Veterans Affairs, and Homeland Security were established in this manner. This approach, however, does not incorporate action-forcing deadlines or a required final congressional vote on proposed reorganization plans that are thought to expedite the consideration of reorganizations. The President might attempt a minor reorganization, such as establishing a small, temporary entity within the Executive Office of the President, by issuing a directive, such as an executive order. Attempting more ambitious reorganizations through a presidential directive, if not ultimately found to be illegal, may incur congressional displeasure and subsequent legislative and fiscal reaction. As a result of the absence of reorganization plan authority, more recent reform efforts to improve the efficiency and economy of government operations have emphasized management improvements of both a government-wide and specific program variety, including applications of information technology that some have characterized as electronic government.

Reinventing Government by the Clinton Administration

An ambitious effort at realizing executive branch reorganization and management reform was launched by President Clinton at the outset of his Administration when, on March 3, 1993, he initiated a National Performance Review (NPR) to be conducted under the leadership of Vice President Albert Gore, Jr. Six months later, on September 7, the initial NPR report was delivered to the President. Various accompanying supplemental reports on both specific agencies and functional

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[19] (...continued)
July 2002), p. xi.

[20] U.S. Office of Management and Budget, *Budget of the U.S. Government: Fiscal Year 2003* (Washington: GPO, 2002), p. 52.

[21] National Commission on the Public Service, *Urgent Business for America: Revitalizing the Federal Government for the 21st Century* (Washington: January 2003), p. 17.

[22] U.S. Congress, House Committee on Government Reform, *Toward a Logical Governing Structure: Restoring Executive Reorganization Authority*, hearing, 108th Cong., 1st sess., April 3, 2003 (Washington: GPO, 2003).

areas of government were subsequently published during 1994. The bulk of the initial report's almost 380 major recommendations (broken into over 1,230 action items) was directed to management reforms; several proposals addressed executive reorganization, including one for congressional restoration of presidential reorganization plan authority.

During the 12 months after the initial NPR report was issued, its recommendations were implemented by 22 presidential directives, several enacted bills, and various agency actions. Anniversary reports, marking progress in implementing NPR recommendations, were issued in September of 1994, 1995, and 1996. The last of these indicated that 43% of the NPR's initial 833 agency action items were completed and 42% were in progress, and that 38% of its initial 430 management systems action items were completed and 49% were in progress. Of an additional 187 agency recommendations, 19% were completed and 62% were in progress. As of January 1996, the executive workforce had been reduced by nearly 240,000. In addition, almost 2,000 obsolete field offices had been closed and approximately 200 programs and agencies had been eliminated. As of September 1996, said the report, "savings of about $97.4 billion have been ensured through legislative or administrative action." According to the report, of the original $108 billion in savings projected in 1993, about $73.4 billion had been realized.[23]

The Clinton Administration renewed its reinventing government effort in mid-January 1995 with Phase 2 of the NPR, which was detailed in the President's FY1996 budget. Shortly thereafter, in late February, the President announced new regulatory reform proposals, including page-by-page review of federal regulations to determine those that were obsolete, replaceable by private sector alternatives, or better administered by state and local government. He also proposed to abolish the Interstate Commerce Commission (ICC) and reconstitute the Federal Aviation Administration's air traffic control services as a wholly owned government corporation. The elimination of the ICC was subsequently realized in December 1995. Certain functions of the commission were transferred to the Surface Transportation Board, newly established within the Department of Transportation by the ICC termination statute.[24]

With the convening of the 105th Congress, the reinvention effort entered another new phase, emphasizing improved service delivery; use of partnerships and community-based strategies to solve problems, not big government; and techniques for improving performance in a time of diminishing resources, including the use of performance-based organizations. As a reflection of this third revamping, the NPR, known heretofore as the National Performance Review, became the National Partnership for Reinventing Government in January 1998.

In May 2000 testimony before a subcommittee of the Senate Committee on Governmental Affairs, Donald F. Kettl, then a University of Wisconsin professor, who had conducted extensive research on the NPR reforms, gave the effort an overall

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[23] U.S. Office of the Vice President, *The Best Kept Secrets in Government: A Report to President Bill Clinton* (Washington: September 1996), pp. 1-7, 73, 149, 167.

[24] 109 Stat. 803.

grade of "B," saying there was "room for improvement." Brookings Institution scholar Paul C. Light added that the NPR program had created "unnecessary politicization of government reform." Two other analysts were also critical of the NPR effort.[25] A few months later, in September, a GAO report concluded that the NPR reinvention effort had been largely successful, with more than 90% of key Clinton Administration recommendations having been fully or partly implemented. The report was based upon a review of 72 NPR recommendations by 10 federal agencies, which found that 33 of them were fully implemented and another 30 were partly implemented.[26]

Reorganization During the Bush Administration

During his campaign for the presidency, Texas Governor George W. Bush emphasized efficiency in government, particularly through the use of information technology, but revealed no plans for reorganizing the executive branch. The terrorist attacks of September 11, 2001 (9/11), however, prompted various structural changes, particularly in the areas of homeland security and intelligence.

Organizing for Homeland Security

A major objective of restructuring was to realize governmental arrangements resulting in more efficient, economical, and effective homeland security. Reinstatement of the President's reorganization plan authority was proposed, and legislation to create a Department of Homeland Security (DHS) was introduced and subsequently enacted.[27] Working with a White House proposal unveiled on June 6, 2002, the House completed action on the DHS legislation in late July; the Senate did not begin work on a counterpart measure until after the August recess, and then was slowed by debate on various amendments. Final legislation reached the President's desk in late November.

The primary issue for Congress and the President was determining the program composition and administrative organization of the new department. In the course of mandating DHS, this overarching consideration broke down into a series of lesser, more finite issues, not the least of which were threshold questions concerning the value of the new entity. President Bush contended that his proposal did not constitute an expansion of the federal government, but merely consolidated existing programs within a more efficient and effective management structure. However, neither the President's proposal nor the principal congressional bills made use of a definition of the concept of homeland security to guide the component composition of the new department. Moreover, whole agencies were proposed for transfer to the

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[25] U.S. Congress, Senate Committee on Governmental Affairs, *Has Government Been "Reinvented"?* hearing, 106th Cong., 2nd sess., May 4, 2000 (Washington: GPO, 2000).

[26] U.S. General Accounting Office, *Reinventing Government: Status of NPR Recommendations at 10 Federal Agencies*, GAO Report GAO/GGD-00-145 (Washington: September 2000).

[27] 116 Stat. 2135.

department with little effort to sort out non-homeland-security functions and programs for possibly more appropriate administration elsewhere other than in the new department.

There were, as well, those who doubted that merely rearranging programs within a new department would truly improve the nation's defenses against terrorism. Others maintained that, no matter how well management and operating arrangements were fine-tuned, the effectiveness of the department and its leadership could not be legislatively guaranteed. And still others wondered aloud who would be willing to serve, for very long, in the leadership of such a department.

Some initially criticized the President's proposal as an inadequate response to what they viewed as intelligence failures, suggesting that, in the context of considering the components of the new homeland security department, the Federal Bureau of Investigation (FBI) and the federal intelligence community, particularly the Central Intelligence Agency (CIA), should not escape scrutiny. Two FBI units — the National Domestic Preparedness Office and the National Infrastructure Protection Center — would have been transferred to the new department under the President's plan, and ultimately were in the bill that was signed into law. The criticism, however, suggested that those developing the President's plan had not given adequate consideration to the prospect of transferring or restructuring FBI and CIA counterterrorism responsibilities. Others questioned why the Bureau of Alcohol, Tobacco, and Firearms, the Drug Enforcement Administration, and the Nuclear Regulatory Commission were not included. GAO, among others, noted that, because the concept of "homeland security" had not been defined, "certain organizational, management, and budgetary decisions cannot currently be made consistently across agencies."[28]

In creating the new department, Congress had the responsibility for determining the appropriate administrative structure for the Secretary to manage, with efficiency, economy, and effectiveness, an organization of some 170,000 employees (many of whom would be working in field facilities), composed of diverse units, with shared responsibility and partnership with state and local governments, as well as the private sector. A key consideration was the Secretary's span of control over the operations of primary divisions and internal agencies, together with such broad departmental functions as human and information resources management, budget setting, and financial management. Under the bill initially adopted by the House, the Secretary of Homeland Security might have had as many as 15 senior officials of the department reporting directly to him or her (or more if the assistant secretaries actually had this relationship); under one Senate version of the legislation, 17 senior officials seemingly would have been reporting directly to the Secretary.

Ultimately, the statute mandating DHS placed most of the entities and functions transferred to the new department within four primary directorates for border and transportation security, emergency preparedness and response, science and

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[28] U.S. General Accounting Office, *Homeland Security: Key Elements to Unify Efforts Are Underway but Uncertainty Remains*, GAO Report GAO-02-610 (Washington: June 2002), p. 2.

technology, and information analysis and infrastructure protection. The Coast Guard and the Secret Service were excepted from this arrangement and given independent status within the department. The heads of these six components, along with upwards of 12 assistant secretaries and approximately 14 other senior officials, appeared to report directly to the Secretary. In general, the administrative framework statutorily established for the department supported strong vertical management structures while being somewhat weak in detailing horizontal working arrangements among headquarter's divisions and internal agencies.

The President's proposal contained a provision authorizing the Secretary of Homeland Security, in regulations prescribed jointly with the director of the Office of Personnel Management, to establish and, from time to time, adjust a human resources management system for some or all of the organizational units of the department, "which shall be flexible, contemporary, and grounded in public employment principles of merit and fitness." The provision raised various issues concerning staffing requirements, such as adequate numbers of personnel and planning for the replacement of retiring staff; hiring, particularly direct hiring which would not involve traditional guarantees of being merit-based and free of political influence and lacked preference for veterans; and pay, particularly pay parity or equity for employees who are performing similar jobs. Civil service protections and collective bargaining rights for department workers were among the most contentious issues surrounding the establishment of the Department of Homeland Security. Ultimately, the statute mandating the new department largely supported the President's position on these matters.

Upon signing the Homeland Security Act into law on November 25, 2002, President Bush transmitted, pursuant to Section 1502 of the statute, his reorganization plan for the Department of Homeland Security. This document set deadlines for the transfer of agencies, programs, and functions to the new department, and specified related agency consolidations, reorganizations, or streamlinings. DHS became operational on January 24, 60 days after its statutory mandate was signed into law. That same day, Tom Ridge, the President's homeland security adviser and director of the Office of Homeland Security (OHS), was sworn in as the Secretary of Homeland Security. A reorganization of border agencies was announced by Secretary Ridge on January 30. Formulation of the Department of Homeland Security took a major step on March 1 when, in accordance with the President's reorganization plan, some three dozen agencies and programs were transferred to the new department. Ultimately, all such transfers were completed by September 30, 2003.

The future of OHS, which had been created by presidential directive in response to the 9/11 terrorist attacks, came into question in late July 2003 when House appropriators, in their report on the Departments of Transportation and Treasury and Independent Agencies Appropriations Bill, 2004, revealed that the Bush Administration had changed the "Office of Homeland Security" account to one for the "Homeland Security Council." The current council is mandated by the Homeland

Security Act of 2002.[29] The report questioned the role of OHS, saying "it is not clear what work remains that cannot be effectively performed by the Department of Homeland Security." The account change apparently also implied the shift of 66 staff from OHS to the council, which the report questioned "given the existence and support of the Department of Homeland Security." The committee cut the President's request of $8.3 million for the council to $4.1 million.[30] The full House approved the recommended amount. In the Senate counterpart bill, appropriators recommended $8.3 for the council, the amount requested, but placed the funds in a separate account.[31] Conferees on the Consolidated Appropriations Act, 2004 (H.R. 2673), which included funding for agencies of the Executive Office of the President, made no recommendation of funds for OHS, but did propose $7.2 million for the Homeland Security Council in the White House Office account. The House agreed to the conference report on December 8 and adjourned sine die; the Senate completed action on the legislation on January 23, 2004, and the President signed the measure the following day.[32] OHS disappeared from the President's budget request for FY2005.

In a first-year assessment of the Department of Homeland Security (DHS), Donald F. Kettl, a veteran public administration analyst then at the University of Wisconsin-Madison, gave it a grade of C+. This overall grade derived from evaluations of five areas of department responsibility: aviation security (B-), intelligence (B-), immigration (C+), coordination with state and local governments (C), and departmental management (C+). "As is scarcely surprising given the enormity of the task it faced," wrote Kettl, "the department's performance has varied widely. In some areas, the DHS has done exceptionally well, yet in other areas, conditions are worse than before the DHS was created. The biggest areas needing improvement," he proffered, "in fact, deal with the very coordination — 'connecting the dots' — problems that the department was created to solve." Kettl's study, made available in an advance copy in early March 2004, subsequently appeared in a book published later in the year by the Century Foundation of New York.[33]

Intelligence Reorganization

In addition to prompting the creation of DHS, the 9/11 terrorist attacks also initiated some reorganization of the federal intelligence community. On February 14, 2002, the leadership of the House and Senate intelligence committees announced a bipartisan, bicameral examination of the operations and activities of the intelligence

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[29] 116 Stat. 2258.

[30] U.S. Congress, House Committee on Appropriations, *Departments of Transportation and Treasury and Independent Agencies Appropriations Bill, 2004*, report to accompany H.R. 2989, 108th Cong., 1st sess., H.Rept. 108-243 (Washington: GPO, 2003), p. 163.

[31] U.S. Congress, Senate Committee on Appropriations, *Transportation, Treasury and General Government Appropriations Bill, 2004*, report to accompany S. 1589, 108th Cong., 1st sess., S.Rept. 108-146 (Washington: GPO, 2003), p. 135.

[32] 118 Stat. 3.

[33] Donald F. Kettl, ed., *The Department of Homeland Security's First Year: A Report Card* (New York: Century Foundation Press, 2004), p. 7.

community pertaining to the 9/11 attacks. This joint inquiry resulted in a report which, among other recommendations, called for the appointment of a Cabinet-level national intelligence chief, who would rank above the Director of Central Intelligence (DCI).[34]

In its final report, released July 22, 2004, the National Commission on Terrorist Attacks Upon the United States recommended, among other proposals, the creation of a board within the executive branch to monitor the federal government's commitment to defending civil liberties, a National Counterterrorism Center (NCTC), and a National Intelligence Director (NID) to replace the current Director of Central Intelligence. It also suggested establishing other national intelligence centers — for example, on counterproliferation, crime and narcotics, and China — and folding the responsibilities of the Homeland Security Council into the National Security Council.[35] During the August 2004 recess, several House and Senate committees began hearings to explore the commission's recommendations.

Legislative efforts to implement the 9/11 Commission's recommendations began in earnest when Congress reconvened after Labor Day. Meeting with congressional leaders on September 8 to discuss reforming and strengthening the federal intelligence services, President Bush endorsed establishing an NID, who, among other considerations, would have been located within the executive branch, but not within the Executive Office of the President; would not have served in the Cabinet; would have received National Foreign Intelligence Program funds and allocated them, as apportioned by OMB, to the intelligence community; would have supervised the NCTC; and would have had a role in the appointment of any individual to a position heading an organization or element within the intelligence community. The President subsequently sent to Congress a September 16 draft proposal to strengthen the intelligence capabilities of the federal government.

During the latter weeks of September, the principal legislative vehicles for implementing 9/11 Commission recommendations and strengthening intelligence capabilities emerged. The Senate bill (S. 2845) was developed in the Committee on Governmental Affairs, introduced on September 23, and initially considered in the Senate on September 27. The legislation would have mandated a National Intelligence Authority (NIA) as an independent establishment within the executive branch, which would have been headed by a NID, who would have been appointed by the President with Senate confirmation. A NCTC would have been established within the NIA; the head of this entity also would have been appointed by the President with Senate confirmation and would have reported to the NID on the NCTC budget, programs, and activities and to both the President and the NID on the planning and progress of joint counterterrorism operations. A Privacy and Civil Liberties Oversight Board (PCLOB) would have been established within the

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[34] U.S. Congress, Senate Select Committee on Intelligence and House Permanent Select Committee on Intelligence, *Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001*, report, 107th Cong., 2nd sess., S.Rept. 107-351 and H.Rept. 107-792 (Washington: GPO, 2002).

[35] U.S. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (Washington: GPO, 2004).

Executive Office of the President (EOP). Its chair and four additional members would have been appointed by the President with Senate confirmation for six-year terms.

The House bill (H.R. 10) was introduced on September 24 by Speaker Dennis Hastert and was referred to 13 committees, five of which — Armed Services, Financial Services, Government Reform, Intelligence, and Judiciary — conducted markups and ordered reported on September 29 amended versions of the bill. As introduced, the bill would have created an NID, who would have been appointed by the President with Senate confirmation and not located within the Executive Office of the President. A NCTC would have been established within the office of the NID and would have been headed by a director, who would have been appointed by the NID. A Civil Liberties Protection Officer, who would have been appointed by the NID, also would have been created within the office of the NID to serve as a civil liberties and privacy overseer of the intelligence community, but no provision was made for a civil liberties oversight board. The President would have been authorized to prepare and submit to Congress for affirmation plans to reorganize components of the intelligence community. On October 7, the Committee on Rules reported a version of the legislation for floor consideration and made 23 amendments in order for consideration. The House completed its action on the legislation on October 8 when it approved the modified bill on a 282-134 vote.

Conference committee deliberations on the reform measures began on October 20, 2004, but became prolonged due to considerable differences between the two bills, including their institutional and organizational aspects. Agreement on a November 20 compromise version of the legislation quickly unraveled in the House. Subsequently, another compromise version was realized, and the conferees filed their report on this legislation on December 7.[36] That day, the House, on a 336-75 vote, approved the conference committee report, and the Senate accepted it the following day on an 89-2 vote. President Bush signed the bill into law on December 17.[37] The reform legislation established a National Intelligence Director (NID), appointed by the President with Senate confirmation, to serve as the principal intelligence adviser to the President, head the intelligence community, and oversee and direct the National Intelligence Program. Other new components included a National Counterterrorism Center, within the office of the NID, to serve as the primary executive branch organization for counterterrorism intelligence and strategic operational planning. In addition, the President was authorized to establish a National Counter Proliferation Center to prevent and halt the proliferation of weapons of mass destruction, their delivery systems, and related materials and technologies; and the NID was authorized to establish one or more national intelligence centers to address intelligence priorities, including regional issues. A PCLOB, composed of five members appointed by, and serving at the pleasure of, the President, was also created and located within the EOP. Implementation of the legislation occurred during the initial months of 2005.

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[36] U.S. Congress, Conference Committee, *Intelligence Reform and Terrorism Prevention Act of 2004*, conference report to accompany S. 2845, 108th Cong., 2nd sess., H.Rept. 108-796 (Washington: GPO, 2004).

[37] 118 Stat. 3638.

Shortly after the convening of the 109th Congress, the Senate Committee on Homeland Security and Governmental Affairs held a January 26, 2005, oversight hearing on the "road ahead" for DHS. Witnesses included the DHS Acting Inspector General and management experts from the Brookings Institution, Council on Foreign Relations, Heritage Foundation, and Rand Corporation. Several major organization and management issues were discussed, and two reforms, in particular, appeared to enjoy some support, particularly from Senator Susan Collins, the committee's chair, and Senator Joseph Lieberman, the panel's ranking minority member. These reforms, which had been discussed in a December 2004 Heritage Foundation report, *DHS 2.0: Rethinking the Department of Homeland Security*,[38] included (1) eliminating the DHS management directorate and Under Secretary for Management, but relocating the chief management officers to the office of the Deputy Secretary; and (2) establishing an Under Secretary for Policy, who would be assisted by a unified policy planning staff. It was thought that the first reform would eliminate an unnecessary layer of bureaucracy and otherwise strengthen the roles of the chief management officers, and that the second reform would bring unity to DHS through the development of proactive, strategic homeland security policy and plans. Indications were that these reforms, among others, would be considered for inclusion in subsequent legislation reauthorizing DHS programs within the jurisdiction of the Senate committee. At the hearing, some consideration was also given to merging the department's Bureau of Customs and Border Protection (CBP) and Bureau of Immigration and Customs Enforcement (ICE).[39]

The prospect of merging CBP and ICE was the subject of a March 9, 2005, hearing by the Subcommittee on Management, Integration, and Oversight of the House Committee on Homeland Security. Among those testifying was one of the coauthors of the Heritage Foundation report *DHS 2.0: Rethinking the Department of Homeland Security*, wherein the merger had been proposed. Other participants at the hearing included a retired immigration and customs enforcement agent, who supported the merger; a representative of the National Homeland Security Council of the American Federation of Government Employees (AFGE), who had mixed views on the merger; a representative of the National Border Patrol Council of the AFGE, who supported the merger; a former immigration senior special agent, who supported the merger; and a former senior deportation officer, who proffered that a merger was "not necessary at this time and may well cause the department to move backwards." A *GovExec.com Daily Briefing* issued just before the House subcommittee hearing described the merger issue in the following terms: "Many ex-Customs investigators are unhappy with ICE management and want to be merged into CBP because it will reunite them with their old colleagues. But many former [Immigration and Naturalization Service] officials want ICE to remain a distinct

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[38] James Jay Carafano and David Heyman, *DHS 2.0: Rethinking the Department of Homeland Security*, Heritage Special Report SR-02 (Washington: December 13, 2004), pp. 11-12, 15-16.

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

entity because it gives them more clout and pay than they had prior to the merger."[40] Secretary Chertoff has continued to resist a CBP-ICE merger.

Several days thereafter, in remarks made at a March 22, Washington, DC, luncheon sponsored by the IBM Center for the Business of Government, Clay Johnson III, OMB Deputy Director for Management, reportedly told his audience that renewal of the President's reorganization plan authority is not one of the Bush Administration's top priorities. Indicating that there was no interest in regaining this authority just for the purpose of reorganization, Johnson stressed that the Administration placed more emphasis on the importance of leadership. "No agency," he said, "is so well conceived that bad management can't mess it up." Good management, he proffered, must be a priority of Cabinet secretaries. Furthermore, he stressed that he did not want to wait to see how new personnel systems at the Departments of Defense and Homeland Security turn out before proposing government-wide civil service reform. While the Administration had expressed interest in the reauthorization of the President's reorganization plan authority as early as July 2002, Johnson's remarks left some with uncertainty as to whether or not the White House had any particular reorganizations under consideration.[41]

The House, on May 18, 2005, amended and approved the Department of Homeland Security Authorization Act for FY2006 (H.R. 1817). The legislation did not make some of the major managerial or structural changes that had been discussed in the past, such as creating an Under Secretary for Policy Planning, or dissolving the management directorate and relocating its chief officers in the office of the Deputy Secretary. It does, however, allocate some of the responsibilities of the Under Secretary for Information Analysis and Infrastructure Protection to Assistant Secretaries for closer supervision and more immediate execution. The position of the director of the National Cyber Security Division, which was thought to be at a "relatively low level," is elevated to an Assistant Secretary. Having cleared the House, the bill is pending with the Senate Committee on Homeland Security and Governmental Affairs.

On October 7, the Senate approved the conference report on the Department of Homeland Security Appropriations Act, 2006, clearing the bill for the President's signature.[42] The conferees, "[f]or the most part," provided an appropriations structure reflecting a DHS reorganization deriving from Secretary Michael Chertoff's Second Stage Review (2SR). Conducted during the prior four months, the 2SR initiative resulted in a six-point agenda, announced on July 13, 2005, with DHS

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[40] Chris Strohm, "Turmoil Erupts Over Merging Homeland Security Agencies," *GovExec.com Daily Briefing*, March 8, 2005, available at [http://www.govexec.com/dailyfed/ 0305/030805c1.htm].

[41] Kimberly Palmer, "Bush Administration Official Downplays Reorganization," *GovExec.com Daily Briefing*, March 22, 2005, available at [http://www.govexec.com/ dailyfed/0305/032205k1.htm].

[42] 119 Stat. 2064.

organizational structure being one primary area of focus.[43] Conferees, among other actions, concurred with abolishing the Border and Transportation Security Directorate and relocating its functions elsewhere in DHS components; splitting the Information Analysis and Infrastructure Protection Directorate into a Preparedness Directorate and Intelligence and Analysis Office; and establishing a Policy Office, which may be statutorily established as a Policy Directorate (see S. 1866).[44] Despite major controversy regarding the Federal Emergency Management Agency's (FEMA's) 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.

With the convening of the 110th Congress, no proposals for a major reorganization of the executive branch were awaiting congressional attention. Early in the first session, legislation (H.R. 1; S. 4) was introduced to implement unfinished recommendations of the 9/11 Commission. Title 8 of the House bill would have reconstituted the Privacy and Civil Liberties Oversight Board (PCLOB) as an independent establishment within the executive branch, required Senate confirmation of all members of the PCLOB, set qualifications and terms for nominees to be board members, vested the board with subpoena power, required the designation of Privacy and Civil Liberties Officers, and enhanced the authorities of the DHS Privacy Officer. The House approved the bill on January 9, 2007, on a 299-128 vote.

The Senate counterpart bill was referred to the Committee on Homeland Security and Governmental Affairs, which held a January 9 hearing on full implementation of the recommendations of the 9/11 Commission. Reported on February 22 with an amendment in the nature of a substitute, but without an accompanying written report, the bill came under Senate consideration on March 1 after the committee-reported substitute amendment was withdrawn by unanimous consent. The Senate concluded its deliberations on the bill on March 13, and approved the measure with an amendment on a 60-38 yea-nay vote. Title 6 of the Senate bill would have reconstituted the PCLOB as an agency within the Executive Office of the President; required Senate confirmation of all members of the board; set qualifications and terms for nominees to be board members; authorized the board to request the Attorney General to issue a subpoena on its behalf; and required the Attorney General, if such a request were modified or denied, to report such action to the House and Senate Committees on the Judiciary.

Conferees on the reform legislation filed their report on July 25. The Senate adopted the report the following day on a 85-8 vote; the House concurred on July 27 on a 371-40 vote. The legislation, signed into law on August 3, reconstitutes the

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[43] See CRS Report RL33042, *Department of Homeland Security Reorganization: The 2SR Initiative*, by Harold C. Relyea and Henry B. Hogue.

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

board as an independent agency with modified analysis, review, and advisory responsibilities, requires Senate confirmation of all members of the PCLOB, sets qualifications and terms for nominees to be board members, authorizes the Attorney General to exercise subpoena power on behalf of the board, requires the designation of Privacy and Civil Liberties Officers, and enhances the authorities of the DHS Privacy Officer.[45]

Other matters of interest to congressional overseers in the 110th Congress were organizational issues regarding the efficiency, economy, and effectiveness of the administrative structure of the Department of Homeland Security (DHS), the organizational status of the Federal Emergency Management Agency (FEMA), and enhancement of the department's policy office. Several key lawmakers, during the initial weeks of the new Congress, had indicated frustration with the lack of progress on the congressionally mandated restructuring of FEMA within DHS.[46] Other aspects of DHS organization and administrative structural reform were reflected in the Department of Homeland Security Authorization Act for Fiscal Year 2008 (H.R. 1684), introduced by Representative Bennie Thompson on March 26, 2007, and referred to the Committee on Homeland Security, which marked up the bill and ordered it, as amended, favorably reported on a 26-0 vote on March 28. A report on the measure was filed on May 4.[47] The House adopted the bill, with amendments, on a 296-126 vote on May 9. The legislation was received in the Senate on May 1, when it was referred to the Committee on Homeland Security and Governmental Affairs, but no further action was taken on the measure.

Title 2 of H.R. 1684, as approved by the House, would have established within DHS a Directorate for Policy, headed by an Under Secretary appointed by the President with Senate approval. The new directorate would replace the existing Office of Policy and otherwise have within it an Office of the Private Sector, a Victim Assistance Officer, a Tribal Security Officer, and a Border Community Liaison Officer. The bill would also direct the Secretary of Homeland Security to delegate to each Chief Operating Officer within DHS direct authority over that Officer's counterparts in component agencies to ensure that the component agencies adhere to the laws, rules, regulations, and departmental policies which each Officer is responsible for implementing. The Secretary would be made responsible, moreover, for conducting a Comprehensive Homeland Security Review regarding departmental homeland security strategy; the adequacy of personnel resources and organizational structure necessary for the successful execution of DHS missions called for in the department's strategy; and a related budget plan, acquisition strategy,

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[45] P.L. 110-53; 121 Stat. 266.

[46] The Post-Katrina Emergency Management Reform Act of 2006, which was enacted as Title VI of the Department of Homeland Security Appropriations Act, 2007 (120 Stat. 1394), reestablished FEMA within DHS with an Administrator, appointed by the President with Senate confirmation, who is the principal advisor to the President on emergency management and who would report directly to the President when addressing disasters and catastrophic incidents.

[47] U.S. Congress, House Committee on Homeland Security, *Department of Homeland Security Authorization Act for Fiscal Year 2008*, report to accompany H.R. 1684, 110th Cong., 1st sess., H.Rept. 110-122 (Washington: GPO, 2007).

and procurement process necessary to provide sufficient resources for the successful execution of the full range of missions called for in the department's strategy. The bill would also set qualifications for any nominee for the existing position of Under Secretary for Management. A sense of Congress provision indicated that the consolidation of DHS and its key component headquarters on the West Campus of St. Elizabeth's Hospital "should move forward as expeditiously as possible." Finally, the bill directs the Secretary of Homeland Security to ensure that the Assistant Secretary for Legislative Affairs has adequate authority over the Assistant Secretary's respective counterparts in component agencies of DHS to ensure that the component agencies adhere to the laws, rules, and regulations to which the department is subject and the departmental policies that the Assistant Secretary is responsible for implementing.

Among the provisions in Title 3 of the bill was a section directing the Chief Financial Officer of DHS to establish an Authorization Liaison Officer to provide timely budget and other financial information to the House Committee on Homeland Security and the Senate Committee on Homeland Security and Governmental Affairs, as well as other appropriate committees, and to ensure, to the greatest extent possible, that all reports prepared for the congressional appropriations committees are submitted concurrently to the House Committee on Homeland Security and the Senate Committee on Homeland Security and Governmental Affairs, as well as other appropriate committees. Another provision would require the Secretary to actively consult with the congressional homeland security committees, and to keep such committees fully and currently informed with respect to all activities and responsibilities within the jurisdictions of these committees.

On August 1, 2007, the Senate Committee on Homeland Security and Governmental Affairs approved S. 547 by voice vote without debate. The bill, introduced on February 12 by Senator George Voinovich with bipartisan support, would create a Deputy Secretary of Homeland Security for Management, who would be appointed by the President with Senate approval, would serve a five-year term, and would function as a chief management officer and principal advisor to the Secretary of Homeland Security on all issues related to management of DHS. The nominee for the position, according to the bill, is expected to have "extensive executive level leadership and management experience in the public or private sector," "strong leadership skills," "a demonstrated ability to manage large and complex organizations," and "a proven record in achieving positive operational results." The bill did not receive floor consideration in the Senate.

In early December 2007, just prior to the opening of the second session of the 110th Congress, the Helping to Enhance the Livelihood of People (HELP) Around the Globe Commission issued its final report regarding U.S. development assistance to foreign countries. Mandated by provisions in the Consolidated Appropriations Act, 2004,[48] the commission, among other recommendations, proposed (1) reducing the number of agencies responsible for development; (2) rewriting the Foreign Assistance Act to make development and humanitarian assistance programs less diffuse and more focused; (3) improving interagency coordination; (4) establishing

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[48] 118 Stat. 3 at 101.

parity between policy decisions about foreign assistance and those responsible for program design, implementation, or operations; and (5) creating a new structure for foreign assistance activities. Options offered regarding the last recommendation include (1) creating a new Department for International Development with Cabinet status; (2) folding federal development organizations into the Department of State; or (3) establishing a new Department of International Affairs that reconstitutes the Department of State, the Agency for International Development, and most of the other organizations funded by the international affairs budget into a single department with Cabinet status.[49] Neither the House nor the Senate addressed these recommendations during the 110th Congress.

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Legislation

P. L. 110-53; H.R. 1 (Thompson); S. 4 (Reid)

A bill to implement unfinished recommendations of the 9/11 Commission to fight the war on terror more effectively, to improve homeland security, and for other purposes; Title 8 of H.R. 1 would reconstitute the Privacy and Civil Liberties Oversight Board (PCLOB) as an independent establishment within the executive branch, require Senate confirmation of all members of the PCLOB, set qualifications and terms for nominees to be board members, vest the board with subpoena power, require the designation of Privacy and Civil Liberties Officers, and enhance the authorities of the DHS Privacy Officer. Title 6 of S. 4 would reconstitute the PCLOB as an agency within the Executive Office of the President; require Senate confirmation of all members of the board; set qualifications and terms for nominees to be board members; authorize the board to request the Attorney General to issue a subpoena on its behalf; and require the Attorney General, if such a request were modified or denied, to report such action to the House and Senate Committees on the Judiciary. House bill introduced January 5, 2007, and approved on a 299-128 vote on January 9; Senate bill introduced January 4 and referred to the Committee on Homeland Security and Governmental Affairs; hearing January 9; reported on February 22 with an amendment in the nature of a substitute, but without an accompanying written report; Senate consideration begun March 1 after the

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[49] U.S. Helping to Enhance the Livelihood of People (HELP) Around the Globe Commission, *Beyond Assistance* (Washington: GPO, 2007), pp. 68-89.

committee reported substitute amendment was withdrawn by unanimous consent; approved with an amendment on a 60-38 yea-nay vote March 13, 2007. Conferees on the reform legislation filed their report on July 25. The Senate adopted the report the following day on a 85-8 vote; the House concurred on July 27 on a 371-40 vote. The legislation, signed into law on August 3 (P.L. 110-53; 121 Stat. 266), reconstitutes the board as an independent agency with modified analysis, review, and advisory responsibilities; requires Senate confirmation of all members of the PCLOB; sets qualifications and terms for nominees to be board members; authorizes the Attorney General to exercise subpoena power on behalf of the board; requires the designation of Privacy and Civil Liberties Officers; and enhances the authorities of the DHS Privacy Officer.

H.R. 1684 (Thompson)

Department of Homeland Security Authorization Act for Fiscal Year 2008. Introduced March 26, 2007, and referred to the Committee on Homeland Security; marked up and ordered favorably reported on a 26-0 vote March 28; report filed (H.Rept. 110-122) May 4; approved by the House, as amended, on a 296-126 vote May 9; received in the Senate and referred to the Committee on Homeland Security and Governmental Affairs May 11.

S. 547 (Voinovich)

Effective Homeland Security Management Act of 2007. Introduced February 12, 2007, and referred to the Committee on Homeland Security and Governmental Affairs. Approved by voice vote without debate in committee August 1, 2007.

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