

# Report for Congress

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## **Homeland Security: Department Organization And Management—Legislative Phase**

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# Homeland Security: Department Organization and Management—Legislative Phase

## Summary

After substantial congressional entreatment, President George W. Bush gave impetus to the creation of a Department of Homeland Security when, on June 6, 2002, he proposed the establishment of such an entity by Congress. At the time, bills to mandate a department were pending in both houses of Congress. The President's action was viewed as an effort to move beyond the coordination efforts of the Office of Homeland Security, established by E.O. 13228 of October 8, 2001, to a strong administrative structure for managing consolidated programs concerned with border security and effective response to domestic terrorism incidents.

The President transmitted his department proposal to the House of Representatives on June 18, where it was subsequently introduced by request (H.R. 5005). The House approved the bill in amended form on July 26. The Senate did not begin consideration of the legislation until after the August congressional recess. Senate deliberations on the matter were slower due to partisan and parliamentary factors as well as a few highly contentious issues, such as the civil service protections and collective bargaining rights of the employees of the new department. When both houses of Congress reconvened after the fall elections, a new, compromise department bill was introduced in the House (H.R. 5710), which considered and adopted the measure on November 13. Six days later, the Senate approved the original House bill (H.R. 5005) as modified with the language of the compromise legislation (H.R. 5710), which had been offered as an amendment. The House cleared the Senate-passed measure for the President's signature. Ultimately, President Bush largely obtained what he wanted in the legislation mandating the department (P.L. 107-296; 116 Stat. 2135). This report is no longer being updated. CRS Report RL31751, *Homeland Security: Department Organization and Management—Implementation Phase*, assesses the implementation of the Department of Homeland Security provisions of the Homeland Security Act of 2002.

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# Homeland Security: Department Organization and Management—Legislative Phase

In the aftermath of the September 11, 2001, terrorist attacks on the World Trade Center and the Pentagon, the term *homeland security* came to be used in public parlance as a reference to American efforts at combating terrorism. To coordinate these efforts, President George W. Bush established, with E.O. 13228 of October 8, 2001, an Office of Homeland Security (OHS) within the Executive Office of the President and a Homeland Security Council (HSC), under his chairmanship.<sup>1</sup> He also appointed an Assistant to the President for Homeland Security to direct OHS, and shortly thereafter, on October 29, the President inaugurated Homeland Security Presidential Directives, which, while somewhat similar to executive orders, are not published in the *Federal Register*.

While these events were transpiring, more elaborate organization designs for realizing and maintaining homeland security began to appear. On October 11, 2001, Senator Joseph Lieberman introduced a bill (S. 1534) for himself and Senator Arlen Specter establishing a Department of National Homeland Security. The head of the new department, who would have been a member of the Cabinet and the National Security Council, “would have the rank and power,” said Senator Lieberman, “to ensure that the security of our homeland remains high on our national agenda, and that all necessary resources are made available toward that end.”<sup>2</sup> In brief, this official would have been the principal administrator of homeland security programs and operations. By contrast, the director of OHS is a coordinator of homeland security policy, administration, and operations. Six months later, after the director of OHS had become embroiled in controversy over his declining to appear before congressional committees to discuss his activities, the director of the Office of Management and Budget reportedly said that President Bush might be interested in the departmental option as a solution to the issue of a presidential adviser, which is one of the roles of the OHS director, testifying before congressional committees.<sup>3</sup> On May 2, Senator Lieberman introduced an expanded version of his initial bill (S. 2452) for himself, Senator Specter, and Senator Bob Graham. A companion bill was offered in the House that same day by Representative Mac Thornberry for himself and six cosponsors. The legislation would have mandated both a Department of

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<sup>1</sup>See *Federal Register*, vol. 66, Oct. 10, 2001, pp. 51812-51817.

<sup>2</sup>*Congressional Record*, daily edition, vol. 147, Oct. 11, 2001, p. S10646.

<sup>3</sup>Elizabeth Becker, “Domestic Security: Bush Is Said to Consider A New Security Department,” *New York Times*, Apr. 12, 2002, p. A15.

National Homeland Security and a National Office for Combating Terrorism within the Executive Office of the President.<sup>4</sup>

President Bush gave impetus to the creation of a Department of Homeland Security when, on June 6, 2002, he proposed the establishment of such an entity by Congress. The President's action was viewed as an effort to move beyond the coordination efforts of OHS to a strong administrative structure for managing consolidated programs concerned with border security and effective response to domestic terrorism incidents.<sup>5</sup>

On June 18, the President transmitted to the House of Representatives proposed legislation to establish a Department of Homeland Security. It was subsequently introduced by request (H.R. 5005). According to a legislative strategy announced by Speaker Dennis Hastert and Minority Leader Richard Gephardt, the House would begin working with this proposal on an expedited basis. Plans called for an initial review and modification of the administration bill by the standing committees of the House having jurisdiction over homeland security matters, followed by a similar review and refinement of the measure by an ad hoc select panel under the direction of Majority Leader Dick Armey.<sup>6</sup> The bill would then be sent to the House floor for final action. The Senate elected to work with the department bill (S. 2452) sponsored by Senator Lieberman. The resulting House and Senate bills would then be reconciled in conference.

## Department Tradition

Within the federal government, the departments are among the oldest primary units of the executive branch, the Departments of State, War, and the Treasury all being established within a few weeks of each other in 1789. The heads of the departments are the members of the traditional Cabinet; since 1792, they have, by statutory specification, constituted a line of succession, after the Speaker of the House and the President pro tempore of the Senate, to the presidency in the event of a vacancy in both that office and the vice presidency.<sup>7</sup> The Constitution is referring to these officials when it authorizes the President, in Article II, section 2, to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." In brief, they and their organizations are the administrative arms of the President.<sup>8</sup>

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<sup>4</sup>See *Congressional Record*, daily edition, vol. 148, May 2, 2002, pp. S3874-S3880.

<sup>5</sup>For the President's remarks, see *Weekly Compilation of Presidential Documents*, vol. 38, June 10, 2002, pp. 963-965; also see White House Office, *The Department of Homeland Security* (Washington: June 2002).

<sup>6</sup>See CRS Report RL31449, *House and Senate Committee Organization and Jurisdiction: Considerations Related to Proposed Department of Homeland Security*, by Judy Schneider.

<sup>7</sup>See 1 Stat. 239; the line of succession is currently specified at 3 U.S.C. 19.

<sup>8</sup>Harold Seidman, "A Typology of Government," in Peter Szanton, ed., *Federal Reorganization: What Have We Learned?* (Chatham, NJ: Chatham House, 1981), p. 37.

The departments were the preeminent administrative entities of the executive branch throughout most of the 19<sup>th</sup> century. The creation of the U.S. Civil Service Commission in 1883 inaugurated the tradition of enduring independent agencies—that is, nondepartmental entities with a degree of independence from presidential supervision—followed by the launching of independent regulatory bodies in 1887 with the Interstate Commerce Commission. In many regards, the departments have remained “the most prestigious of the organizational types” of the executive branch, currently being 14 in number.<sup>9</sup>

**Table 1. Federal Executive Departments**

Department	Creation	Modification
State	1789	
War	1789	Subsumed by Defense
Treasury	1789	
Navy	1798	Subsumed by Defense
Interior	1849	
Justice	1870	
Post Office	1872	Reorganized as U.S. Postal Service
Agriculture	1889	
Commerce and Labor	1903	Labor later separated
Labor	1913	
Defense	1947	Initially named the National Military Establishment
Health, Education, and Welfare	1953	Education later separated
Housing and Urban Development	1965	
Transportation	1966	
Energy	1977	
Education	1979	
Veterans Affairs	1988	

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<sup>9</sup>Ibid.

## Departmentalization

When does departmentalization occur? What factors contribute to the creation of a new federal department? Several considerations can be offered in response to these questions. Departmentalization involves the thematic consolidation of existing programs and entities in a single, hierarchically organized, administrative structure. These components may be modified during the transfer process, and new programs may be created and assigned to the new department as well. Departmentalization also serves to strengthen presidential management of program administration by the new department, and emphasizes the importance of these collective programs for the nation. Finally, departmentalization occurs because it has the political support of relevant interest groups that regard the change as beneficial in terms of proximity to the President and national prestige.

Three years after launching the New Deal to realize the economic recovery of the nation, President Franklin D. Roosevelt, in 1936, organized the President's Committee on Administrative Management to assess and make recommendations concerning, among other matters, the role of the President in the managerial direction and control of all executive branch departments and agencies and the streamlining of the executive branch, which counted a number of temporary, experimental, and redundant component entities. Reporting in January 1937, the committee recounted the evolution of the executive branch, finding that it had "grown up without plan or design like the barns, shacks, silos, tool sheds, and garages of an old farm." This led the panel to conclude that the "structure of the Government throws an impossible task upon the Chief Executive," with the result that: "No President can possibly give adequate supervision to the multitude of agencies which have been set up to carry on the work of the Government, nor can he coordinate their activities and policies."<sup>10</sup> To rectify this situation, the committee recommended, in part, increasing the number of Cabinet departments from 10 to 12, and requiring and authorizing "the President to determine the appropriate assignment to the 12 executive departments of all operating administrative agencies and fix upon the Executive continuing responsibility and power for the maintenance of the effective division of duties among the departments."<sup>11</sup> In brief, in the hierarchical model recommended by the panel, as many of the executive administrative agencies as possible would have been transferred to one of the departments and become subject to the supervision of the head of the department. These department heads, in turn, would have been subject to the direction of the President. Implementation of these recommendations, said the committee, would "make effective management possible by restoring the President to his proper place as Chief Executive."<sup>12</sup>

Underlying the work of the committee regarding these matters was a theory of organization developed by one of the panel's principal members, Luther Gulick, a proponent of orthodox or classical organization doctrine derived largely from

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<sup>10</sup>U.S. President's Committee on Administrative Management, *Administrative Management in the Government of the United States* (Washington: GPO, 1937), pp. 29-30.

<sup>11</sup>Ibid., p. 31.

<sup>12</sup>Ibid.

business administration and the scientific management movement of the early 20<sup>th</sup> century.<sup>13</sup> Schuyler Wallace, who had been a member of the staff of the President's Committee on Administrative Management, expanded upon many of Gulick's views in his 1941 assessment of federal departmentalization.<sup>14</sup> Of particular interest are his proffered considerations which enter into the construction of a department. Among the first of these are quantitative considerations. Beginning with the President, he comments "that the boundaries of a chief executive's span of control cannot be easily ascertained and described in a mathematical formula of universal applications."<sup>15</sup> History records that the traditional Cabinet has grown from six members in 1789 (including three heads of departments), to nine members in 1900 (including eight heads of departments), to 15 members in 2002 (including 14 heads of departments). Since the presidency of John F. Kennedy, other officials, such as the ambassador to the United Nations, have been appointed with Cabinet rank, meaning that they attend Cabinet meetings and otherwise receive related documents. By regulating the number of officials appointed with Cabinet rank, the President may exert some restraint upon the size of this body. Furthermore, he may use other specialized forums, such as the National Security Council and the Homeland Security Council, to exercise managerial control of selected department heads.

Similarly, since 1929, when the President's staff was increased from a single personal secretary to three such aides and an administrative assistant, the White House staff has grown to supplement the Chief Executive's span of control over departmental management. When making a plea for such increased staffing in 1937, the President's Committee on Administrative Management famously asserted:

The President needs help. His immediate staff assistance is entirely inadequate. He should be given a small number of executive assistants who would be his direct aides in dealing with the managerial agencies and administrative departments of the government. These assistants, probably not exceeding six in number, would be in addition to the present secretaries, who deal with the public, with the Congress, and with the press and radio. These aides would have no power to make decisions or issue instructions in their own right. They would not be interposed between the President and the heads of his departments. They

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<sup>13</sup>See Luther Gulick, "Notes on the Theory of Organization" in Luther Gulick and L. Urwick, eds., *Papers on the Science of Administration* (New York: Institute for Public Administration, 1937), pp. 1-45.

<sup>14</sup>For critiques of, and alternatives to, orthodox organization theory, see Warren G. Bennis, *Changing Organizations: Essays on the Development and Evolution of Human Organization* (New York: McGraw-Hill, 1966); Bertram M. Gross, *The Managing of Organizations: The Administrative Struggle*, vol. 1 (New York: Free Press, 1964); Daniel Katz and Robert L. Kahn, *The Social Psychology of Organization* (New York: John Wiley and Sons, 1966); Douglas McGregor, *The Human Side of Enterprise* (New York: McGraw-Hill, 1960); John D. Millett, *Organization for Public Service* (Princeton, NJ: D. Van Nostrand, 1966); William G. Scott, *Organization Theory: A Behavioral Analysis for Managers* (Homewood, IL: Richard D. Irwin, 1967); Herbert A. Simon, *Administrative Behavior*, 2<sup>nd</sup> ed. (New York: Macmillan, 1957); Dwight Waldo, *The Administrative State* (New York: Ronald Press, 1948); Stephen J. Wayne, *The Legislative Presidency* (New York: Harper and Row, 1978).

<sup>15</sup>Schuyler Wallace, *Federal Departmentalization: A Critique of Theories of Organization* (New York: Columbia University Press, 1941), p. 43.



would not be assistant presidents in any sense. Their function would be, when any matter was presented to the President for action affecting any part of the administrative work of the Government, to assist him in obtaining quickly and without delay all pertinent information possessed by any of the executive departments so as to guide him in making his responsible decisions; and then when decisions have been made, to assist him in seeing to it that every administrative department and agency affected is promptly informed. Their effectiveness in assisting the President will, we think, be directly proportional to their ability to discharge their functions with restraint. They would remain in the background, issue no orders, make no decisions, emit no public statements. Men for these positions should be carefully chosen by the President from within and without the Government. They should be men in whom the President has personal confidence and whose character and attitude is [sic] such that they would not attempt to exercise power on their own account. They should be possessed of high competence, great physical vigor, and a passion for anonymity. They should be installed in the White House itself, directly accessible to the President. In the selection of these aides, the President should be free to call on departments from time to time for the assignment of persons who, after a tour of duty as his aides, might be restored to their old positions.<sup>16</sup>

By 1947, White House Office staff numbered over 200, and would be twice that number by the end of the century. Along the way, the President would appoint a chief of staff to help him manage his retinue of personal aides who strengthen his span of control over department management.

Wallace also observes that, “just as there are limits to the chief executive’s span of control, so also are there limits to the control which can be exercised by any of his subordinates.”<sup>17</sup> For the head of a large department, such limits include his or her span of control, or how many officials are routinely reporting directly to him or her. It also includes contending with excessive layers of middle management or an abundance of management control positions, which can contribute to a sluggish administrative system and delayed system outcomes. Other limits may include lack of administrative feedback arrangements for monitoring subordinates’ behavior;<sup>18</sup> inadequate information technology applications to supplement hierarchical communications structures for effective staff edification, guidance, and development;<sup>19</sup> and insufficient planning capability for forecasting new challenges, developing departmental goals and performance measures, and instilling a sense of mission unity. Regarding this last consideration, experience with the early Policy Planning Staff of the Department of State is worth recalling. The group, composed of senior department staff, was hurriedly put together in late April 1947 to assist Secretary of State George C. Marshall with quickly developing recommendations for

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<sup>16</sup>U.S. President’s Committee on Administrative Management, *Administrative Management in the Government of the United States*, p. 5.

<sup>17</sup>Wallace, *Federal Departmentalization*, p. 48.

<sup>18</sup>See Herbert Kaufman with Michael Couzens, *Administrative Feedback: Monitoring Subordinates’ Behavior* (Washington: Brookings Institution, 1973).

<sup>19</sup>Regarding this consideration and much more, see Jane E. Fountain, *Building the Virtual State: Information Technology and Institutional Change* (Washington: Brookings Institution, 2001).

addressing the economic and political crises mounting in war-ravaged Europe. “The staff did so,” observes one analyst, “making a central contribution to what was soon dubbed the Marshall Plan.”<sup>20</sup> Marshall’s successor, Dean Acheson, described the intentions of the former Army Chief of Staff when creating this planning entity.

The General [as Marshall was often called] conceived the function of this group as being to look ahead, not into the distant future, but beyond the vision of the operating officers caught in the smoke and crises of current battle; far enough ahead to see the emerging form of things to come and outline what should be done to meet or anticipate them. In doing this the staff should also do something else—constantly reappraise what was being done. General Marshall was acutely aware that policies acquired their own momentum and went on after the reasons that inspired them had ceased.<sup>21</sup>

Returning to Wallace’s observations on departmentalization, he comments:

there is no assurance ... that the creation of large departments will lead to an extension of the career systems upward. In the opinion of opponents of this method of administrative integration, the contrary may well be the case. The very size of the department will make the problem of civilian control over the bureaucracy appear to be a more difficult one. This will undoubtedly be seized upon by advocates of democratic control and by spoilsmen as an excuse to push the system of political appointment downward rather than the merit system upward.<sup>22</sup>

This matter also has implications for the control which can be exercised by the head of a large department over his or her organization. If middle and upper management positions are largely political appointees, the head of the proposed department may have the experience of dealing with highly transitory strangers of varying competence who were, for the most part, unilaterally selected by the White House. By contrast, filling middle and upper management positions with career civil servants has somewhat greater potential generally for realizing more enduring, knowledgeable, and capable departmental leadership, even though cases may result where a careerist fails to perform management responsibilities adequately.

Turning to “the determination of the criteria by which the subordinate administrative units should be grouped together in a departmental structure,” Wallace proffers “that the process of departmentalization rests upon four major concepts of organization: (1) function; (2) work processes; (3) clientele; and (4) territory.” He quickly cautions that “these several modes of organization may seem to be self-evident, yet such is far from the case,” and proceeds to demonstrate that these are not clearly understood concepts.<sup>23</sup> Furthermore, he admits:

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<sup>20</sup>I. M. Destler, *Presidents, Bureaucrats, and Foreign Policy: The Politics of Organizational Reform* (Princeton, NJ: Princeton University Press, 1974), p. 224.

<sup>21</sup>Dean Acheson, *Present at the Creation: My Years in the State Department* (New York: W. W. Norton, 1969), p. 214.

<sup>22</sup>Wallace, *Federal Departmentalization*, pp. 62-63.

<sup>23</sup>*Ibid.*, p. 91.

No one has ever advocated the construction of departments solely upon the basis of function, or work processes, or clientele or territory. Instead, in the very nature of things, functional, technical, clientele, and territorial factors enter into the construction and operation of all national or large-area departments. Such considerations vary from division of work to division of work, and practice and common sense take them into account as existing departmental organizations demonstrate. Back of all technical considerations, however, lie large questions of national policy and purpose which have a bearing upon present practices and proposed innovations. Given a particular set of assumptions respecting public policy—e.g., the desirability of maintaining constitutional government, the normal judicial processes, legislative control over the administration, etc.—the problem then is the emphasis which should be laid upon one relevancy rather than another, i.e., function, clientele, etc., in a given social context and the particular devices which can be adopted to offset any disadvantages to efficiency accruing from a given emphasis.<sup>24</sup>

“The most widely utilized basis of departmental integration,” he continues, “is that of function or purpose,” defined as “the grouping of subordinate administrative units in a departmental pattern upon the basis of the underlying purpose to which they each have been dedicated.” Reliance upon work processes involves “the bringing together in a single department ... those who have had similar professional training or who make use of the same or similar equipment.” Departmentalization based upon clientele “should result in the concentration in a single department of those subordinate administrative units which are designed to serve some particular segment of the body politic.”<sup>25</sup> Finally, departmental organization may be “based upon place or territory,” and “has long been used as a basis of interdepartmental organization,” such as in the regional divisions of the Department of State.<sup>26</sup>

Although these concepts were offered as bases for departmental integration, Wallace also mentions “another principle of administrative organization, that of devolution of operating autonomy.”

This is best exemplified in the realm of economic organization by the holding-company mode of organization. Instead of concentrating full and final authority in the hands of a single executive, holding companies usually organize their component parts more or less as independent economic units, in many cases directed by independent presidents, immediately responsible to independent boards of trustees. In all such holding companies some measure of coordination is imposed, but the techniques by which it is achieved differ radically. In some situations the board of directors of the top holding company constitutes a majority of the board of directors of each of the operating units. In other cases, the chief executives of the various operating units report directly to the president of the top company. But in any case, devolution rather than integration is the outstanding characteristic of these economic units. The actual administration and management of the various operating organizations is under the direction and supervision of its immediate management. Such coordination as exists, apart from financial and certain technical considerations, is confined to broad

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<sup>24</sup>Ibid., p. 97.

<sup>25</sup>Ibid., pp. 94, 98.

<sup>26</sup>Ibid., p. 131.

questions of business policy or to that limited sphere in which it is thought either that standardization of procedure is imperative or that the overall facilities of the parent organization make possible a contribution of administrative efficiency not otherwise attainable.<sup>27</sup>

A few years after the publication of Wallace's departmentalization study, the creation to two new massive federal departments gave particular credence to some of his observations.

## Department of Defense

In the aftermath of World War I, the establishment of a Department of National Defense, unification of the armed forces, and the creation of an independent Air Force began to be discussed in various quarters in the United States. Sometimes these issues dramatically captured public attention, perhaps no more so than in the fall of 1925 during the court martial of Colonel Billy Mitchell. Congress began exploring these matters in early 1944.<sup>28</sup> Subsequently, proposals for a central intelligence agency and improved arrangements for the mobilization of war resources were added to the debate, and an elaborate plan, embracing all of these considerations in fulfillment of "national security," was offered by Secretary of the Navy James Forrestal.<sup>29</sup> This plan was largely enacted with the National Security Act of 1947, which created the National Military Establishment, headed by the Secretary of Defense and embracing, as subunits, Army, Navy, and Air Force departments; the Central Intelligence Agency; the National Security Council; and the National Security Resources Board.<sup>30</sup> Forrestal became the first Secretary of Defense. In 1949, based upon his experience, he proposed amendments to the National Security Act, which Congress adopted, strengthening the supervisory authority of his position and changing the name of the National Military Establishment to the Department of Defense.<sup>31</sup>

Creation of the National Military Establishment/Department of Defense had been under consideration in Congress for approximately three years and ultimately came to be guided by a plan of some detail. Establishment of the new department involved very few agencies: the Department of War became the Department of the Army, but the U.S. Army Air Forces was transferred to the new Department of the Air Force, and the Department of the Navy, like the other two armed services

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<sup>27</sup>Ibid., p. 76.

<sup>28</sup>U.S. Congress, House Select Committee on Post-War Military Policy, *Proposal to Establish a Single Department of Armed Forces*, 78<sup>th</sup> Cong., 2<sup>nd</sup> sess., hearings pursuant to H. Res. 465, Apr. 24-May 19, 1944 (Washington: GPO, 1944), and, U.S. Congress, House Select Committee on Post-War Military Policy, *A Single Department of Armed Forces*, 78<sup>th</sup> Cong., 2<sup>nd</sup> sess., H.Rept. 1645 (Washington: GPO, 1944).

<sup>29</sup>U.S. Congress, Senate Committee on Naval Affairs, *Unification of the War and Navy Departments and Postwar Organization for National Security*, by Ferdinand Eberstadt, 79<sup>th</sup> Cong., 1<sup>st</sup> sess., committee print (Washington: GPO, 1945).

<sup>30</sup>61 Stat. 495.

<sup>31</sup>63 Stat. 578.

departments, came under the supervision of the Secretary of Defense. In 1946, the House and Senate had collapsed their defense-related committees into single armed services panels in each chamber, and the new department largely fell within their legislative and oversight jurisdiction.<sup>32</sup>

In 1941, Wallace had recognized that a Department of National Defense might be established on an integrated basis, with a strong head supervising subordinate leaders of the armed services components or, alternatively, on a devolution basis, following the holding company model. Discussing this latter version, he wrote:

It would certainly embrace two component parts—a Division of War and a Division of Navy. It might also embrace a Division of Military Aviation. Each of these great divisions might be headed by its own secretary and might remain practically autonomous in the conduct of its own internal affairs. Above the three secretaries might be placed a secretary of National Defense. His primary function might be, first, the reception of routine reports from the two or three major divisions as the case might be, and the transmission of such segments of these reports as he might think necessary to the chief executive, and second, the coordination of the overlapping activities of the component parts of the department. ... Moreover, he might undertake certain military activities now carried on by neither the Department of War nor that of the Navy, or certain functions such as propaganda which are in reality not a technical part of the fighting service.<sup>33</sup>

This arrangement, of course, was rejected in the National Security Act of 1947, but the matter of which model to adopt would be revisited six years later in the case of another new department.

## Department of Health, Education, and Welfare

Created in 1953 by reorganization plan, the Department of Health, Education, and Welfare was rooted in the social welfare administration of the New Deal, the Social Security Board and the Federal Security Agency being primary components.<sup>34</sup> The President's Committee on Administrative Management had recommended establishing a Department of Social Welfare in 1937, and may have envisioned its accomplishment through a presidential reorganization plan.<sup>35</sup> However, the initial statute authorizing the President to propose reorganization plans—the Reorganization Act of 1939—prohibited the use of this method to establish any new executive

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<sup>32</sup>See 60 Stat. 812.

<sup>33</sup>Wallace, *Federal Departmentalization*, p. 82.

<sup>34</sup>The Social Security Board, established in 1935 (49 Stat. 620), was transferred to the Federal Security Agency by Reorganization Plan 1 of 1939 (53 Stat. 1423), which mandated the latter agency and included within it the Office of Education, Public Health Service, U.S. Employment Service, Civilian Conservation Corps, and National Youth Administration.

<sup>35</sup>U.S. President's Committee on Administrative Management, *Administrative Management in the Government of the United States*, p. 32.

department.<sup>36</sup> Consequently, another strategy was followed, as Louis Brownlow, the chairman of the President's committee and author of Reorganization Plan 1 of 1939 recounted in his memoirs.

Part 2 of Plan I set up a Federal Security Agency. This was to take the place of the department of social welfare that had been a feature of our original recommendations. Forbidden to create a department, "F.D.R." created an agency. Forbidden to call its head a "secretary," he called him an "administrator." Forbidden to give a salary of \$10,000 a year, equal to that of members of the Cabinet and incidentally to that of members of the two houses of Congress, he provided for the administrator a salary of \$9,000 a year. Actually, the Federal Security Agency became in everything but words a major department of the government, although it was not until the early days of the Eisenhower administration that it was set up as the Department of Health, Education, and Welfare, and its administrator blessed with the title of "Secretary."<sup>37</sup>

Following the creation of the Federal Security Agency, attention continued to be given to elevating its programs to departmental status. A majority of the members of the first Hoover Commission on Organization of the Executive Branch of the Government (1947-1949) recommended the establishment of a department for education and social security programs, but would have returned some Federal Security Agency responsibilities to the Department of Labor and located federal health activities in a separate United Medical Administration. Three members of the panel dissented from this separation of health and welfare functions and recommended a Department of Welfare which included health activities.<sup>38</sup> A Brookings Institution assessment of grouping health, education, employment, and social security and relief functions in a single department, which was prepared for the Hoover Commission, expressed reservations about this prospect:

department heads are usually laymen serving ordinarily for relatively short terms, frequently with little prior experience in the substantive work of the department. In the present instance the problems which will come to the President will apparently lie in distinctly professional fields and deal with substantive matters or broad issues of administration. Only under exceptional circumstances could a single department head deal competently with so diverse a range of technical activities. When the President has to consider substantive issues it would seem entirely possible that he might get more help from several heads of smaller departments than from the head of one big one because one could scarcely master the details in a reasonable period.<sup>39</sup>

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<sup>36</sup>53 Stat. 561; the statute was a limited realization of another recommendation of the President's Committee on Administrative Management.

<sup>37</sup>Louis Brownlow, *A Passion for Anonymity: The Autobiography of Louis Brownlow, Second Half* (Chicago: University of Chicago Press, 1958), p. 417.

<sup>38</sup>See U.S. Commission on Organization of the Executive Branch of the Government, *Social Security, Education, Indian Affairs: A Report to the Congress* (Washington: GPO, 1949), pp. 3-4, 7-12, 37-42.

<sup>39</sup>U.S. Commission on Organization of the Executive Branch of the Government, Task Force (continued...)

President Harry S. Truman sent a reorganization plan to Congress in June 1949 for a Department of Welfare<sup>40</sup> and another in May 1950 for a Department of Health, Education, and Security.<sup>41</sup> Both plans built upon the programs of the Federal Security Agency. Under the terms of the Reorganization Act of 1949, a plan could be rejected by the adoption of a simple resolution in either house of Congress.<sup>42</sup> The President's Department of Welfare plan was rejected in the Senate on a 60-32 vote adopting a resolution (S.Res. 147) of disapproval;<sup>43</sup> the Department of Health, Education, and Security plan was rejected in the House on a 249-71 vote adopting a resolution (H.Res. 647) of disapproval.<sup>44</sup>

On February 2, 1953, newly installed President Dwight D. Eisenhower, with his party in majority control of both houses of Congress, announced in his State of the Union message that he would shortly send to Congress "a reorganization plan defining new administrative status for all Federal activities in health, education, and social security."<sup>45</sup> The promised plan for a Department of Health, Education, and Welfare (HEW) was delivered on March 12.<sup>46</sup> Support for the proposal was sufficiently strong that Congress expedited approval and implementation of the plan through the adoption of a joint resolution, which the President signed into law on April 1.<sup>47</sup>

The HEW plan had been prepared by Oveta Culp Hobby, whom Eisenhower had named to head the Federal Security Agency. A former commander of the Women's Army Corps who had served under Eisenhower in the European theater during World War II and an ardent personal supporter of his presidential candidacy, she was elevated to become the first head of the new department. She made the plan as simple as possible so as to avoid congressional disapproval, which meant little detail, no vesting of the various legal authorities of the Surgeon General or the Commissioner of Education in the new secretary, and no transfers of organizations

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<sup>39</sup>(...continued)

Report on Public Welfare (Appendix P), *Functions and Activities of the National Government in the Field of Welfare*, by The Brookings Institution (Washington: GPO, 1949), p. 6.

<sup>40</sup>U.S. General Services Administration, National Archives and Records Service, Office of the Federal Register, *Public Papers of the Presidents of the United States: Harry S. Truman, 1949* (Washington: GPO, 1964), pp. 310-311.

<sup>41</sup>U.S. General Services Administration, National Archives and Records Service, Office of the Federal Register, *Public Papers of the Presidents of the United States: Harry S. Truman, 1950* (Washington: GPO, 1965), pp. 443-445.

<sup>42</sup>See 63 Stat. 203.

<sup>43</sup>*Congressional Record*, vol. 95, Aug. 16, 1949, pp. 11520-11560.

<sup>44</sup>*Ibid.*, vol. 96, July 10, 1950, pp. 9843-9864.

<sup>45</sup>U.S. General Services Administration, National Archives and Records Service, Office of the Federal Register, *Public Papers of the Presidents of the United States: Dwight D. Eisenhower, 1953* (Washington: GPO, 1960), p. 33.

<sup>46</sup>*Ibid.*, pp. 94-98.

<sup>47</sup>67 Stat. 18; Reorganization Plan 1 of 1953 appears at 67 Stat. 631.

or programs from other parts of the government. It was initially proposed that the head of the department would manage the organization with an under secretary and three assistant secretaries, one each for the primary health, education, and welfare components.<sup>48</sup> This arrangement had the support of an important congressional figure, Senator Robert A. Taft, who reportedly “thought this was a logical division of responsibilities and would be conducive to good management.”

For quite different reasons, the American Medical Association and the various national education associations also recommended separate assistant secretaries for health, education, and welfare. Each interest group thought that if it had an assistant secretary to concern himself with its specific functions, he would become an effective spokesman within the Administration for the group’s interests.<sup>49</sup>

Analysts at the Bureau of the Budget (predecessor to the Office of Management and Budget) opposed the assistant secretary trinity, “concerned that these three appointees might become captives of the pressure groups and the bureaucracy, working in league with one another, and told Mrs. Hobby that she needed some top-level assistants to aid her in her job.” Ultimately, the plan mandated two assistant secretaries “to perform such functions as the Secretary may prescribe” and an equivalent special assistant to the secretary for health and medical affairs. However, the secretary, nonetheless, “had a tiny staff of her own choosing and an unusually small number of supporting civil servants,” as well as an unwieldy management structure.<sup>50</sup>

At the time HEW officially came into being in 1953, the organization was no infant. It had over 34,000 employees with total expenditures of \$5.4 billion, including \$2.0 billion in general funds and \$3.4 billion in Social Security trust funds. It was clear that the Social Security program would grow steadily and rapidly for many years, assuming the system was preserved in its form at that time. What was far less clear was how the other components of the Department would change. Nobody really realized how forces and events during the next twenty years would throw one responsibility after another on the shoulders of the young Department, straining its capacity to cope with all of its functions.<sup>51</sup>

When the department began operations, authority for its programs was not clearly vested in the secretary, which led to friction between the head of the organization and subordinate leaders within the health, education, and welfare components. Interest groups sometimes exploited the situation. The secretary seemingly did not have an effective management structure or adequate supporting staff, the latter shortcoming contributing to the Brookings warning about the manageability of a department dealing with so many distinct professional fields. To some, HEW appeared to be the “holding company” mode of organization described

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<sup>48</sup>Rufus E. Miles, Jr., *The Department of Health, Education, and Welfare* (New York: Praeger, 1974), pp. 25-26.

<sup>49</sup>*Ibid.*, p. 27.

<sup>50</sup>*Ibid.*, p. 28.

<sup>51</sup>*Ibid.*, p. 29.



by Wallace. As late as July 1962, when he stepped down as the head of HEW in order to run for the Senate, Abraham Ribicoff reportedly “complained that the department was so large and so diverse as to be unmanageable. After becoming a senator in 1962,” it was observed, “Ribicoff consistently supported legislation to dismantle the department.”<sup>52</sup>

Creation of the Department of Health, Education, and Welfare had been under consideration in Congress, at various times, in one way or another, for about a dozen years, and ultimately came to be realized with a proposal of little detail. As a result, management arrangements were unwieldy. Establishment of the new department involved only the components of the Federal Security Agency. The 1946 consolidation of congressional committees resulted in Senate panels on finance and on labor and public welfare and in House panels on education and labor and on ways and means, which would largely have legislative and oversight jurisdiction over the programs of the new department. However, because HEW had been established by a reorganization plan, none of these committees had an opportunity to contribute to the development of the initial operating arrangements of the new department.<sup>53</sup>

## Homeland Security—Coordination Office

Shortly after the terrorist attacks of September 11, 2001, President George W. Bush established, with E.O. 13228, the Office of Homeland Security (OHS) within the Executive Office of the President. Former Pennsylvania Governor Tom Ridge was named to head the new entity and to serve, as well, as the Assistant to the President for Homeland Security. “The mission of the Office shall be to develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks,” said the executive order, and “to coordinate the executive branch’s efforts to detect, prepare for, protect against, respond to, and recover from terrorist attacks within the United States.”<sup>54</sup>

Critics of OHS and Ridge’s role contended that the executive order did not give him adequate authority, including remedial budgetary power, over agency efforts at combating terrorism. In response, Ridge said that his close proximity and easy access to the President gave him all the authority he needed to do his job. Some were not convinced by Ridge and sought to reconstitute OHS with a statutory mandate and more explicit responsibilities and powers. Others favored a different course of action, consolidating relevant programs and hierarchical administrative authority in a new department. Among the first to pursue this approach was Senator Lieberman, who introduced his initial proposal (S. 1534) a few days after the establishment of

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<sup>52</sup>Edward Berkowitz, “Health and Human Services, Department of,” in George Thomas Kurian, ed., *A Historical Guide to the U.S. Government* (New York: Oxford University Press, 1998), p. 279.

<sup>53</sup>Prepared, in part, in furtherance of realizing efficiency and economy in government, reorganization plans were usually referred to the House Committee on Expenditures in the Executive Departments (later Government Operations and now Government Reform) and the Senate Committee on Expenditures in the Executive Departments (later Government Operations and now Governmental Affairs).

<sup>54</sup>See *Federal Register*, vol. 66, Oct. 10, 2001, pp. 51812-51817.

OHS. He and Representative Thornberry would introduce more elaborate versions of this legislation (S. 2452 and H.R. 4660) in early May 2002.<sup>55</sup>

By late January 2002, Ridge, according to the *Washington Post*, was “facing resistance to some of his ideas, forcing him to apply the brakes on key elements of his agenda and raising questions about how much he can accomplish.” OHS plans engendering opposition from within the executive branch reportedly included those to streamline or consolidate agencies responsible for border security; improve intelligence distribution to federal, state, and local agencies; and alert federal, state, and local officials about terrorist threats using a system of graduated levels of danger.<sup>56</sup>

At about this same time, Ridge began to become embroiled in controversy over his refusal to testify before congressional committees. Among the first to request his appearance were Senator Robert C. Byrd and Senator Ted Stevens, respectively, the chairman and ranking minority member of the Committee on Appropriations. Ridge turned down their initial, informal invitation and later formal requests of March 15 and April 4.<sup>57</sup> When Ridge declined the request of Representative Ernest Istook, Jr., chairman of the House Appropriations Subcommittee on Treasury, Postal Service, and General Government, appropriations for the Executive Office of the President were threatened, prompting Ridge to offer to meet with Istook and other subcommittee members in an informal session.<sup>58</sup> Thereafter, Ridge arranged other informal briefings with members of the House Committee on Government Reform and a group of Senators, and agreed to a similar such session with members of the House Committee on Energy and Commerce. These informal meetings, however, did not appear to abate the controversy that Ridge’s refusals to testify had generated.<sup>59</sup>

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<sup>55</sup>Representative Thornberry had introduced legislation (H.R. 1158) on March 21, 2001, to establish a National Homeland Security Agency which closely resembled his subsequent departmental proposal, but the organization was not denominated a department and, therefore, its head did not have Cabinet status.

<sup>56</sup>Eric Pianin and Bill Miller, “For Ridge, Ambition and Realities Clash,” *Washington Post*, Jan. 23, 2002, pp. A1, A10.

<sup>57</sup>Dave Boyer, “Ridge Reluctant to Testify in Senate,” *Washington Times*, Feb. 27, 2002, p. A4; Alison Mitchell, “Congressional Hearings: Letter to Ridge Is Latest Jab in Fight Over Balance of Powers,” *New York Times*, Mar. 5, 2002, p. A8; Mark Preston, “Byrd Hold Firm,” *Roll Call*, Apr. 18, 2002, pp. 1, 26.

<sup>58</sup>George Archibald, “Panel Ties Funding to Ridge Testimony,” *Washington Times*, Mar. 22, 2002, pp. A1, A14; George Archibald, “White House Mollifies House Panel,” *Washington Times*, Mar. 23, 2002, pp. A1, A4.

<sup>59</sup>Bill Miller, “Ridge Will Meet Informally with 2 House Committees,” *Washington Post*, Apr. 4, 2002, p. A15; George Archibald, “Ridge Attends Private Meeting on Hill,” *Washington Times*, Apr. 11, 2002, p. A4; Elizabeth Becker, “Ridge Briefs House Panel, but Discord Is Not Resolved,” *New York Times*, Apr. 11, 2002, p. A17; Bill Miller, “From Bush Officials, a Hill Overture and a Snub,” *Washington Post*, Apr. 11, 2002, p. A27; Amy Fagan, “Democrats Irked by Ridge’s Closed House Panel Meeting,” *Washington Times*, Apr. 12, 2002, p. A6; Stephen Dinan, “Ridge Briefing Called ‘Stunt’,” *Washington Times*, May 3, 2002, p. A17.

(continued...)

Assessing the situation in early May, a *New York Times* news analysis proffered that, “instead of becoming the preeminent leader of domestic security, Tom Ridge has become a White House adviser with a shrinking mandate, forbidden by the president to testify before Congress to explain his strategy, overruled in White House councils and overshadowed by powerful cabinet members reluctant to cede their turf or their share of the limelight.” In support of this view, the analysis noted that the Pentagon did not consult with Ridge when suspending air patrols over New York City—a special assistant to the Secretary of Defense explained this action by saying, “We don’t tell the Office of Homeland Security about recommendations, only about decisions”—and the Attorney General unilaterally announced a possible terrorist threat against banks in April.<sup>60</sup> Asked about this assessment by Jim Lehrer on the PBS *Newshour*, Ridge called it “false” and said, “I just don’t think they have spent enough time with me on a day-to-day basis.”<sup>61</sup> Shortly thereafter, a *New York Times* editorial opined that one of the reasons Ridge “lost these turf battles is that he failed to build a constituency for change in Congress. His refusal to testify before Congressional committees has not helped.”<sup>62</sup>

Ridge’s problems had not escaped White House attention. In his April 11, 2002, testimony before the Senate Committee on Governmental Affairs concerning Senator Lieberman’s proposal for a homeland security department, Mitchell E. Daniels, Jr., the director of the Office of Management and Budget, indicated that the President might eventually decide to create the department as envisaged in the Lieberman bill. In addition, Daniels said he would consider creating a working group with Senator Lieberman to discuss the legislation.<sup>63</sup> Subsequently, Daniels, Ridge, White House Chief of Staff Andrew H. Card, Jr., and White House counsel Alberto R. Gonzales would constitute the principal members of a secret group that would begin drafting the President’s departmental plan on April 23. This proposal was unveiled on June 6, 2002. The President’s surprise announcement was viewed not only as an attempt to regain the initiative in the nation’s efforts at combating terrorism, but also to move beyond the coordination efforts of OHS to a strong administrative structure for managing consolidated programs concerned with border security and effective response to domestic terrorism incidents. The President transmitted a draft bill detailing his plan for the department on June 18, and it was formally introduced (H.R. 5005) on June 24.<sup>64</sup> An alternative model was provided by Senator Lieberman (S. 2452) and Representative Thornberry (H.R. 4660), to create both a Department

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<sup>59</sup>(...continued)

2002, p. A9; Bill Miller, “On Homeland Security Front, a Rocky Day on the Hill,” *Washington Post*, May 3, 2002, p. A25.

<sup>60</sup>Elizabeth Becker, “Big Visions for Security Post Shrink Amid Political Drama,” *New York Times*, May 3, 2002, pp. A1, A16.

<sup>61</sup>*NewsHour Focus, Newsmaker: Tom Ridge*, May 9, 2002, transcript available at NewsHour Index, [[http://www.pbs.org/newshour/newshour\\_index.html](http://www.pbs.org/newshour/newshour_index.html)].

<sup>62</sup>Editorial, “Faltering on the Home Front,” *New York Times*, May 12, 2002, p. 14.

<sup>63</sup>Elizabeth Becker, “Domestic Security: Bush Is Said to Consider a New Security Department,” *New York Times*, Apr. 12, 2002, p. A15.

<sup>64</sup>See *Congressional Record*, daily edition, vol. 148, June 18, 2002, pp. H3639-H-3641.

of National Homeland Security and a new Executive Office of the President entity, the National Office for Combating Terrorism.

## Homeland Security—Initial Department Bills

By the time the President's draft legislation was formally introduced, House leaders had agreed that it would be the legislative vehicle for that body to develop a mandate for a Department of Homeland Security. According to the agreed-upon plan, the bill would be referred to standing committees, which would (for approximately three weeks) consider and recommend modifications, as deemed appropriate, within their jurisdictions. The bill would then be referred to a select committee on homeland security which, under the chairmanship of the Majority Leader, would produce (after approximately two weeks) a version of the legislation for floor consideration.

In the Senate, by the time the President's draft legislation was unveiled, Senator Lieberman's second bill (S. 2452) to establish a Department of National Homeland Security had been ordered to be reported, with amendments, from the Committee on Governmental Affairs.<sup>65</sup> It was determined that this measure would be the legislative vehicle for the Senate to develop a mandate for a Department of Homeland Security.<sup>66</sup> The resulting Senate-passed bill and the counterpart approved by the House would then be sent to conference for reconciliation, and that version of the legislation would be considered by each house.

At the outset, the House and Senate bills differed in some major regards. The House bill would have transferred approximately two dozen primary components to the new department; the Senate bill would have transferred one-third of these primary components. **Table 2** generally reflects these comparative differences.

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<sup>65</sup>U.S. Congress, Senate Committee on Governmental Affairs, *National Homeland Security and Combating Terrorism Act of 2002*, report to accompany S. 2452, 107<sup>th</sup> Cong., 2<sup>nd</sup> sess., S.Rept. 107-175 (Washington: GPO, 2002).

<sup>66</sup>The discussion of S. 2452 in this section (Phase 1) refers to the version of the bill ordered to be reported from the Committee on Governmental Affairs on May 22 (S.Rept. 107-175).

**Table 2. Primary Components Transferred to the Department of Homeland Security**

House Bill (H.R. 5005, as introduced)	Senate Bill (S. 2452, as initially reported)
Animal and Plant Health Inspection Service (DOA)	Animal and Plant Health Inspection Service (DOA) (in part)
Critical Infrastructure Assurance Office (DOC)	Critical Infrastructure Assurance Office (DOC)
Federal Emergency Management Agency	Federal Emergency Management Agency
Immigration and Naturalization Service	Immigration and Naturalization Service (in part)
National Domestic Preparedness Office (FBI)	National Domestic Preparedness Office (FBI)
National Infrastructure Protection Center (FBI)	National Infrastructure Protection Center (FBI)
U.S. Coast Guard	U.S. Coast Guard
U.S. Customs Service	U.S. Customs Service
Chemical, Biological, and Nuclear Security, Non-proliferation, and Verification Programs (DOE)	
Civilian Biodefense Research Programs (HHS)	
Computer Security Division (NIST)	
Domestic Emergency Support Teams (DOJ)	
Environmental Measurements Laboratory (DOE)	
Federal Computer Incident Response Center (GSA)	
Federal Protective Service (GSA)	
Lawrence Livermore National Laboratory (DOE)	
National Biological Weapons Defense Analysis Center (DOD)	
National Communications System (DOD)	
National Infrastructure Simulation and Analysis Center (DOE)	

House Bill (H.R. 5005, as introduced)	Senate Bill (S. 2452, as initially reported)
Nuclear Incident Response (DOE)	
Office for Domestic Preparedness (DOJ)	
Office of the Assistant Secretary for Public Health Emergency Preparedness (HHS)	
Plum Island Animal Disease Center (DOA)	
Select Agent Registration and Enforcement Program (HHS)	
Strategic National Stockpile (HHS)	
Transportation Security Administration (DOT)	
U.S. Secret Service	
Acronyms: DOA = Department of Agriculture DOC = Department of Commerce DOD = Department of Defense DOE = Department of Energy DOJ = Department of Justice DOT = Department of Transportation FBI = Federal Bureau of Investigation, Department of Justice GSA = General Services Administration HHS = Department of Health and Human Resources NIST = National Institute of Standards and Technology, Department of Commerce	

The two bills also differed concerning the number and kinds of officials who would be reporting directly to the head of the department. The House bill identified as many as 12 officers who seemingly would have been reporting directly to the Secretary, while the Senate bill identified half as many such officials. However, the Senate bill made no reference to three positions—general counsel, Chief Financial Officer, and Chief Information Officer—specified in the House bill. **Table 3** generally reflects these comparative differences.

**Table 3. Officials Reporting Directly  
to the Secretary of Homeland Security**

<b>House Bill (H.R. 5005, as introduced)</b>	<b>Senate Bill (S. 2452, as initially reported)</b>
Deputy Secretary	Deputy Secretary
Under Secretary for Information Analysis and Infrastructure Protection	Directorate of Critical Infrastructure Protection
Under Secretary for Chemical, Biological, Radiological, and Nuclear Countermeasures	
Under Secretary for Border and Transportation Security	Directorate of Border and Transportation Protection
Under Secretary for Emergency Preparedness and Response	Directorate for Emergency Preparedness and Response
Under Secretary for Management	
	Director of the Office of Science and Technology
Inspector General	Inspector General
Commandant of the Coast Guard	
General Counsel	
Director of the Secret Service	
Chief Financial Officer	
Chief Information Officer	

The House and Senate bills also reflected major differences regarding related components. The House bill would have created only a new department and presumed the continued existence of OHS and HSC established by E.O. 13228. If the new department had been established by the House bill, an amendment to the executive order could have appropriately adjusted the membership of the council. The Senate bill, however, would have created a new department, made the head of the department a member of the National Security Council, established a National Office for Combating Terrorism within the Executive Office of the President (presumably replacing OHS), and mandated a National Combating Terrorism and Homeland Security Response Council to assist with the preparation and implementation of a National Strategy for Combating Terrorism and Homeland Security Response (presumably replacing HSC). Creation of a National Office for Combating Terrorism posed a question as to the head of that entity, who would have been subject to Senate confirmation, also serving as the principal presidential adviser on homeland security. At the time, the situation was reversed: the Assistant to the President for Homeland Security, who was a member of the White House Office staff, also headed OHS and had declined to appear before congressional committees because he was a presidential adviser.

Concerning the need for both a homeland security coordinating office in the Executive Office of the President and a department, Indiana University public affairs professor Charles R. Wise warns: “Combining an interagency coordinating role with the role of leader of a major department inevitably will raise concern that the head of the department is using the coordinating role to further the interests of his or her own department and will undermine the coordinating position by fostering perceptions of partiality.”<sup>67</sup> Moreover, while the Secretary of Homeland Security would have been a major player in homeland security policy and practice, he or she would not be the only leader involved in these matters, and the efforts of the department would have to have been coordinated with those of other departments and agencies having homeland security responsibilities.

## Homeland Security—Markup of Department Bills

As the second week of July came to a close, the standing committees of the House that had been considering the President’s proposal for a Department of Homeland Security offered their recommendations for modifying the bill. A few committees indicated disagreement with some of the primary component transfers (see **Table 2**) that would have been made by the President’s legislation. The Committee on Armed Services recommended that the Lawrence Livermore National Laboratory and the Coast Guard remain in their current status, although some Coast Guard functions were proposed for transfer. The Committee on the Judiciary recommended transferring only the Office of National Preparedness of the Federal Emergency Management Agency (FEMA) to the new department, not the entire agency; moving only the enforcement responsibilities of the Immigration and Naturalization Service (INS) to the new department and leaving the Service’s administrative duties with the Department of Justice; and transferring the Secret Service to the Department of Justice instead of the new department. The Committee on Transportation and Infrastructure also proposed leaving the Coast Guard and FEMA in their current status, and recommended that the recently established Transportation Security Administration (TSA) be moved to the new department after TSA was fully organized. The Committee on Ways and Means urged keeping the revenue collecting authority of the Customs Service at the Department of the Treasury rather than transferring the whole agency to the new department.<sup>68</sup>

Not bound by these standing committee recommendations, the House Select Committee on Homeland Security began hearings on the President’s proposal on July 11, receiving testimony from Attorney General John Ashcroft, Secretary of Defense Donald H. Rumsfeld, Secretary of State Colin Powell, and Secretary of the Treasury

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<sup>67</sup>Charles R. Wise, “Organizing for Homeland Security,” *Public Administration Review*, vol. 62, Mar-Apr. 2002, p. 137.

<sup>68</sup>Associated Press, “House Panels Finish New Security Lineup,” *Washington Times*, July 13, 2002, p. A2; David Firestone, “The Reorganization Plan: Congressional Panels Recast Homeland Security Dept.,” *New York Times*, July 11, 2002, p. A18; Walter Pincus, Juliet Eilperin, and Bill Miller, “Details of Homeland Plan Assailed: House Panels Vote to Block Transfers of Some Agencies,” *Washington Post*, July 11, 2002, pp. A1, A4.



Paul H. O'Neill.<sup>69</sup> A July 9 discussion draft of substitute language to the President's proposal, released by the chairman of the select committee, added detail to the pending legislation, but made no adjustment of the primary components proposed for transfer to the new department. A second discussion draft, very similar to the first one, was released by the chairman on July 18; it was used by the select committee in its July 19 markup, and the resulting legislation, as amended, was ordered reported on a party-line vote at the end of the day.<sup>70</sup>

The House bill, as reported from committee, largely continued to reflect the department component structure proposed by the President. A notable exception in this regard, however, was the transference of only the enforcement responsibilities of INS to the new department and leaving its administrative duties with the Department of Justice. Among the more contentious issues before the committee were civil service protections and collective bargaining rights for department workers. The bill continued to vest broad authority in the secretary regarding these matters. Institutional additions to the legislation, as introduced (the President's proposal), included:

- a special assistant to the secretary, appointed by the secretary and responsible for several specified communications, policy advice, homeland security mission assessment, and partnership matters regarding the private sector;
- a National Council of First Responders, composed of not less than 100 individuals appointed by the President for three-year terms and chaired by an individual appointed by a Director of Homeland Security (not otherwise identified in the bill), which was tasked with various information, education, identification, and evaluation duties relative to first response matters and first responders;
- a Privacy Officer, appointed by the secretary by designating a senior department official to assume primary responsibility for privacy policy, including, among other duties, assuring that the use of information technologies sustain, and do not erode, privacy protections relating to the use, collection, and disclosure of personal information; assuring full compliance with the Privacy Act of 1974; evaluating legislative proposals involving collection, use, and disclosure of personal information by the federal government; and conducting a privacy impact assessment of proposed rules of the department or that of the department on the privacy of personal information, including the type of personal information collected and the number of people affected;

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<sup>69</sup>David Firestone, "Top Bush Aides Urge No Change in Security Plan," *New York Times*, July 12, 2002, pp. A1, A16; Walter Pincus and Bill Miller, "4 Secretaries Endorse New Homeland Department," *Washington Post*, July 12, 2002, p. A4.

<sup>70</sup>See U.S. Congress, House Select Committee on Homeland Security, *Homeland Security Act of 2002*, a report to accompany H.R. 5005, 107<sup>th</sup> Cong., 2<sup>nd</sup> sess., H.Rept. 107-609 (Washington: GPO, 2002).

- an Office for Civil Rights and Civil Liberties, headed by a director responsible for reviewing and assessing information alleging abuses of civil rights, civil liberties, and racial and ethnic profiling by employees and officials of the department;
- an Office of International Affairs, established within the office of the secretary and headed by a director appointed by the secretary, which was to promote information and education exchange with nations friendly to the United States in order to promote the sharing of best practices and technologies relating to homeland security; and
- a Homeland Security Council, established within the Executive Office of the President with the President, Vice President, Attorney General, Director of Central Intelligence, and Secretaries of Homeland Security, Health and Human Services, Defense, the Treasury, State, Energy, and Agriculture as members, to advise the President on homeland security matters; the staff of the council were to be directed by a presidentially appointed executive secretary; the council could be convened jointly with the National Security Council.

The number of assistant secretary positions to which the President could make unilateral appointments was reduced from not more than ten, as proposed by the President, to not more than eight; the number of such positions for which the presidential appointment was subject to Senate confirmation was reduced from not more than six to not more than four. The provision in the House bill, as introduced, authorizing the President, until the transfer of an agency to the new department, to transfer to the Secretary amounts not to exceed 5% of the unobligated balance of any appropriation available to such agency was adjusted, a 2% ceiling being set for transfers for administrative expenses related to the establishment of the department and a 3% ceiling being set for transfers for which the funds were appropriated. Similarly, the President's proposal to allow the secretary to transfer between appropriation accounts upwards of 5% of any appropriation available to such official in any fiscal year was reduced to upwards of 2%. The reported bill prohibited all federal activities to implement the proposed Citizen Corps program known as Operation TIPS (Terrorism Information and Prevention System), designed to recruit private citizens to report "suspicious" activities of other individuals for collection in a centralized database.<sup>71</sup> Another provision specified that the legislation did not authorize the development of a national identification system or card. Finally, as noted below, although two definitions of the homeland security concept were available to the select committee at the time of its markup, the panel did not include any such explanation of the term in the reported bill.

In related developments, on July 15, the Brookings Institution released the first comprehensive critique of the President's proposal, suggesting, among other

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<sup>71</sup>See Bill Berkowitz, "AmeriSnitch," *The Progressive*, vol. 66, May 2002, pp. 27-28; Ariana Eunjung Cha, "Citizen Tips on Terrorists: Leads or Liabilities?," *Washington Post*, June 19, 2002, pp. A8, A9; Ellen Sorokin, "Planned Volunteer-Informant Corps Elicits '1984' Fears," *Washington Times*, July 16, 2002, p. A4.

considerations, that it “merges too many different activities into a single department,” should leave science and technology research and development responsibilities for later deliberation, and begged a rethinking of congressional committee arrangements.<sup>72</sup> The following day, the President released the National Strategy for Homeland Security, which offered a definition of homeland security that could be used in determining the program composition of the new department. “Homeland security,” it was stated, “is a concerted national effort to prevent terrorist attacks within the United States, reduce America’s vulnerability to terrorism, and minimize the damage and recover from attacks that do occur.”<sup>73</sup> An alternative definition of homeland security was offered in the marked-up version of the President’s proposal containing the recommendations of the House Committee on Government Reform: “the deterrence, detection, preemption, prevention, and defense against terrorism targeted at the territory, sovereignty, population, or infrastructure of the United States, including the management of the programs and policies necessary to respond to and recover from terrorist attacks within the United States.”

In the Senate, the Committee on Governmental Affairs began a markup of the Lieberman bill (S. 2452) on July 24, working with an amendment drafted by Senator Lieberman. The following day, the committee authorized the chairman to withdraw the version of the bill that had been amended and ordered favorably reported on May 22, then approved the modified amendment in the nature of a substitute to the text of the withdrawn bill. The new version would have included largely the same agencies and programs in the Department of Homeland Security as would have been transferred by the House bill. Exceptions were the inclusion of the Computer Security Division of the National Institute of Standards and Technology and the National Bioweapons Defense Analysis Center of the Department of Defense, which the House bill did not include. By contrast, the House bill would have transferred the Environmental Measurements Laboratory of the Department of Energy, portions of the Advanced Scientific Computing Research Program of the Lawrence Livermore National Laboratory, portions of the Chemical Biological Defense Program of the Department of Defense, the Plum Island Animal Disease Center of the Department of Agriculture, and the Domestic Emergency Support Teams of the Department of Justice, which the new Senate bill did not include in the Department of Homeland Security. Also, the House bill would have transferred the Federal Law Enforcement Training Center of the Department of the Treasury to the Attorney General, while the Senate bill would have placed it in the new department.

The newly amended Senate bill also added most of the same senior officials—a Chief Financial Officer, Chief Information Officer, general counsel, and Privacy Officer—included in the House bill. It would have established six directorates within the new department, including a large immigration directorate to which all of INS would have been transferred. The House bill would have moved only the enforcement functions of INS to the new department. Like the House bill, the newly amended Senate bill would have removed critical infrastructure information, which

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<sup>72</sup>Ivo Daalder, et al., *Assessing the Department of Homeland Security* (Washington: Brookings Institution, 2002), p. ii.

<sup>73</sup>U.S. Office of Homeland Security, *National Strategy for Homeland Security* (Washington: July 2002), p. 2, available at [[http://www.whitehouse.gov/homeland/book/nat\\_strat\\_his.pdf](http://www.whitehouse.gov/homeland/book/nat_strat_his.pdf)].

was voluntarily shared by industry with the department, from the information access arrangements of the Freedom of Information Act. However, unlike the House bill, the new Senate bill would have established a National Office for Combating Terrorism within the Executive Office of the President, mandated a National Strategy for Combating Terrorism, and continued civil service protections and collective bargaining rights for workers in the new department.

In the closing days of July, the Senate, contending with a schedule somewhat crowded with other pending legislation, delayed taking up the Department of Homeland Security legislation until it returned in early September from a summer recess.<sup>74</sup>

## Homeland Security—Floor Action on Department Bills

The House began consideration of the department bill (H.R. 5005), as reported by the Select Committee on Homeland Security, on July 25, with debate extending into the late night, then resuming the next day.<sup>75</sup> Twenty-six amendments were in order for consideration.<sup>76</sup> Among those agreed to were amendments:

- establishing a Homeland Security Institute as a research and development center;<sup>77</sup>
- requiring a plan within one year to consolidate and co-locate regional and field offices in each city with existing offices transferred to the department;<sup>78</sup>
- establishing an office for state and local government coordination;<sup>79</sup>
- requiring biennial reports to Congress on the status of homeland security preparedness, including an assessment for each state, and a report within one year of enactment that assessed the progress of the department in implementing the act to ensure that core functions of each entity transferred

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<sup>74</sup>Stephen Dinan, “Senate Putts Off Vote on Security,” *Washington Times*, July 30, 2002, pp. A1, A8; David Firestone, “For Homeland Security Bill, a Brakeman,” *New York Times*, July 31, 2002, p. A17; Bill Miller and Helen Dewar, “Senate to Delay Voting on Homeland Department,” *Washington Post*, July 30, 2002, p. A2.

<sup>75</sup>*Congressional Record*, daily edition, vol. 148, July 25, 2002, pp. H5621-H5704; *Ibid.*, July 26, 2002, pp. 5793-H5888.

<sup>76</sup>See U.S. Congress, House Committee on Rules, *Providing for Consideration of H.R. 5005, Homeland Security Act of 2002*, report to accompany H.Res. 502, 107<sup>th</sup> Cong., 2<sup>nd</sup> sess., H.Rept. 107-615 (Washington: GPO, 2002).

<sup>77</sup>*Congressional Record*, daily edition, vol. 148, July 25, 2002, p. H5694.

<sup>78</sup>*Ibid.*, pp. H5697-H5698.

<sup>79</sup>*Ibid.*, pp. H5702-H5703.

to it were maintained and strengthened and recommending any conforming changes in law necessary to the further implementation of the act;<sup>80</sup>

- protecting the union rights of employees transferred into the department and allowing the President to exempt applications where there would be a substantial adverse impact on the department's ability to protect homeland security;<sup>81</sup>
- requiring collaboration with employee representatives in the planning, development, and implementation of any human resources management system;<sup>82</sup>
- strengthening security controls over information resources that support federal operations and assets;<sup>83</sup> and
- facilitating the sharing of security information among federal, state, and local governments.<sup>84</sup>

Among the amendments rejected during the House floor debate were proposals:

- establishing the Office of Homeland Security statutorily with a director appointed by the President with Senate approval;<sup>85</sup>
- retaining FEMA as an independent agency with responsibility for natural disaster preparedness, response, and recovery;<sup>86</sup>
- preserving the Customs Service as a distinct entity within the Department of Homeland Security;<sup>87</sup>
- protecting the rights of union employees who are transferred into the department with the same job responsibilities as they had in their previous organization;<sup>88</sup>

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<sup>80</sup>Ibid., pp. H5703-H5704.

<sup>81</sup>Ibid., July 26, 2002, pp. H5800-H5804.

<sup>82</sup>Ibid., pp. H5809-H5813.

<sup>83</sup>Ibid., pp. H5817-H5829, H5837-H5838; the provisions, included in an en bloc manager's amendment, had been offered in H.R. 3844.

<sup>84</sup>Ibid., pp. H5854-H5861; many of the provisions had been offered in H.R. 4598, which was approved by the House on June 26, 2002.

<sup>85</sup>Ibid., pp. H5793-H5798.

<sup>86</sup>Ibid., pp. H5798-H5799.

<sup>87</sup>Ibid., p. H5799.

<sup>88</sup>Ibid., pp. H5804-H5809.

- striking section 761 of the bill, which established a human resources management system and inserting various provisions, including the authority for the director of the Office of Personnel Management to adjust pay schedules, except that employees transferred to the Department of Homeland Security could not have their pay reduced; provided for suspension and removal of employees in the interest of national security; and provided remedies for retaliation against whistleblowers;<sup>89</sup>
- striking subtitle C of Title VII regarding voluntarily shared critical infrastructure information; striking section 762 regarding advisory committees; and inserting a new section dealing with remedies for retaliation against whistleblowers;<sup>90</sup> and
- defining the term “covered Federal agency,” for purposes of exemption from disclosure under the Freedom of Information Act, to mean the Department of Homeland Security and agencies with which the department shares critical infrastructure information.<sup>91</sup>

Concluding debate on July 26, 2002, the House voted 295-132 to adopt H.R. 5005, as amended.

Returning from the August recess, the Senate began consideration of the House bill establishing a Department of Homeland Security on September 3. That day, the text of the Senate bill, as modified by the Committee on Governmental Affairs, was submitted by Senator Lieberman as an amendment (S.Amdt. 4471) in the nature of a substitute for the language of the House bill. During the opening discussion of the legislation, Senator Robert Byrd indicated his intention to offer an amendment designed to slow down the process by which components were transferred to the new department in order to allow more time for careful consideration by Congress. His amendment (S.Amdt. 4644) was subsequently submitted on September 18. By that time, several other amendments had been offered and others would be submitted later.

Initial amendments to the Lieberman substitute, which were adopted on September 5, would have prohibited the Secretary of Homeland Security from contracting with any corporate expatriate and improved flight and cabin security on passenger aircraft. On September 17, after extended debate, a third amendment was adopted, striking Title II of the Lieberman substitute, which would have established a National Office for Combating Terrorism, and Title III, which would have mandated a National Strategy for Combating Terrorism and Homeland Security Response.

Amendments approved the following day would have created an Office of National Capital Region Coordination within the new department; clarified the

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<sup>89</sup>Ibid., pp. H5817-H5817, H5837.

<sup>90</sup>Ibid., pp. H5845-H5850, H5869.

<sup>91</sup>Ibid., pp. H5850-H5853, H5869-H5870.

transfer of certain agricultural inspection functions of the Department of Agriculture; enhanced the management and promotion of electronic government services and processes by establishing an Office of Electronic Government within OMB, along with a broad framework of measures requiring the use of Internet-based information technology to enhance citizen access to government information and services; identified certain sites as key resources for protection by the Directorate of Critical Infrastructure Protection; amended various laws administered by the Secretary of Veterans Affairs to take into account the assumption by the Secretary of Homeland Security of jurisdiction of the Coast Guard; and improved the protection of Department of Defense storage depots for lethal chemical agents and munitions through strengthened temporary flight restrictions. An amendment approved on September 19 would have strengthened criminal laws and provided greater flexibilities to prevent and protect against cyber attacks.

Amendments adopted on September 24 would have mandated a National Commission on Terrorist Attacks Upon the United States to conduct a comprehensive investigation of the events of September 11, and established an Office for State and Local Government Coordination within the office of the Secretary for Homeland Security. An amendment (S.Amdt. 4644) offered by Senator Byrd defining “homeland security” and otherwise establishing an incremental arrangement for determining the composition of the new department was defeated on a 28-70 vote.

The following day, Senator Phil Gramm submitted an amendment (S.Amdt. 4738), which would have structured the department and created management arrangements very similar to the President’s original proposal, but otherwise containing many other portions identical to those of the Lieberman substitute. Another amendment (S.Amdt. 4740), offered by Senator Ben Nelson, sought to modify certain personnel provisions to effect a compromise between the flexibilities in human resources management sought by the President and the continued civil service protections and collective bargaining rights contained in the Lieberman substitute. By this time, the President, in his September 21 radio address to the nation and in September 23 remarks at an Army National Guard aviation support facility in Trenton, NJ, was demanding Senate approval of his position on human resources management. He indicated that he could accept the Gramm proposal, adding that “anything less than that is a bill I cannot accept.”<sup>92</sup>

On September 26, attempts to invoke cloture on the Lieberman substitute failed for the third and fourth times, as did an October 1 attempt to invoke cloture on the Gramm amendment, leaving the outcome on legislating a Department of Homeland Security in doubt. Further discussion of the matter was discontinued in the Senate, both houses subsequently adjourning on November 8 for the fall elections.

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<sup>92</sup> White House Office, Office of the Press Secretary, “President Calls on Congress to Act,” remarks at Army National Guard Aviation Support Facility, Trenton, NJ, Sept. 23, 2002, p. 3, available at [<http://www.whitehouse.gov/news/releases/2002/09/print/20020923-2.html>].

## Homeland Security—Continued Floor Action on Department Bills

When the House and the Senate reconvened on November 12, it was clear from the recent election returns that the President's political party would have majority control of both houses of the 108th Congress. Furthermore, Representative Arme, the House Majority Leader and chairman of the Select Committee on Homeland Security, introduced, with bipartisan support, a new bill (H.R. 5710) to establish a Department of Homeland Security, which was supported by the Bush Administration. The bill was brought up for floor consideration the following day under a closed rule (no amendments), and was approved on a 299-121 vote.<sup>93</sup>

Similar in many regards to the President's original proposed legislation for creating a homeland security department and the modified version (H.R. 5005) adopted by the House in late July, the new House-passed bill would provide the President many of the human resources management flexibilities he had sought, mandate a National Homeland Security Council, and transfer the following components to the new department:

- agricultural import and entry inspection functions (Department of Agriculture);
- chemical and biological nonproliferation and verification research and development program, nuclear smuggling programs, and nuclear assessment program (Department of Energy);
- Critical Infrastructure Assurance Office (Department of Commerce);
- Domestic Emergency Support Teams (Department of Justice);
- Environmental Measurements Laboratory (Department of Energy);
- Federal Computer Incident Response Center (General Services Administration);
- Federal Emergency Management Agency;
- Federal Law Enforcement Training Center (Department of the Treasury);
- Federal Protective Service (General Services Administration);
- Immigration and Naturalization Service, immigration enforcement functions (Department of Justice);
- Lawrence Livermore National Laboratory, advanced scientific computing research program (Department of Energy);

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<sup>93</sup>*Congressional Record*, daily edition, vol. 148, Nov. 13, 2002, pp. H85595-H8722.



- Metropolitan Medical Response System (Department of Health and Human Services);
- National Communications System (Department of Defense);
- National Disaster Medical System (Department of Health and Human Services);
- National Domestic Preparedness Office (Department of Justice, Federal Bureau of Investigation);
- National Infrastructure Protection Center (Department of Justice, Federal Bureau of Investigation);
- National Infrastructure Simulation and Analysis Center (Department of Energy);
- National Oceanic and Atmospheric Administration, integrated hazard information system (Department of Commerce);
- Office of Domestic Preparedness (Department of Justice);
- Office of Emergency Preparedness (Department of Health and Human Services);
- Plum Island Animal Disease Center (Department of Agriculture);
- Strategic National Stockpile (Department of Health and Human Services);
- Transportation Security Administration (Department of Transportation);
- United States Coast Guard (Department of Transportation);
- United States Customs Service (Department of the Treasury); and
- United States Secret Service (Department of the Treasury).

On November 13, the Senate resumed consideration of the initial House-passed bill (H.R. 5005) establishing a Department of Homeland Security. Pending on the floor was the Lieberman substitute (S.Amdt. 4471), which was subsequently tabled on a 50-47 vote.<sup>94</sup> Senator Fred Thompson offered the text of the second House-passed bill (H.R. 5710) creating a Department of Homeland Security as an amendment (S.Amdt. 4901) for later consideration as a substitute to the language of the initial House-passed department bill. The following day, Senator Lieberman offered an amendment (S.Amdt. 4911) to make certain provisions of the Thompson substitute noneffective. On November 15, the Senate, on a 65-29 vote, ended further

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<sup>94</sup>Ibid., p. S10856.

debate on the Thompson substitute (S.Amdt 4901).<sup>95</sup> Four days later, the Thompson substitute was adopted on a 73-26 vote, and the Senate then passed the House bill (H.R. 5005), as amended, on a 90-9 vote and returned the measure to the House.<sup>96</sup> The House agreed to the Senate-amended version of the bill on November 22, clearing the measure for the President's signature.<sup>97</sup> President Bush signed the legislation into law on November 25.<sup>98</sup>

## Legislative Issues

Proposals to create a Department of Homeland Security raised many 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 department with very little effort to sort out non-homeland security functions and programs for more appropriate administration elsewhere other than the new department. Of course, attempts to sort out the homeland security programs of transferred agencies from non-homeland security programs might have resulted in increased cost for additional administrative overhead. Some contended that the creation of any new department would result in budget expansion. In a July 9, 2002, cost estimate, the Congressional Budget Office proffered that the initial House-passed bill (H.R. 5005) establishing a new Department of Homeland Security "would cost about \$3 billion over the 2003-2007 period," which would be "in addition to projected net spending for ongoing activities of the transferred agencies—about \$20 billion in 2002, growing to \$31 billion by 2007."<sup>99</sup>

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 legislatively, the effectiveness of the department and its leadership could not be guaranteed. And still others wondered aloud who will be willing to serve, for very long, in the leadership of such a department. Additional issues concerning the scope of the President's proposal, the transfer of non-homeland security functions, and certain operating arrangements of the new department are discussed below.

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<sup>95</sup>Ibid., Nov. 15, 2002, p. S11169.

<sup>96</sup>Ibid., Nov. 19, 2002, pp. S11358-S11404.

<sup>97</sup>Ibid., Nov. 22, 2002, pp. H9040-H9114.

<sup>98</sup>P.L. 107-296; 116 Stat. 2135; see *Weekly Compilation of Presidential Documents*, vol. 38, Nov. 25, 2002, pp. 2092-2095.

<sup>99</sup>U.S. Congressional Budget Office, *H.R. 5005, Homeland Security Act of 2002*, CBO Cost Estimate (Washington: July 9, 2002), p. 1.

**Adequate Scope.** 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 (15 employees) and the National Infrastructure Protection Center (795 employees)—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.<sup>100</sup> Others questioned why the Bureau of Alcohol, Tobacco, and Firearms, the Drug Enforcement Administration, and the Nuclear Regulatory Commission were not included.<sup>101</sup> 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.”<sup>102</sup> As the House and the Senate were giving final approval to legislation establishing the department, questions about its scope arose anew when the chairman of a counterterrorism study commission recommended the creation of a national counterterrorism center to improve cooperation among intelligence agencies and it was reported that senior Bush Administration officials were seriously discussing the creation of a domestic intelligence agency.<sup>103</sup>

**Inappropriate Program Transfers.** During the course of legislatively establishing a Department of Homeland Security, some noted that the transfer of whole agencies to the new department would result in it being responsible for the administration of programs having nothing to do with homeland security and which, consequently, might not receive adequate resources for their execution.<sup>104</sup> These included the marine safety responsibilities of the Coast Guard, the drug and child pornography interdiction efforts of the Customs Service, the counterfeiting detection and investigation program of the Secret Service and the research and non-native plant and pest eradication efforts of the Animal and Plant Health Inspection Service. OHS Director Tom Ridge, in his June 20, 2002, testimony before the Senate Committee

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<sup>100</sup>Jim VandeHei and Dan Eggen, “Hill Eyes Shifting Parts of FBI, CIA,” *Washington Post*, June 13, 2002, pp. A1, A14; Tim Kauffman, “Focusing on Security,” *Federal Times*, June 17, 2002, pp. 1, 8; Bill Miller and Mike Allen, “Homeland Security Dept. Could Receive Raw FBI, CIA Data,” *Washington Post*, June 19, 2002, p. A8.

<sup>101</sup> Chet Dembeck, “Why Were These Agencies Left Out?,” *Federal Times*, June 17, 2002, p. 8.

<sup>102</sup>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.

<sup>103</sup>Associated Press, “Panel Calls for Creation of Counterterrorism Center,” *Washington Times*, Nov. 15, 2002, p. A14; Dana Priest and Dan Eggen, “Bush Aides Consider Domestic Spy Agency,” *Washington Post*, Nov. 16, 2002, pp. A1, A13.

<sup>104</sup>Dan Davidson, “Some Fear Non-Security Programs May Suffer,” *Federal Times*, June 17, 2002, p. 6.

on Governmental Affairs, acknowledged that the new department would have a number of programs not directly related to countering terrorism, but did not indicate any particular concern about this development. Sorting out these programs for continued administration by their parent departments was an option for Congress, but little effort was actually made in this regard for various reasons, not the least of which was the possibility that it might result in increased cost for additional administrative overhead. The desire to get the department quickly established, and to do so before the adjournment of the 107<sup>th</sup> Congress, also were factors.

**Administrative Structure.** 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 (e.g., the Coast Guard and Secret Service), together with such broad departmental functions as human and information resources management, budget setting, and financial management. Initial versions of both the House and Senate bills appeared to support strong vertical management structures, and both were seemingly weak in detailing horizontal working arrangements among headquarter's divisions and internal agencies and among field staff. 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 the Senate bill recrafted in committee, 17 senior officials seemingly would have been reporting directly to the secretary.

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

**General Management Requirements.** During the 20<sup>th</sup> century, Congress enacted a variety of general management laws prescribing how federal departments and agencies shall manage assets and resources, prepare budgets, engage in the purchase of goods and services, and conduct regulatory activities and their evaluation.<sup>105</sup> Some of these laws are generally inclusive in their application—they

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<sup>105</sup>See CRS Report RL30795, *General Management Laws: A Selective Compendium—107th* (continued...)

automatically apply to all departments and agencies unless otherwise excepted. Others are explicit, requiring amendment in order for their provisions to be applicable to specific departments and agencies. As legislation establishing a Department of Homeland Security progressed in the House and the Senate, questions about the applicability of some of these laws were raised and were only sporadically addressed. For example, the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary devoted a hearing to administrative law, adjudicatory, and privacy issues posed by the House bill.<sup>106</sup> Another case involved the Government Performance and Results Act (GPRA).<sup>107</sup> At one point, the Senate bill, while not exempting the new department from GPRA requirements, provided some GPRA-like results-based management obligations—a strategic plan, a performance plan, and a performance report—for the department.<sup>108</sup> Ultimately, the statute mandating a Department of Homeland Security reflects special arrangements in such areas as human resources management and procurement, but uncertainties regarding the applicability of other general management laws are likely to arise.

Worth mentioning is the innovation of establishing a Privacy Officer within the new department. This idea gained attention when OMB Controller Mark W. Everson, in his July 9 testimony before the House Subcommittee on Commercial and Administrative Law, commented: “Although the general counsel of an agency often handles privacy issues, we recognize the special importance of these issues in the homeland security context and are examining options for establishing a specialized privacy officer within the new Department.”<sup>109</sup> The Department of Justice has had such an official since December 1998. The initial House-approved bill included a Privacy Officer, an addition to the legislation made by the Select Committee on Homeland Security, and the committee-modified Senate bill also provided for a Privacy Officer, as did the final version of the legislation.

**Human Resources Management.** Although the President’s proposal would have resulted in the transfer of almost 170,000 employees to the new department, the initial version of the Senate legislation (S. 2452) would have involved the transfer of about 119,500 personnel. The President’s proposal contained a provision not included in the initial version of the Senate bill 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

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<sup>105</sup>(...continued)

Congress, by Ronald C. Moe.

<sup>106</sup>U.S. Congress, House Committee on the Judiciary, *Administrative Law, Adjudicatory Issues, and Privacy Ramifications of Creating a Department of Homeland Security*, hearing, 107<sup>th</sup> Cong., 2<sup>nd</sup> sess. July 9, 2002.

<sup>107</sup>107 Stat. 285.

<sup>108</sup>Cf. S. 2452, as modified in committee July 24-25, 2002, section 192(e) with 5 U.S.C. 306 and 31 U.S.C. 1115-1116.

<sup>109</sup>U.S. Congress, House Committee on the Judiciary, *Administrative Law, Adjudicatory Issues, and Privacy Ramifications of Creating a Department of Homeland Security*, p. 11; also see Adam Clymer, “Privacy Officer Is Possibility at Security Department,” *New York Times*, July 10, 2002, p. A17.

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.” In testimony before the Senate Committee on Governmental Affairs on June 20, OHS Director Ridge indicated that the President would request for the department “significant flexibility in hiring processes, compensation systems and practices, and performance management to recruit, retain, and develop a motivated, high-performance and accountable workforce.” Government officials conducting a June 18 background briefing were reported to have said that the Bush Administration’s legislation

would allow employees to carry over their union affiliations and current pay rates to the new federal agency. Once the department is up and running, the secretary would work with the Office of Personnel Management to develop personnel rules. The secretary would also eventually decide whether to continue providing employees with union rights.<sup>110</sup>

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 be merit-based and free of political influence and otherwise devoid of preference for veterans; and pay, particularly pay parity or equity for employees who are performing similar jobs.<sup>111</sup> 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.

## Legislation

**S. 2452 (Lieberman)/H.R. 4660 (Thornberry).** Establishes a Department of National Homeland Security and a National Office for Combating Terrorism within the Executive Office of the President. Introduced May 2, 2002, and referred in the Senate to the Committee on Governmental Affairs, and in the House to the Committee on Government Reform.

- May 22: Committee on Governmental Affairs ordered S. 2452, as amended, to be reported on a 7-3 vote.
- June 20: Committee on Governmental Affairs hearing on a Department of Homeland Security with OHS Director Tom Ridge as a witness.
- June 24: Committee on Governmental Affairs report (S.Rept. 107-175) on S. 2452, as amended, ordered to be printed.

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<sup>110</sup>Brian Friel, “New Agency Could Bring New Pay System,” *GovExec.com*, June 18, 2002, available at [<http://www.govexec.com>].

<sup>111</sup>See Tim Kauffman, “Critics See Few Job Protections at New Agency,” *Federal Times*, June 24, 2002, p. 5; Tim Kauffman, “Retirements Threaten Homeland Security Staffing,” *Federal Times*, June 24, 2002, p. 3.

- June 25: Committee on the Judiciary, Subcommittee on Technology, Terrorism, and Government Information hearing on a Department of Homeland Security.
- June 26: Committee on the Judiciary hearing on a Department of Homeland Security with OHS Director Tom Ridge as a witness.
- June 26: Committee on the Judiciary, Subcommittee on Immigration hearing on inclusion of the Immigration and Naturalization Service in a Department of Homeland Security.
- June 26-27: Committee on Governmental Affairs hearings on the relationship between a Department of Homeland Security and the intelligence community.
- June 28: Committee on Governmental Affairs hearing on a Department of Homeland Security, weapons of mass destruction, and relevant science and technology, research and development, and public health issues.
- July 10: Committee on Energy and Natural Resources hearing concerning a Department of Homeland Security.
- July 10: Committee on Environment and Public Works hearing on a Department of Homeland Security with Tom Ridge as a witness.
- July 16: Committee on Finance hearing on transfer of customs functions to a Department of Homeland Security.
- July 16: Committee on Health, Education, Labor, and Pensions hearing on a Department of Homeland Security.
- July 17: Committee on Agriculture, Nutrition, and Forestry hearing on a Department of Homeland Security with Tom Ridge as a witness.
- July 24-25: Committee on Governmental Affairs began a markup of an amendment to the text of S. 2452, authorized the chairman to withdraw the version of S. 2452 that had been amended and ordered favorably reported on May 22, then approved the modified amendment in the nature of a substitute to the text of the bill.
- September 3: Senate began debate on H.R. 5005; the text of S. 2452 as modified by the Committee on Governmental Affairs was offered by Senator Joseph Lieberman (D-CT) as an amendment (S.Amdt. 4471) in the nature of a substitute for the language of the House bill.
- September 25: Senator Phil Gramm (R-TX) offered an amendment (S.Amdt. 4738) structuring the department and creating management arrangements very similar to those in the President's original proposal, but otherwise containing many other portions identical to those of the Lieberman substitute. Another amendment (S.Amdt. 4740), offered by Senator Ben Nelson (D-NE), sought to modify certain personnel provisions to effect a compromise between the flexibilities in human resources management sought by the President and the

continued civil service protections and collective bargaining rights contained in the Lieberman substitute.

- November 13: the Lieberman substitute (S.Amdt. 4471) was tabled on a 50-47 vote. Senator Fred Thompson (R-TN) offered the text of the second House-passed bill (H.R. 5710) creating a Department of Homeland Security as an amendment (S.Amdt. 4901) for later consideration as a substitute to the language of the initial House-passed department bill (H.R. 5005).
- November 14: Senator Lieberman offered an amendment (S.Amdt. 4911) to make certain provisions of the Thompson substitute noneffective.
- November 15: Senate, on a 65-29 vote, ended further debate on the Thompson substitute.
- November 19: Senate rejected the Lieberman amendment (S.Amdt. 4911) to make certain provisions of the Thompson substitute (S.Amdt. 4901) noneffective, adopted the Thompson substitute on a 73-26 vote, passed H.R. 5005, as amended, on a 90-9 vote, and returned the measure to the House.

**H.R. 5005 (Army) (by request).** Establishes a Department of Homeland Security. Introduced June 24, 2002, and referred to the Select Committee on Homeland Security, and, in addition, to the Committees on Agriculture, Appropriations, Armed Services, Energy and Commerce, Financial Services, Government Reform, Intelligence, International Relations, the Judiciary, Science, Transportation and Infrastructure, and Ways and Means. Recommendations of the standing committees provided to the select committee, which began consideration of the bill on July 15; select committee hearings commenced July 12.

- June 20: Committee on Government Reform hearing on a Department of Homeland Security with OHS Director Tom Ridge as a witness.
- June 26: Committee on Agriculture hearing on a Department of Homeland Security.
- June 26: Committee on Armed Services hearing on a Department of Homeland Security.
- June 26: Committee on Government Reform, Subcommittee on Civil Service, Census, and Agency Organization hearing on transfer of consular affairs to a Department of Homeland Security.
- June 26: Committee on International Relations hearing on a Department of Homeland Security.
- June 26: Committee on the Judiciary hearing on a Department of Homeland Security with OHS Director Tom Ridge as a witness.
- June 26: Committee on Ways and Means hearing on a Department of Homeland Security.



- June 27: Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Claims hearings on the role of immigration on a Department of Homeland Security.
- June 27: Committee on Science hearing on a Department of Homeland Security.
- July 9: Committee on Energy and Commerce, Subcommittee on Oversight and Investigations hearing on a Department of Homeland Security.
- July 9: Committee on the Judiciary, Subcommittee on Commercial and Administrative Law hearing on administrative law, adjudicatory issues, and privacy ramifications of creating a Department of Homeland Security.
- July 9: Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security hearing on a Department of Homeland Security.
- July 10: Committee on Armed Services ordered reported, as amended, H.R. 5005.
- July 10: Committee on International Relations ordered reported, as amended, H.R. 5005.
- July 10: Committee on the Judiciary ordered reported, as amended, H.R. 5005.
- July 10: Committee on Science order reported, as amended, H.R. 5005.
- July 10: Committee on Ways and Means order reported, as amended, H.R. 5005.
- July 11: Committee on Energy and Commerce ordered reported, as amended, H.R. 5005.
- July 11: Committee on Government Reform considered recommendations on H.R. 5005.
- July 11: Select Committee on Homeland Security hearing on a Department of Homeland Security with Attorney General John Ashcroft, Secretary of Defense Donald H. Rumsfeld, Secretary of State Colin Powell, and Secretary of the Treasury Paul H. O'Neill as witnesses.
- July 12: Committee on Government Reform considered and approved H.R. 5005, as amended.
- July 15: Select Committee on Homeland Security hearing on a Department of Homeland Security with Tom Ridge as a witness.
- July 16: Select Committee on Homeland Security hearing on a Department of Homeland Security with Secretary of Agriculture Ann Veneman, Secretary of Health and Human Services Tommy G. Thompson, Secretary of

Transportation Norman Y. Mineta, and Secretary of Energy Spencer Abraham, among others, as witnesses.

- July 17: Select Committee on Homeland Security hearing on a Department of Homeland Security.
- July 19: Select Committee on Homeland Security marked up and ordered reported H.R. 5005, as amended (H.Rept. 107-609).
- July 25: House of Representatives began debate on H.R. 5005, as amended.
- July 26: House of Representatives completed debate and amendment of H.R. 5005 and approved the bill, as amended, on a 295-132 vote.
- November 22: House of Representatives agreed to the Senate-amended version of H.R. 5005, clearing the measure for the President's signature.
- November 25: President signed H.R. 5005, as amended, into law (P.L. 107-296).

**H.R. 5710 (Arme y).** Establishes a Department of Homeland Security. Introduced November 12, 2002, and referred to the Select Committee on Homeland Security. Brought to the House floor on November 13 for immediate consideration upon the adoption, on a 237-177 vote, of a resolution (H. Res. 600) setting a closed rule (no amendments) with one hour of debate on the bill; approved, without amendment, on a 299-121 vote. Vacated in lieu of H.R. 5005, as amended in the Senate.

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U.S. Congress. House. Committee on Government Reform. *Federal Interagency Data-Sharing and National Security*. Hearing. 107<sup>th</sup> Congress, 1<sup>st</sup> session, July 24, 2001. Washington: GPO, 2002.

—. *The Department of Homeland Security: An Overview of the President's Proposal*. Hearing. 107<sup>th</sup> Congress, 2<sup>nd</sup> session, June 20, 2002. Washington: GPO, 2002.

U.S. Congress. House. Committee on International Relations. *Homeland Security Act of 2002*. Hearing and markup on H.R. 5005. 107<sup>th</sup> Congress, 2<sup>nd</sup> session, June 26 and July 10, 2002. Washington: GPO, 2002.

U.S. Congress. House. Committee on the Judiciary. Subcommittee on Administrative Law. *Adjudicatory Issues, and Privacy Ramifications of Creating a Department of Homeland Security*. Hearing. 107<sup>th</sup> Congress, 2<sup>nd</sup> session, July 9, 2002. Washington: GPO, 2002.

- *Homeland Security Act of 2002*. Hearing on H.R. 5005. 107<sup>th</sup> Congress, 2<sup>nd</sup> session, June 26, 2002. Washington: GPO, 2002.
- *Proposal to Create a Department of Homeland Security*. Hearings. 107<sup>th</sup> Congress, 2<sup>nd</sup> session, July 9, 2002. Washington: GPO, 2002.
- U.S. Congress. House. Committee on Science. *Amendment and Views to the Select Committee on Homeland Security on H.R. 5005, the Homeland Security Act of 2002 (Including Committee Markup of H.R. 5005)*. Committee print. 107<sup>th</sup> Congress, 2<sup>nd</sup> session, July 10, 17, 2002. Washington: GPO, 2002.
- *Creating a Department of Homeland Security*. Hearing. 107<sup>th</sup> Congress, 2<sup>nd</sup> session, June 27, 2002. Washington: GPO, 2003.
- U.S. Congress. House. Committee on Transportation and Infrastructure and Committee on Government Reform. *Combating Terrorism: Options to Improve Federal Response*. Joint hearing. 107<sup>th</sup> Congress, 1<sup>st</sup> session, April 24, 2001. Washington: GPO, 2002.
- U.S. Congress. House. Select Committee on Homeland Security. *H.R. 5005, the Homeland Security Act of 2002, Days 1 and 2*. Hearings, 107<sup>th</sup> Congress, 2<sup>nd</sup> session, July 15, 16, 2002. Washington: GPO, 2002.
- *Homeland Security Act of 2002*. Report to accompany H.R. 5005. 107<sup>th</sup> Congress, 2<sup>nd</sup> session. H.Rept. 107-609, part 1. Washington: GPO, 2002.
- *Transforming the Federal Government to Protect America from Terrorism*. Hearing. 107<sup>th</sup> Congress, 2<sup>nd</sup> session, July 11, 2002. Washington: GPO, 2002.
- U.S. Congress. Senate. Committee on Energy and Natural Resources. *Homeland Security*. Hearing. 107<sup>th</sup> Congress, 2<sup>nd</sup> session. July 10, 2002. Washington: GPO, 2002.
- U.S. Congress. Senate. Committee on Governmental Affairs. *President Bush's Proposal to Create a Department of Homeland Security*. Hearing. 107<sup>th</sup> Congress, 2<sup>nd</sup> session, June 20, 2002. Washington: GPO, 2002.
- U.S. Congress. Committee on Health, Education, Labor, and Pensions. *Homeland Security*. Hearing. 107<sup>th</sup> Congress, 2<sup>nd</sup> session, July 16, 2002. Washington: GPO, 2002.

## **Related CRS Products**

### **CRS Congressional Distribution Memoranda**

*Department of Homeland Security — Current Administrative Structure of Units Proposed to Transfer*, by Sharon S. Gressle, June 28, 2002.

*Functions Transferred to the Proposed Department of Homeland Security Arguably Not Related to Homeland Security*, by Jennifer E. Lake, July 31, 2002.

*Homeland Security: A Comparison of H.R. 4660, S. 2452, and H.R. 5005 (and Related Orders)*, by William W. Ellis, July 12, 2002.

*Intelligence Support to a Department of Homeland Security*, by Dick Best, July 16, 2002.

*Overview of Agencies and Programs Implicated in the Transfer of Functions and Authorities to the Proposed Department of Homeland Security*, by T. J. Halstead, June 24, 2002.

*Reorganization Implementation Plans*, by Ronald C. Moe, June 20, 2002.

*Statutes Relating to Personnel Management and Pay Systems That May Be Affected by Creating the Department of Homeland Security*, by Thomas J. Nicola, July 3, 2002.

*Summary of Human Resources Management System Statutes and the Proposed Department of Homeland Security*, by Thomas J. Nicola, July 18, 2002.

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CRS Report RS21251. *Analysis of President's Proposal Concerning the Office of Inspector General for the Proposed Department of Homeland Security*, by Diane T. Duffy.

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CRS Report RL31497. *Creation of Executive Departments: Highlights from the Legislative History of Modern Precedents*, by Thomas P. Carr.

CRS Report RL31472. *Departmental Organization, 1947-2001*, by Sharon Gressle.

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- CRS Report RL31446. *Reorganizing the Executive Branch in the 20<sup>th</sup> Century: Landmark Commissions*, by Ronald C. Moe.