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**THESIS**

**BORDER SECURITY AGENCY STRUCTURE:  
A HINDRANCE TO DEMONSTRATING BORDER  
SECURITY SUCCESS**

by

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December 2013

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DEMONSTRATING BORDER SECURITY SUCCESS**

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## **ABSTRACT**

Long-awaited immigration reform may become a reality in 2013, as Congress debates the merits of a comprehensive overhaul. The primary criteria for triggering reforms in the Border Security, Economic Opportunity, and Immigration Modernization Act (S.744), involves demonstrated control of the Southwest border. The debate has been complicated, however, because only a few analysts and not the Department of Homeland Security itself have been able to produce acceptable metrics that illustrate success at enforcing border operations, at or between, the ports of entry.

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## LIST OF ACRONYMS AND ABBREVIATIONS

2SR	Second Stage Review
AHS	Assistant to the President for Homeland Security
AI	Appreciative Inquiry
ATF	Bureau of Alcohol, Tobacco and Firearms
BTS	Border and Transportation Security Directorate
CIA	Central Intelligence Agency
CBP	United States Customs and Border Protection
CFR	Code of Federal Regulations
CIA	Central Intelligence Agency
CRS	Congressional Research Service
CSIS	Center for Strategic International Study
DHS	United States Department of Homeland Security
DOE	United States Department of Energy
DOJ	United States Department of Justice
DOS	United States Department of State
DOT	Department of Transportation
ERO	Enforcement Removal Operations
FAA	Federal Aviation Administration
FBI	Federal Bureau of Investigation
FEMA	Federal Emergency Management Agency
FLETC	Federal Law Enforcement Training Center
FTE	Full-time Employee
GAO	United States Government Accounting Office/United States Government Accountability Office
GE	Government Executive
H&HS	Health and Human Services
HRC	Hart-Rudman Commission
HSA	Homeland Security Act
HSI	Homeland Security Investigations
ICE	United States Immigration and Customs Enforcement

INS	United States Immigration and Naturalization Service
MOU	Memorandum of Understanding
NHSA	National Homeland Security Agency
NS	National Border Patrol Strategy
NSC	National Security Council
NYPD	Police Department of New York
OFAB	One Face at the Border
OHS	Office of Homeland Security
OIG	Office of the Inspector General
OIS	Operational Integration Staff
OMB	United States Office of Management and Budget
PDD	Presidential Decision Directive
SBA11	Secure Border Act of 2011
SBINet	Secure Border Initiative Network
SOP	Standard Operation Procedure(s)
SWBS	Southwest Border Strategy
TSA	Transportation Security Administration
US-VISIT	United States Visitor and Immigration Status Indicator Technology
USC	United States Code
USCG	United States Coast Guard
USCIS	United States Citizenship and Immigration Services
USCS	United States Customs Service
VSP	Visa Security Program
WMD	Weapons of Mass Destruction
WTC	World Trade Center

## EXECUTIVE SUMMARY

Long-awaited immigration reform may become a reality, as Congress debates the merits of a comprehensive overhaul. The primary criteria triggering implementation of reforms in the Border Security, Economic Opportunity, and Immigration Modernization Act (S.744) is demonstrated control of the southwest border. The debate has been complicated, however, because only a few analysts and not the Department of Homeland Security itself have been able to produce acceptable metrics that illustrate success at enforcing border operations at or between the Ports of Entry.

In this thesis, I argue that a primary challenge in developing a widely-embraced measure of border enforcement success is the structure of the Department of Homeland Security and confusion among its units on complex and conflicting missions. The structure of the Department, as created by President Bush's Executive Order of January, 2003, created three separate agencies with no single mission or set of objectives, leaving critical tasks of strategic planning, priority setting, and goal definition and measurement open to conflicting and ill-defined task-oriented projects.

It did not have to happen that way. Initial legislative efforts to create a single border security agency were clearly recommended in the third and final report of the Hart-Rudman Commission, released on April 15, 2001. Yet, as a new multi-mission Department was constructed, little reflection seemingly went into deciding how the actual duties of conflicting or redundant agencies would be accomplished. Rather than focusing on how customs and trade enforcement would be integrated on-the-ground with non-enforcement activities, for instance, the organizational change debate became preoccupied with the relative minutiae of job reorganization, personnel changes, and lines of authority. The reform needed at the time was ignored. How could the dual benefits and conflicting missions of border agencies be eliminated or at least mitigated, as the Hart-Rudman report envisioned?

This thesis examines in four parts the current organizational structure of the border enforcement agencies and how that structure may be responsible for continuing challenges in attaining border security. The analysis focuses first on missions of the affected agencies and the results of the co-mingling undertaken under the Executive Order of 2003. This thesis will outline and analyze the discussion surrounding the origination of the Department as outlined in the Homeland Security Act and how the Executive Order of 2003 altered the agencies. Next, it will discuss the buildup of U.S. border security approaches leading to the final HSA. The thesis will then focus on the actual agency missions under the current structure, then conclude with a way forward to create a single-focus border security agency.

The thesis concludes with a recommendation for legislative action that would replace the 2003 Order to realign the border security functions within DHS, Treasury, and Justice to create an integrated approach specifically to focus on the multiple dimensions of the border enforcement and security mission. This integrated approach would retain the experience and expertise of agents trained under separate but complementary authorities, resist efforts to homogenize skills into a single force clearly unable to train under and uphold the complex legal authorities of customs, immigration and agricultural activities, and eliminate direct financial competition between functions that, by law, need to be fulfilled together. Decentralized but aggressively collaborative agencies, working with their own authorities and institutional identities, provided appropriate leadership, will match the complex and multidimensional goals of comprehensive border security.



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## I. INTRODUCTION

Comprehensive reform of U.S. immigration policy, a perennial topic, appears to be a real possibility for the first time in decades. Even with passage of a reform bill, however, a number of roadblocks will exist to slow its full implementation. Primarily, enactment of key provisions of such a bill may well rely upon the Department of Homeland Security's (DHS) ability to control the U.S. borders, as demonstrated with reliable and consistent metrics. This task has eluded DHS since its inception and does not appear to be any closer to a real solution. The primary reason is that the structure of the border security agencies complicates the mission and undermines the focus and efficiencies required for success. Multiple reviews of DHS and its functions have led to numerous recommendations that the border security agencies be restructured, and almost every recommendation has been partially or completely ignored.

The structure of a ubiquitous Border Security Agency has been one of persistent discussion as well. No viewpoint or recommendation for change came near implementation until 2001, when H.R. 1158 and S. 1534 were introduced to align border security to coincide with the recommendations of the Hart-Rudman Commission. As those recommendations were being continually expanded to incorporate more and more non-border security functions, the attacks of 9/11 occurred, leading to passage of H.R. 5005, The Homeland Security Act of 2002 (HSA). The HSA was enacted despite explicit criticism and warnings of putting too many disparate functions under one agency and possibly watering down, again, an agency focus on border security. More importantly, the HSA Border Security provisions have never been implemented, which has not been fully examined. The HSA appeared to be a genuine effort to place all border security-related efforts of the executive branch into a single agency. The DHS activity focused on most heavily under the Act are those providing border security, to include immigration enforcement and benefits. However, a single border security agency does not exist within DHS.

## **A. PROBLEM STATEMENT**

Long before three hijacked planes devastated New York City and the Pentagon, studies of U.S. preparedness for terror attacks and reviews of border security were underway. The most promising steps forward in creating a border security agency for the twenty-first century was the work of the Hart-Rudman Commission. The Commission released the results of its work in three reports over a three-year period beginning in August 1998. The third release containing government restructuring recommendations was made in February 2001. Debate on the initial bill to create a trim, focused, border security and enforcement agency based on the Hart-Rudman recommendations was barely underway on September 10, 2001.

The enormity of the 9/11 attacks and the knowledge that another aircraft, presumably headed toward Washington, D.C., had crashed en route, provided the stimulus for public interest in a review of our country's security efforts, with little public awareness of the efforts already underway. President Bush responded rapidly to the attacks of by creating the White House Office of Homeland Security (OHS) on October 8, 2001, and issuing a National Strategy for Homeland Security on July 16, 2002, calling upon all agencies to refocus their efforts to protect our country.

Before the concept of an OHS could be fully developed, however, and the security strategy fully implemented, Congress determined that a new Department was required for homeland security to become fully realized. President Bush signed the HSA on November 25, 2002. The HSA affected multiple Departments within the Executive Branch of government, reorganized or eliminated twenty-two agencies, and created several others. A key feature of the HSA was the creation of a Border and Transportation Security Directorate, under which all non-military border and transportation security functions were to be placed. The U.S. Coast Guard (USCG), a military organization answering to both the Secretaries of Defense and Transportation (DOT), was moved to DHS from DOT.

President Bush submitted a reorganization plan to Congress on November 25, 2002, implementing the HSA and outlining the transfer of the multiple entities directed to

join DHS, setting the operational start date for DHS Headquarters to take place on January 23, 2003. The legacy agencies were scheduled to become operational under DHS on March 1, 2003 (Borja, 2008, p. 10). However, a second reorganization plan was signed by the President on January 30, 2003, before the legacy agency moves became effective. Under that directive, USCS was renamed U. S. Customs and Border Protection, which absorbed in whole the U.S. Border Patrol, as well as Immigration Inspectors. Additionally, the enforcement support operations of both legacy INS and the USCS were carved out to create a new stand-alone agency, U.S. Immigration and Customs Enforcement (ICE) (Bush, 2003). This resulted in a change that could be considered akin to separating the patrol division of the NYPD into its own agency, leaving patrol officers with no investigators to whom cases are referred, no jailers to house apprehended prisoners, and no evidence custodians to take possession of seized contraband and evidence.

Given the longstanding debates over the structure and performance of border security agencies, this thesis will focus on two specific research questions.

## **B. RESEARCH QUESTIONS**

Is the current structure of border security effectively functioning as a unified border security and enforcement agency? If not, could restructuring the border and transportation security elements to the original, untried structure as delineated in the original HSA, or the original act proposed by the Hart-Rudman Commission, meet the deficiencies identified?

## **C. PRACTICAL SIGNIFICANCE OF THE RESEARCH**

This research is intended to explore the current border security structure within DHS and potential for improvement. This thesis could be used as a starting point by those devoted to enhancing DHS' border security activities. It can also serve as a reference by which public policy can be reviewed prior to implementation, ensuring a critical analysis, and encouraging an imaginative view of potential consequences and pathways to how a new policy can be most successfully implemented. Following the HSA mandate or the original recommendations of the Hart-Rudman Commission of 2001

could free management to focus on security and enforcement issues, working cooperatively with other executive departments. A single purpose and focus under one department, as envisioned in the HSA, and its predecessors, HR 1158 and S 1534, could ensure that the American people can more clearly follow the lines of authority and responsibility of their government regarding border security.

#### **D. APPROACH**

A thesis of this nature and length is not intended to be an in-depth study of DHS and its subordinate agencies. This thesis focuses on analyzing the current structure of border security agencies, and their effectiveness in providing the means of attaining demonstrable border security. Government reports, personal memoirs of those who created the DHS's inner workings, Presidential memos and policy directives pertaining to DHS, the departments and agencies within the government that retain homeland security missions both under the control and exclusive of DHS were considered in this thesis. Comments and reports regarding success of DHS programs and policies as reviewed and assessed by the GAO, RAND, the Brookings Institution and other non-governmental review and accountability agencies, and HSA-based review findings were also considered. Additionally, a number of Congressional Research Service reports have been analyzed.

This literature was selected because it illustrates how homeland security was evaluated before passage of the HSA. The literature provides comparisons and contrasts between border security functions directed in the HSA and the Department of today. It also illuminates a dilemma regarding the limited literature available regarding DHS. Some of the reports contain elements of minor discrepancies which may have been accepted by some readers as facts regarding DHS organizations. Those reports often do not address the department structure as mandated, but as *fait accompli* to the existing structure.

The basics of Appreciative Inquiry (AI) provide beneficial steps to follow in evaluating the border security structure. Comparing and contrasting the development and implementation of the HSA to the AI method of strong organizational development

would illustrate how to capitalize upon the strengths of the border security agencies which were merged into DHS. At the heart of the thesis is the inquiry. As described in *Appreciative Inquiry, A Positive Approach to Building Cooperative Capacity* by Frank J. Barrett and Ronald E. Fry, the inquiry is about the honest desire "...to learn about something at its premise. It is not only about mobilizing human resources to change or to "buy in" to a strategy, that has already been derived" (Barrett & Fry, 2005, p. 36). A discussion of DHS' border security focus and its successes should begin with readers having a working knowledge of the Homeland Security Act and its mandates to put current operations into a context.

This inquiry will also view how the merger of border security functions could move forward to implementation as mandated. The offices and agencies within DHS which could be successfully relocated as recommended by the Hart-Rudman Commission are also identified, allowing the resultant agency leadership to focus on border security issues. Using AI as a guide, the recommendations of this thesis will seek to identify the strengths of the DHS components which the HSA appears to have attempted to harness into a single border security agency.

## **E. LITERATURE REVIEW**

Throughout each of the past ten years since its establishment, DHS has been the subject of ample literature critical of its programs. However, very little literature has been created regarding the Homeland Security Act itself or its implementation. The literature review for this thesis begins with *The Homeland Security Act of 2002, as amended through 2008*, with the remainder broken down based upon the arena from which the comments were generated, divided into the categories of *Comments from Principals in Government; Comments from the GAO and the DHS OIG; and Further Actions by Congress, the White House and DHS*.

### **1. The Homeland Security Act of 2002, as Amended through 2008**

The HSA established DHS with multiple missions to enhance U.S. security. Highlights of the HSA relating to border security are:

- Most responsibility of the Attorney General regarding immigration and border security was transferred from the Department of Justice to DHS in Section 402; responsibility for enforcement of Customs laws was transferred from Department of the Treasury to DHS in the same section. All Customs revenue responsibilities were to have been retained by Treasury per Sec. 412.
- The HSA established a Border and Transportation Security (BTS) directorate housing immigration functions of legacy U.S. Immigration and Naturalization Service (INS), to include the U.S. Border Patrol, detention and removal, intelligence, investigations and (immigration) inspections is established at Section 441. A Bureau of Border Security to facilitate the work in Section 442 is created, specifically stating that the Bureau head will have a minimum of five years professional experience in law enforcement and five years of management experience.
- Section 445 required a report to Congress one year after the DHS Secretary was sworn into office of how the Bureau of Border Security “...will enforce comprehensively, effectively, and fairly all the enforcement provisions of the Immigration and Nationality Act (8 U.S.C. (1101 et seq.).”
- The U.S. Coast Guard was transferred into DHS under Section 888 with the heading Preserving Coast Guard Mission Performance.
- The HSA mandates a single border security agency encompassing air, land, and sea border security at and between the ports of entry, with investigative, detention and removal, and supporting elements under a single border and transportation security directorate. The HSA directed that only enforcement functions of the legacy INS, USCS and U.S. Secret Service would be incorporated into the BTS. Non-enforcement elements of the legacy agencies were directed to be retained in their legacy agencies.

*a. Immediate Restructuring of the Department*

No record exists of a White House release explaining the January 30, 2003, restructuring of the border enforcement and investigations/support branches within the BTS directorate. A news release by DHS Secretary Tom Ridge that day stated that the modification presented a structural change, “but does not consolidate, discontinue or diminish transferred agencies’ current operations in the field” (Ridge, 2003). Further reading of the release, however, shows that the intent of the reorganization was to “refocus Homeland Security inspection and investigation functions” (Ridge, 2003). This directive set a course for all inspectors, immigration, and customs, to begin enforcing two



codes of federal regulations, relying upon resident expertise of the inspectors from the legacy agencies to bridge the two legal areas, with no clearly defined path for maintaining or developing the same level of expertise in future DHS inspectors. In February 2012, the GAO reported that the dual immigration and inspections training of CBP officers is not producing the expertise in either field that was promised by CBP at the outset of consolidation, and continues to diminish as legacy officers of both disciplines retire. As former U.S. Immigration and Naturalization Service General Counsel David Martin noted in his April 2003 review of the reorganization, the plan “seems premised on the notion that the process involved, or the generic type of job (inspection), is more important than the substance of the laws that are being applied” (Martin, 2003, p. 8).

The release also said the CBP “will focus its operations on the movement of goods and people across our borders,” and that ICE will be focused on enforcement of immigration laws within the interior of the United States and protecting specified federal buildings. The comments also claimed that TSA would benefit from enhanced information sharing with the new BTS bureaus. However, TSA is now an amalgam of non-law enforcement officers at airport pre-boarding inspection sites, with no arrest authority or direct access to law enforcement records, and the Federal Air Marshals, who are law enforcement officers.

The reassignment of enforcement support functions of INS and USCS to ICE created immediate stovepipes of communications and records management between enforcement and their former supporting arms when no such bars existed within the legacy agencies. The creation of ICE as a separate entity with a budget and enforcement goals unique from the enforcement arms they were originally created to support resulted in minimal support for border security operations. It also created the need for enforcement personnel to take steps to replicate the supporting functions required for even daily operations and gave ICE full discretion over cases that would be accepted and investigated. This discretion and rejection of cases lead to border enforcement agencies referring cases to enforcement agencies of other Departments and local law enforcement

agencies. Another unintended consequence was reduced manpower on Border Patrol Agent enforcement shifts as Agents were forced to complete supporting roles such as detainee transportation, which the new ICE agency stopped providing.

These negative impacts of the reorganization on enforcement and inspections have been repeatedly reported by the DHS OIG, the GAO, numerous non-governmental organizations, and multiple witnesses before Congressional committees.

## **2. Principals in Government**

First person recollections by President George W. Bush and former DHS Secretaries Tom Ridge and Michael Chertoff (Bush 2010; Ridge, 2009; Chertoff, 2009), provide little insight into DHS during its initial phase of development as a department.

Anecdotal comments were discussed that President Bush did not want a new department to handle homeland security that were not addressed until the release of his memoir, *Decision Points*. DHS receives minimal mention in the memoir. President Bush wrote that he was initially wary of Senator Joseph Lieberman's idea for a new department, knowing that a big bureaucracy would be cumbersome. "I was also anxious about a massive reorganization in the midst of crisis," he said. "Over time, I changed my mind. I recognized that having one department focused on Homeland Security would align authority and responsibility. With the agencies accountable for protecting the country under one roof, there would be fewer gaps and less redundancy.... I decided the reorganization was worth the risk" (Bush, 2010, p. 156).

Former DHS Secretary Tom Ridge offered insight into the inner workings of his office and the opening of DHS (Ridge, 2009). He addressed the immediacy required to assure the public that DHS was functional and that our country is being made safe. Ridge also discussed challenges from the public faced by his office, and offered multiple recommendations for improvements to DHS. Former Secretary Chertoff spent more time writing about what DHS should do moving into the future than his time with the Department (Chertoff, 2009).

Richard A. Clarke, a senior National Security Staff member under Presidents Clinton, George H.W. Bush, and George W. Bush, offered a somewhat scathing review of the Act, its passage, and its early implementation in his 2004 book, *Against All Enemies* (Clarke, 2004). Clarke wrote in more detail that the White House and White House Security Office leader Ridge were all opposed to the creation of a new department and that “adept White House coordination and leadership could get the many agencies all working on components of a consistent overall program” (Clarke, 2004, p. 249). President Bush pointed to the new OHS in the White House when the HSA was initially proposed. Several weeks after the anthrax-laced letters were mailed, according to Clarke, the President appeared to embrace the bill and urge its passage and acceptance. Clarke stated that the HSA contains more agency elements requested in the bill by President Bush than Congress initially included.

“The outcome, as the Washington Post revealed in a major review in September 2003, has been a disappointing and disorganized mess,” according to Clarke. Clarke expressed concern that the leadership of DHS was more by political appointees than experienced professionals within their fields. He added that limited resources were afforded to the new department, and that limited guidance was offered by the President. This combination of circumstance he attributed to the departure of senior legacy agency leadership whose presence would have been beneficial to the new Department, and the need for more focus on managing administrative reorganization than operational effectiveness (Clarke, 2004, p. 251).

Gregory F. Treverton recapped the results of the Federal Performance Project in the January 1, 2004, *Government Executive* (Treverton, 2004). The project is a four-year review conducted by *GE* in conjunction with the Pew Charitable Trusts and the Maxwell School of Citizenship and Public Affairs, later joined by the Washington University Department of Public Administration.

These writers all expressed negative concerns over the development of the HSA and creation of a single department, concerns which they either claim to have buried, or feel have increased as the Department has grown. Others felt that the security concerns are not being adequately addressed by DHS.

### **3. The GAO and the DHS OIG**

There is voluminous information available for review and analysis of how DHS is functioning. This thesis will follow up primarily with those reports and recommendations addressing the border security agencies.

The initial report which critically viewed the establishment of DHS in a manner other than that mandated by the HSA was the DHS OIG report, *An Assessment of the Proposal to Merge Customs and Border Protection with Immigration and Customs Enforcement* (Skinner, 2005). That was followed by *Detention and Removal of Illegal Aliens, U.S. Immigration and Customs Enforcement (ICE)* (Skinner, 2006); and *DHS' Progress in Addressing Coordination Challenges Between Customs and Border Protection and Immigration and Customs Enforcement* (Skinner, 2007).

The 2005 review encompassed not just ICE and CBP, but encompassed all border security-related enforcement agencies including Federal Protective Service, Transportation Security Administration, Federal Air Marshalls Service, the Forensic Document Laboratory, and the U.S. Secret Service. The review concluded that all of these agencies are misaligned and should be rejoined or realigned before all of the legacy workforces retire, in order to facilitate the establishment of functional new organizations.

Results of a follow-on study were released in April 2007. The OIG found improved coordination in many instances between CBP and ICE. Interestingly, the report does not summarize one important point in their own findings: the areas of the country in which the OIG found that DHS policies regarding ICE and CBP interaction are not reaching the field are those in which ICE and CBP maintain separate office locations (Skinner, 2007). The GAO released a new report on March 30, 2011. Despite reviews and reports between 2007 and 2011, weaknesses remain for border security between the ports of entry and with inspection procedures at the ports of entry. The report notes “significant gaps” in information and resource sharing within DHS for operations (Stana, 2011, p. i).

GAO-11-881 was released in September 2011, to coincide with the 10th anniversary of 9/11 (Berrick, 2011). In the Highlights section of the report, the GAO

stated it has completed more than 1,000 products on DHS operations since 2003, making more than 1,500 recommendations, about half of which have been addressed, with work continuing on others. The GAO identified a key area in which work remains to be done is Border Security. Three themes at the foundation of DHS' challenges are: leading and coordinating the homeland security enterprise; implementing and integrating management functions for results; and strategically managing risks and assessing homeland security efforts (Berrick, 2011, p. i).

The volume of GAO reports available and the rapid, ever-evolving nature of DHS might suggest that a current analysis could be completed by reviewing reports created over the past 12 months. However, multiple findings remain open from OIG and GAO reports dating from 2005 in every facet of DHS operations and functions, particularly border and transportation security operations. The findings of the 2005 and 2007 reports recommending the realignment of the border security agencies remain open and, in some cases, not revisited by GAO or the OIG. In almost all instances, the GAO and DHS OIG have found fault with DHS border security structure.

#### **4. Further Actions by Congress, the White House, and DHS**

On January 26, 2005, the Senate Committee on Homeland Security and Governmental Affairs, with the confirmation hearings of a new DHS Secretary pending, held its first-ever hearing entitled "Department of Homeland Security: The Road Ahead (Governmental Affairs, 2005). Those hearings were called to discuss several issues regarding DHS, including the structural problem of CBP and ICE separation, what Senator Susan Collins referred to as "muddled division of responsibility between DHS and other agencies," and multiple layers of bureaucracy within DHS. In his opening remarks, Senator Joseph Lieberman noted that three years after the passage of the HSA, "the absence of a well-designed strategy, a homeland security strategy, is one of the Department's most significant shortcomings." He added that, "We cannot tolerate a Department where lines of authority do not align with responsibilities. During his testimony to the committee, DHS IG Richard Skinner outlined continuing problems his

office found within DHS, including visa security and use of stolen passports to enter the U.S.

Dr. James Jay Carafano of the Heritage Foundation, a witness to the committee, reiterated the Foundation's previous recommendation that ICE and CBP should be merged. Citing the findings of a team from the Center for Strategic International Study (CSIS) and the Heritage Foundation, he told the committee, "...what you are intentionally doing is creating opportunities for disconnects and gaps between investigative operations and ongoing operations in one and the other. And why are you creating a need for coordination when you do not need one?" During a similar hearing by the House Subcommittee on Management, Integration and Oversight of the Committee on Homeland Security on March 9, 2005, Congressman Mike Rogers opened the hearing stating the purpose was to discuss whether or not the separation of CBP and ICE had created "more operational, administrative, and budgetary problems that negatively impact the homeland security missions of these agencies" (Subcommittee on Management, 2005). The concerns of the hearing witnesses focused on the disparate roles of Customs and Immigration laws being enforced within the same agency, which is ongoing today.

Following the hearings, the DHS OIG undertook the review of CBP and ICE functions, resulting in the 2005 report assessing the proposal to merge CBP and ICE. The 2005 DHS OIG finding resulted in extensive Senate hearings on BTS operations and direction for a follow-on GAO inquiry into the separated border enforcement agencies, addressed previously in this Literature Review.

## **5. Conclusions on the Literature Reviewed**

The literature displays two very divergent viewpoints on the existence of a single border and transportation security agency within DHS. This calls into question the true aims of Congress and passage of the Act, as well as the President's decision not to veto the Act. President Bush said at the outset that he did not think the new department was necessary, but ultimately signed the HSA, only to reorganize the border and transportation security functions two months later into a structure bearing little resemblance to the original BTS directed by Congress.

The HSA is very specific in its details regarding creation of an enforcement-focused border security agency. Multiple hearings by Congress in the following years have questioned the functioning of the border and transportation security elements. DHS OIG and GAO reports recommending reintegration of enforcement and supporting arms of CBP and ICE have been released supporting the original structure. Yet, Congress has not taken any action to overturn President Bush's reorganization of January 30, 2003, to establish border and transportation security as mandated in the Act. The available literature provides little insight as to why the current structure has remained in place.

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## **II. THE U.S. APPROACH TO BORDER SECURITY PRIOR TO HART-RUDMAN AND PASSAGE OF THE HOMELAND SECURITY ACT (HSA), A BRIEF HISTORY**

### **A. BORDER SECURITY PRIOR TO 9/11 AND THE PASSAGE OF THE HSA**

Appreciative Inquiry (AI) posits the importance of learning about “at thing at its premise.” In the case of focus of border security efforts of the United States, it is most important to know that there has never been a direct line of progression before 1994 and since 2003.

The goals and desires of the U.S. government in providing security were apparently to maintain a sense of security normalcy and freedom from the specter of terrorism in the United States. The threat of terrorism was known to the United States prior to September 11, 2001, but not understood as we know it today. The 1993 World Trade Center bombing, and the 1995 bombing of the Murrah Federal Building in Oklahoma City, appeared to be anomalies and were treated as law enforcement events. The perpetrators were identified, tried and convicted, and U.S. life and government business returned to normal. Those incidents, however, marked a turning point in the government’s focus on terrorism as a real threat on American soil.

After the bombing at Oklahoma City, the perspective for combating terrorism remained a law-enforcement centric one. Presidential Decision Directive/NSC-39 was signed by President Clinton on June 21, 1995. This secret directive, declassified on January 27, 2009, says that the focus to combat terrorism was that “the U.S. shall pursue vigorously efforts to deter and preempt, apprehend and prosecute, or assist other governments to prosecute, individuals who perpetrate or plan to perpetrate such attacks” (Clinton, 1995, p. 1). The executive branch continued to practice its law enforcement approach to border and transportation security. Each agency and department continued their duties individually.

## **B. AGENCIES THAT PROVIDED BORDER AND TRANSPORTATION SECURITY PRIOR TO PASSAGE OF THE HSA**

### **1. Department and Agency Border Security Efforts Prior to 9/11**

Before passage of the HSA, ‘border and transportation security’ was a phrase used in multiple documents as a concept, not an organization, identifying activities of various agencies within the government. The phrase routinely referred to several agencies, but not necessarily the same agencies - that description varied depending upon the group or commission discussing the concept at any given time. The day of the 1993 attack on the World Trade Center, the roles of the Immigration & Naturalization Service (INS)/ U.S. Border Patrol (Department of Justice), U.S. Customs Service (Department of Treasury), U.S. Coast Guard (Department of Defense and Department of Transportation), and the Department of State were focused on domestic security and law enforcement while actively promoting international diplomacy and trade and immigration benefits. Reports by the GAO and other reviewers were critical of many aspects of mission performance of those agencies, with no mention of a role in security. The term “weapons of mass destruction” was not part of the border security agencies’ mission lexicon before the passage of the HSA.

### **2. The U.S. Customs Service**

In 1992, the GAO reported that U.S. Customs Service (USCS) inspectors failed to detect nearly 84 percent of trade laws violations they were mandated to enforce in 1991 in their limited role to “enforce trade laws and policies against the introduction into the country of foreign goods that threaten our health, safety, or economic well-being” (Bowsher, 1992, p. 2). Customs agents were implementing new technological assets to determine cargo contents and duties to be collected without norms. USCS had no minimum requirements for inspections or training its agents, and had disparate enforcement requirements between regions (Bowsher, 1992, p. 3–5).

The Shadow Wolves, a Tohono-O’Odom tribal police force operated under USCS, patrolled the reservation lands straddling the U.S./Mexico border, where U.S. federal law enforcement agencies have no jurisdiction.

### **3. The Department of Justice**

Within DOJ, the INS had the combined missions of securing the U.S. border between the ports of entry from illegal entrants of migrants and contraband, as well as inspection for admissibility of those who presented themselves for entry to the United States at the ports of entry. The INS' most visible role, to some, was adjudicating applications for immigration benefits, including refugees and those seeking asylum.

The focus of enforcement of immigration and customs laws prior to 9/11 were contraband - narcotics, human illegal entries, and goods being introduced in violation of trade and tariff laws. Focus on terrorists and weapons of mass destruction were the province of the FBI and the Bureau of Alcohol, Tobacco and Firearms. INS and the USCS were two of nine agencies to have a major role in the Organized Crime Drug Enforcement Task Force with INS in charge of enforcement operations in four "pilot cities" (Wray, 1994). A study completed by Sandia Laboratories regarding the flow of narcotics entering the United States (Ekstrand, 1994, p. 1) led to the Office of National Drug Control Policy director naming the Border Patrol as the lead agency in preventing entry of contraband along the U.S. border. During this period, the Border Patrol moved its operations forward to the border to adopt a mission of prevention of illegal entry rather than apprehension of those inside the United States, and halting drug trafficking. The new forward posture was due to the increase in the number of illegal aliens entering the United States following the amnesty of 1986, and the increase in entry of illegal drugs.

Illegal immigration was not seen as a national problem after the Immigration and Nationality Act was passed in 1952, according to the GAO, but had "become a torrent" by 1990, increasing from 45,000 in 1959 to 1.17 million in 1990 (Valentine, 1992, p. 2). The initial implementation of entry prevention in 1993 was known as "Operation Hold the Line," in the El Paso Sector of the Southwest Border. The Southwest Border Strategy was devised as a Border Patrol Sector by Sector effort along the Southwest Border, focused on halting the entry of immigrants without inspection. The plan was designed to systematically close down the southwest border and redirect illegal immigration traffic from outer edges at McAllen, Texas, and San Diego, California, working inward. The

plan was to narrow entry points to the most inhospitable areas of the border, where crossing attempts would be limited by terrain and weather. The Department of Justice approved the multi-year Southwest Border Strategy in 1994. Similar operations were begun as Operation Gatekeeper and Operation Rio Grande and began to show results. Under INS, border control success was measured in numbers of apprehensions and reduced remissions, followed by lower apprehension rates in the targeted area during consistent times of the year. Increased apprehension often led to problems of its own, such as limited bed space for detainees, forcing INS to establish prioritized detention policies which were termed arbitrary and capricious by critics (Valentine, 1992, p. 2). The U.S. Border Patrol was, and remains, responsible for prohibiting the entry of illegal aliens and contraband *between* the ports of entry, or entry without inspection. This authority and responsibility includes the Great Lakes and along the border rivers of the U.S., the same operational space occupied by the U.S. Coast Guard.

#### **4. The U.S. Coast Guard**

The U.S. Coast Guard did not have a counterterrorism mission prior to passage of the HSA. There has been very little change to the mission of the U.S. Coast Guard as a military branch, answering to the Department of Transportation as well as the Department of Defense under the previous government structure. Listing its mission priorities in order of operating expenses on its website, [www.uscg.mil](http://www.uscg.mil), “By law, the Coast Guard has 11 missions:

- Ports, Waterways and Coastal Security
- Drug Interdiction
- Aids to Navigation
- Search and Rescue
- Living Marine Resources
- Marine Safety
- Defense Readiness
- Migrant Interdiction
- Marine Environmental Protection

- Ice Operations
- Other Law Enforcement

Thus, we are military, multi-mission and maritime” (United States Coast Guard Missions, 2013). Other law enforcement is defined as enforcing illegal fishing incursion/prevention.

### **C. PRE-9/11 ANTI-TERRORISM POLICIES AND DIRECTIVES**

The first World Trade Center bombing in New York in 1993, and the bombing of the Murrah Federal Building in Oklahoma City, forced many to reconsider the viewpoint that geography provided the United States some insulation from outside terrorist attacks. Perhaps the fact that Timothy McVeigh, a radicalized former U.S. soldier, was arrested, convicted, and executed for the Oklahoma City bombing, allowed Americans to continue to believe that law enforcement actions against terrorists would still be successful, and that international terrorism was still not a real threat to America.

The first federal document to address terrorism as a domestic threat was PDD-39 in 1995. This Directive named the Department of Justice, housing the INS, as the lead Department for preventing and responding to domestic terrorism, with the FBI as the lead operational response agency. The Department of State was the lead for response to and prevention of international terrorist incidents (Clinton, 1995, p. 7). PDD-39 outlined two “top priorities” for U.S. interests. One section states that in the area of public diplomacy, “there is no higher priority than the pursuit, arrest and prosecution of terrorists” (Clinton, 1995, 3). In the discussion of weapons of mass destruction, “there is no higher priority than preventing the acquisition of this capability (WMD) or removing this capability from terrorist groups potentially opposed to the U.S” (Clinton, 1995, p. 9).

The Attorney General (INS) was given the lead role in excluding potential terrorists from the U.S. The Secretary of Transportation (U.S. Coast Guard/FAA) held the lead in securing airports and aircraft and maritime shipping, and the Secretary of the Treasury (U.S. Customs/U.S. Secret Service) maintained responsibility for prevention of unlawful traffic in firearms and explosives, protecting senior officials, and controlling movement of assets, goods, and services. However, the membership of departments on the Coordinating Sub-Group committee formed by PDD mandate included only State,

Defense, Justice, CIA, and FBI (Clinton, 1995, 12). The secretaries of Treasury, Transportation, Energy, and Health and Human Services, as well as FEMA, and OMB were only included in meetings in which the agenda pre-determined specific inquiries in their departments would be discussed (Clinton, 1995, p. 12). According to the Action Memo prepared for President Clinton by Chief of Staff Anthony Lake, urging signature of the PDD, in an Interagency Disputes section of the memo, Lake reported that the FBI felt that Treasury, DOT, DOE, H&HS, FEMA and OMB did not have the need to know secret, law enforcement related information (Clinton, 1995, p. 16).

In early 1998, President Clinton more strongly acknowledged the growing threat of terrorist attacks on the United States and terrorist's ability to use weapons of mass destruction against U.S. citizens. In response, PDD-62, still classified, was released in May 1998. An unclassified extract of PDD-62 states that PDD-39 is reaffirmed. The Directive also established the Office of the National Coordinator for Security, Infrastructure Protection and Counter-Terrorism, naming Richard A. Clarke the office director, reporting to the National Security Council (Clinton, 1998). The PDD-62 unclassified summary makes no mention of border security. The Directive focused on apprehensions and convictions and increasing "legislative authorities" for fighting terrorism. The PDD expanded diplomatic goals with partner countries, and enhanced roles for the FBI as the lead investigative/prevention agency and FEMA as the lead response agency. President Clinton also focused heavily on federal interaction with state and local responders in the event an attack occurred (Clinton, 1998, p. 3).

As the lead for domestic counterterrorism, Attorney General Janet Reno released the Five-Year Interagency Counterterrorism and Technology Crime Plan in December 1998. An unclassified extract from the plan was released publicly in September 1999 but the plan itself remains classified. The Plan recognized that, to that point, the country's focus in diplomacy and law enforcement had been "the need to treat terrorism as criminal conduct." This required international efforts to prevent terrorists from obtaining sanctuary, and declared that state sponsors of terrorism should be punished and all should "help bring terrorists to justice" (Reno, 1999, p. 5). The DOJ plan was crafted with the cooperative efforts of 24 Federal agencies as a strategy for combating terrorism in the

United States and against Americans overseas. It recognized that multiple agencies within the government had roles in counterterrorism and security efforts, but focused on an interagency Coordinating Sub-Group, chaired by the National Security Council. This included the Departments of State, Defense, Justice, Treasury, and “where appropriate, Transportation (the FAA), FEMA and Health and Human Services.” The synergy of a whole-government approach to border and transportation security, and counter-terrorism writ large, continued to elude the executive branch.

#### **D. THE HART-RUDMAN COMMISSION**

Perhaps recognizing this shortcoming in government planning, Defense Secretary William Cohen established the Hart-Rudman Commission in 1998, formally named The U.S. Commission on National Security/21st Century. Hart-Rudman was created to study how the country could best devise a national security strategy. In three parts over several years, Hart-Rudman released reports on its findings. The work culminated in the final report of January 31, 2001. Part three offered broad recommendations for U.S. government reorganization for efficiency saying the writers “...believed that unless the U.S. government adapts itself to these changes - and to dramatic changes still to come - it will fall out of step with the world of the twenty-first century” (Hart-Rudman Commission, 2001, p. v). The report noted that “not every aspect of U.S. national security organization needs an overhaul,” and that better policies could be the means to the desired end of security. In order to secure the homeland, Hart-Rudman recommended a new, independent National Homeland Security Agency, built upon FEMA as the lead, encompassing the U.S. Coast Guard, U.S. Customs Service, and the U.S. Border Patrol. The recommendation emphasized that the three agencies should remain independent but have overarching leadership that would ensure they received the funding required. There is no reasoning offered by Hart-Rudman as a basis for recommending FEMA as a lead. The Commission also recommended a complete reorganization of the executive branch to “put in place new government organizations and processes, eliminating where possible staff duplication and mission overlap,” apart from the establishment of the proposed NHTSA (Hart-Rudman Commission, 2001, p. 11). This is exactly the opposite of what occurred in 2002 when DHS was established.

The Commission report stated that "...the U.S. government *has not* adopted Homeland Security as a primary national security mission," noting that structures and strategies are "fragmented and inadequate" and the country is "very poorly organized to design and implement any comprehensive strategy to protect the homeland" (Hart-Rudman Commission, 2001, p. 10). Three instruments were identified as available for preventing terrorist attacks on American soil: U.S. diplomacy; U.S. diplomatic, intelligence and military presence overseas; and vigilant border security, citing the international outreach and pre-clearance policies established by the U.S. Coast Guard and U.S. Customs Service overseas (Hart-Rudman Commission, 2001, p. 10). In order to improve border security, the Commission did not suggest creating a new department.

The recommendation predominantly focused on development of new transportation security procedures and practices affecting carriers, bolstering intelligence and information sharing of border control agencies and "strengthening the capabilities of border control agencies to arrest terrorists or interdict dangerous shipments before they arrive on U.S. soil." The means of attaining these goals are not outlined. Since these U.S. agencies have the full force of existing laws with which to effect arrests and apprehensions, what additional capabilities are required is not clear. The Commission recommended the U.S. bolster deterrence by "making clear its determination to use military force in a preemptive fashion if necessary," which was not exercised until after 9/11, and to the chagrin of many.

The Commission envisioned that the Border Patrol, Coast Guard and Customs would be able to enhance their effectiveness under a single organization as long as each continued to operate as independent agencies. The members of the Commission were equally in agreement that immigration benefits and enforcement should be separated with immigration benefits left outside of the security agency

The merging of immigration and customs inspectors was not a new idea. In 1992, with implementation of the North American Free Trade Agreement pending, Senator Daniel Patrick Moynihan asked the GAO to review the continuation of separate immigration and customs inspections operations at the ports of entry. This review was focused on determining how the free flow of trade could best be facilitated. Allan I.



Mendelowitz, Director of the International Trade and Finance Issues General Government Division of the General Accounting Office, testified in 1992 that poor coordination between INS and Customs contributed to staffing problems at Ports of Entry (Mendelowitz, 1992). Issues confronting the two inspection agencies were primarily those of inability of the two to coordinate the numbers of inspectors needed in each location to match the requirements of each other, hiring difficulties, and management inability to adequately project the number of inspectors required.

In its report of January 1993, the GAO characterized the working relationship between INS and Customs as "...a long history of interagency rivalry coupled with ineffective cooperation and coordination pertaining to border crossing operations" (Gadsby, 1993, p. 1). The assumption, which has prevailed with many through several years, is that "Inspector" is a generic term, with no specialty of law and training requirements as part of the professional aspect of that role (Martin, 2003, p. 8). Prior to 9/11 and the HSA, as well as after, cross-training of inspectors from both agencies was promised in response to GAO and congressional inquiries, which appears never to have materialized.

#### **E. EARLY EFFORTS TOWARD A HOMELAND SECURITY AGENCY**

Bills to establish a National Homeland Security Agency along the lines recommended by the Hart-Rudman Commission, HR1158 and S1534, were introduced on March 21, 2001. The bills recommended transfer of FEMA, the U.S. Customs Service, the U.S. Border Patrol, and the U.S. Coast Guard, specifying that all should be maintained as "a distinct entity" within the Agency. They were to be joined by the Critical Infrastructure Assurance Office and the Institute of Information Infrastructure Protection from the Department of Commerce and the National Infrastructure Protection Center and the National Domestic Preparedness Office from the FBI. These bills focused heavily on cyber security and disease control. The last actions taken on those bills were subcommittee hearings in April 2001.

On May, 2, 2002, HR 4660 and S2452 were introduced with language similar to the initial versions. Those bills recommended transfer of FEMA, USCS, USCG, and

added, “the portions of the Immigration and Naturalization Service responsible for law enforcement and border management, including the Border Patrol and Divisions of Inspections, Investigations, Detention and Removal, and the Animal Plant Health Inspection Service of the Department of Agriculture.” The new language dropped the Institute of Information Infrastructure Protection. In its place, the bill addressed information protection issues in a new Directorate to be placed in DHS. These efforts to create a more limited border and transportation agency were merged into HR 5005, the Homeland Security Act.

Despite warnings of the vulnerability of the United States to attacks, and efforts within the executive branch to begin refocusing the attention of all government agencies on counterterrorism concerns, the messages seemed lost in some key areas of our government. For instance, the Department of State, with responsibility for issuance of visas, worked closely with INS. INS approved all visa applications, while DOS consular officers conducted final interviews to grant the visa requested. In May 2001, the Department of State established the Visa Express program, which allowed visitors from Saudi Arabia to obtain entry visas without following standard protocols and checks, often without interviews by an American officer. It was estimated by the GAO that 13 of the 19 9/11 hijackers entered the U.S. from Saudi Arabia using this program and reported in *The Washington Post* (Eggen, 2002). Despite the events of 9/11, Visa Express was not closed until July 19, 2002.

After the 9/11 attacks appeared to take almost everyone by surprise, the White House established an Office of Homeland Security (OHS) to provide a government-wide focal point of information and anti-terrorism efforts. The Executive Order establishing the OHS was published on October 8, 2001, creating a new office of Assistant to the President for Homeland Security (AHS) and establishing a Homeland Security Council to operate in a manner similar and complementary to the National Security Council (Bush, 2001). The reason for creating a second council was never given publicly.

The OHS was to develop a comprehensive strategy to secure the country from terrorist threats or attacks. The functions outlined for OHS to complete that mission directed coordination of the entire Executive Branch’s efforts. This focused

predominantly on intelligence and information gathering and sharing between federal, state, county, local, and tribal governments, with no structural change, and no overriding focus on border and transportation security. However, the Assistant to the President for National Security Affairs was in charge of coordination of efforts “to improve the security of United States borders, territorial waters, and airspace in order to prevent acts of terrorism within the United States...,” and facilitation of information exchanges regarding immigration and visa matters and shipments of cargo, not the Office of Homeland Security. Coordination of security efforts to protect railways, highways, shipping, ports and waterways, and airports and civilian aircraft, fell under the AHS.

The focus of the new OHS was decidedly internal to the country (Bush, 2001). Just as hastily as the White House Office of Homeland Security was established, and before the security strategy issued by President Bush could be implemented, Congress began drafting the Homeland Security Act, determining that a new Department was required to coalesce many counterterrorism and disaster recovery missions in ways that the existing roles of the Executive Branch could not.

The Border and Transportation Security Directorate was established as a part of the DHS encompassing the U.S. Border Patrol, as well as legacy immigration, customs and agricultural inspectors. They were to join other legacy agency enforcement support functions as intended by the original drafter of the HSA, Senator Joseph Lieberman. In his July 29, 2002, appearance with Senator Fred Thompson on “Face the Nation,” and commentator/host Bob Schieffer, Senator Lieberman voiced his intent when drafting the HSA saying his goal was, “to create a strong Department of Homeland Security whose purpose is to close gaps, shortcomings, vulnerabilities that existed, that contributed to the attacks of September 11” (Lieberman, 2002). The gaps, shortcomings, and vulnerabilities to which Senator Lieberman referred were not clearly defined in this discussion, but one might infer that border security structure was one of the issues of concern.

Perhaps Congress acted so quickly to pass the HSA in an effort to avoid the oft-repeated steps of what Barrett and Fry refer to in *Appreciative Inquiry* as fragmentation in the legacy agencies by their attempts to readjust their own missions to more security-focused agendas. When fragmentation occurs, individual experts tend to look inward to

their own areas of expertise without considering their role in the larger picture, “managers often become more convinced that their (partial) views of the situation are the right ones, ignoring the larger system context” (Barrett & Fry, 2005, p. 30). The original Homeland Security agency bills and the HSA represent the Appreciative Inquiry goals of “a deliberate, committed, open ended search; a mutual interdependence and collaboration” (Barrett & Fry, 2005, p. 27). They were simply superseded on January 30, 2003.

### **III. THE CURRENT CONFIGURATION OF THE BORDER SECURITY AGENCIES, HOW THEY COMPARE TO THE HOMELAND SECURITY ACT-MANDATED STRUCTURE, AND REPORTS ON THEIR PERFORMANCE**

Congress appeared to be attempting to unify the multiple functions in providing border and transportation when it passed the Homeland Security Act (HSA). As discussed previously, the concerns about the border and transportation enterprise of the United States were not created on 9/11. 9/11 was the realized fear of those reviewing America's anti-terrorism and security efforts. The Hart-Rudman Commission focused on the perceived need to examine how best to improve America's border and transportation security functions. In the Commission's final report, issued in early 2001, the commission recommended a unified Homeland Security agency to improve the funding and mission enhancement of the U.S. Coast Guard, U.S. Border Patrol and U.S. Customs, with all being maintained as separate agencies to "help ensure that sufficient resources are devoted to (these) tasks" (Hart-Rudman Commission, 2001, p. 16).

The initial legislation offered in response to Hart-Rudman, H.R.1158 and S. 1534, mirrored the Commission's recommendations in an effort to create a National Homeland Security Agency. Those bills failed, passage, however, and each subsequent piece of legislation succeeding those initial efforts added, incrementally, additional agencies and functions with a nexus not just to border and transportation security, but somewhat mirroring the Executive Branch as a whole. Each iteration recommended enveloping additional agencies with roles to help combat terrorism, containment of the effects of weapons of mass destruction and chemical weapons, and response and recovery to terrorist attacks or acts of nature, while maintaining the core concept of border and transportation security (see Figure 1). For instance, the INS Immigration Inspectors were not included in the Hart-Rudman Commission's recommendations, or in the original Homeland Security agency proposed legislation. The Homeland Security Act of 2002, with amendments through 2008, H.R. 5005 (HSA), varies greatly from the initial forms of legislation proposed to unify border and transportation security agencies. The HSA

encompasses significantly more facets of government. It also contains direction and language for a single border and transportation security agency within the department.

**National Homeland Security Agency Proposals Prior to Final Passage of the Homeland Security Act**

**Legislation    Date Introduced    Included Agencies**

**H.R. 1158                    21-Mar-01** The authorities, functions, personnel, and assets of the following entities are hereby transferred to the Agency:

- (1) The Federal Emergency Management Agency, the ten regional offices of which shall be maintained and strengthened by the Agency.
- (2) The United States Customs Service, which shall be maintained as a distinct entity within the Agency.
- (3) The Border Patrol of the Immigration and Naturalization Service, which shall be maintained as a distinct entity within the Agency.
- (4) The United States Coast Guard, which shall be maintained as a distinct entity within the Agency.
- (5) The Critical Infrastructure Assurance Office and the Institute of Information Infrastructure Protection of the Department of Commerce.
- (6) The National Infrastructure Protection Center and the National Domestic Preparedness Office of the Federal Bureau of Investigation.

**S. 1534                    11-Oct-01** The authorities, functions, personnel, and assets of the following entities are transferred to the Department:

- (1) The Federal Emergency Management Agency, the ten regional offices of which shall be maintained and strengthened by the Department.
- (2) The United States Customs Service, which shall be maintained as a distinct entity within the Department.
- (3) The Border Patrol of the Immigration and Naturalization Service, which shall be maintained as a distinct entity within the Department.
- (4) The United States Coast Guard, which shall be maintained as a distinct entity within the Department.
- (5) The Critical Infrastructure Assurance Office and the Institute of Information Infrastructure Protection of the Department of Commerce.
- (6) The National Infrastructure Protection Center and the National Domestic Preparedness Office of the Federal Bureau of Investigation.

Figure 1.            National Homeland Security Proposals Prior to Final Passage of Homeland Security Act (continues on next page)

**H.R. 4660**

**5-May-02** The authorities, functions, personnel, and assets of the following entities are transferred to the Department:

- (1) The Federal Emergency Management Agency, the 10 regional offices of which shall be maintained and strengthened by the Department.
- (2) The United States Customs Service, which shall be maintained as a distinct entity within the Department.
- (3) The portions of the Immigration and Naturalization Service responsible for law enforcement and border management, including the Border Patrol and Divisions of Inspections, Investigations, and Detention and Removal.
- (4) The United States Coast Guard, which shall be maintained as a distinct entity within the Department.
- (5) The Critical Infrastructure Assurance Office.
- (6) The National Infrastructure Protection Center and the National Domestic Preparedness Office of the Federal Bureau of Investigation.
- (7) The Animal Plant Health Inspection Service of the Department of Agriculture.

**S. 2452**

**2-May-02** The authorities, functions, personnel, and assets of the following entities are transferred to the Department:

- (1) The Federal Emergency Management Agency, the 10 regional offices of which shall be maintained and strengthened by the Department.
- (2) The United States Customs Service, which shall be maintained as a distinct entity within the Department.
- (3) The law enforcement components of the Immigration and Naturalization Service relating to Border Patrol, Inspections, Investigations (interior enforcement), Intelligence, Detention and Removal, and International Affairs.
- (4) The United States Coast Guard, which shall be maintained as a distinct entity within the Department.
- (5) The Critical Infrastructure Assurance Office of the Department of Commerce.
- (6) The National Infrastructure Protection Center and the National Domestic Preparedness Office of the Federal Bureau of Investigation.
- (7) The Animal and Plant Health Inspection Service of the Department of Agriculture, that portion of which administers laws relating to agricultural quarantine inspections at points of entry.

Figure 1 (continues on next page)



S. 2794

25-Jul-02 In accordance with title VIII, there shall be transferred to the Secretary the functions, personnel, assets, and liabilities of the following entities--

(1) the National Infrastructure Protection Center of the Federal Bureau of Investigation (other than the Computer Investigations and Operations Section), including the functions of the Attorney General relating thereto;

(2) the National Communications System of the Department of Defense, including the functions of the Secretary of Defense relating thereto;

(3) the Critical Infrastructure Assurance Office of the Department of Commerce, including the functions of the Secretary of Commerce relating thereto;

(4) the Computer Security Division of the National Institute of Standards and Technology, including the functions of the Secretary of Commerce relating thereto;

(5) the National Infrastructure Simulation and Analysis Center of the Department of Energy, including the functions of the Secretary of Energy relating thereto; and

(6) the Federal Computer Incident Response Center of the General Services Administration, including the functions of the Administrator of General Services relating thereto.

**Figure 1**

Source - The Library of Congress, THOMAS, [www.thomas.loc.gov](http://www.thomas.loc.gov)

Figure 1 (continued from previous pages)

Prior to the HSA's passage, President Bush said, "We need this department for one main reason. America needs a group of dedicated professionals to wake up each morning with the overriding duty of protecting the American people" (FoxNews.com, 2002). How the duties of those involved in a federal Homeland Security enterprise and their dedication or responsibilities would equal or outweigh those in the military or any local, county or state police agencies was never clarified. On the date of the bill's passage, Senator Tom Daschle said he was voting for the bill because "there is no doubt that we need to create a Department of Homeland Security," without further elaboration (NewsMax, 2002). Senator Daschle added, however, "Passing this bill does not solve the problem of terrorism on American soil."

**A. SIGNIFICANCE OF BORDER AND TRANSPORTATION SECURITY IN THE ACT**

Despite the vast scope of the final HSA and multiple additional agencies and activities added to the legislation, border and transportation security activities are the primary focus of the HSA. Only the INS, U. S. Customs Service (Customs) and the formerly independent Office of Science and Technology were reorganized or eliminated by the HSA. The U.S. Coast Guard (USCG) moved from the Department of Transportation to DHS, with continuing concurrent command of the Department of Defense.

The printed HSA is 180 pages of directive language excluding the HSA's table of contents and definitions. Of that, 51 pages and several additional paragraphs are devoted to border and transportation security concerns, to include INS, Customs, TSA, USCG, visa issuance, and rail and air security. Provisions including labor management language, training and the Federal Law Enforcement Training Center (FLETC), human resources issues, procurement and financial management combined are the subjects of the next highest amount of discussion at 40 pages. The Congressional Research service noted that in terms of resources, "...the lion's share ... in the new DHS is focused on this target (border and transportation security)," with 60 percent of the budget and over 85 percent of the Department's manpower" committed to this goal" (Congressional Research

Service I, 2005, p. 3). Whether an intended outcome of the HSA or not, GAO commented in an early report that “this transfer (to DHS) creates a great opportunity for DHS to address long-standing management and operational problems within INS” (Stana, 2004, p. i).

The HSA did not direct a complete integration of standing agencies with a nexus to antiterrorism and border and transportation security missions. More importantly, it has not resulted in a comprehensive integration of law enforcement and security agencies. The GAO estimated there were 40 agencies within the U.S. government involved in missions with a nexus to Homeland Security and combating terrorism in 2001 (Dalton, 2002, p. 4). The HSA affects only 22 of those agencies directly (see Figure 2).

**Major Cabinet Departments and Agencies Involved in Homeland Security BEFORE Reorg.**

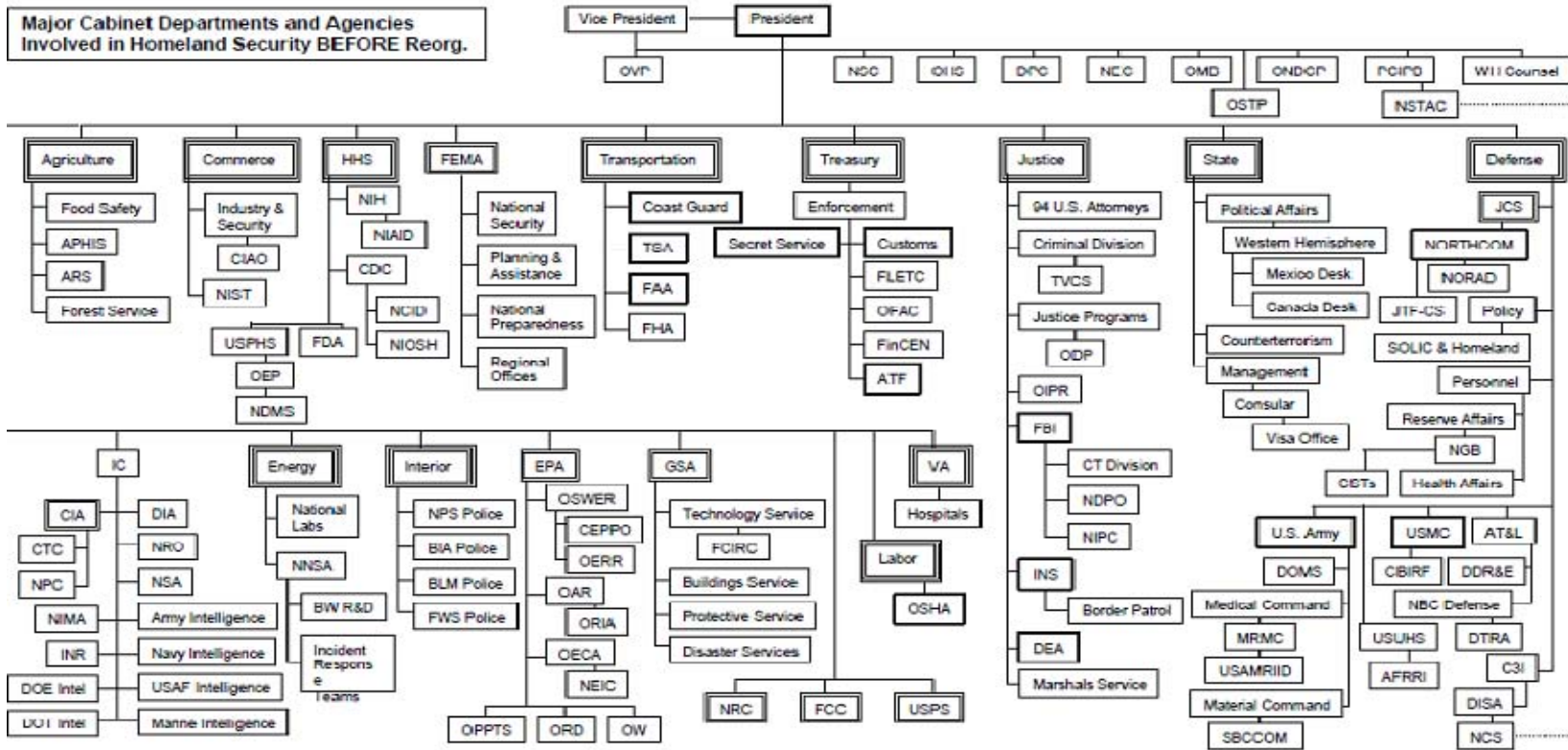


Figure 2. Major Cabinet Departments and Agencies Involved in Homeland Security for Bush (from Bush, 2002)

As an example, not all immigration functions of INS were transferred into DHS. The Executive Office for Immigration Review, which includes the Board of Immigration Appeals, immigration judges, and administrative law judges, was retained in the Department of Justice. The Office of Refugee Resettlement and responsibility for the “care of unaccompanied juveniles formerly under INS authority” were placed under the Secretary of Health and Human Services (Martin, 2003, p. 23). The consular affairs officers at U.S. missions, responsible for visa issuance, remain under the Department of State. The ATF, a law enforcement agency of Customs, was transferred to the DOJ. The supposedly non-enforcement branches of INS, benefits and international affairs, were molded into the new U.S. Citizenship and Immigration Services, severed from border and transportation security activities.

The final HSA mandates a single border security agency encompassing air, land, and sea border security at and between the ports of entry, with investigative, detention and removal, and supporting elements under a single border and transportation security directorate. In addition, for the first time ever, responsibility for providing visa security checks at U.S. missions abroad was placed under the border and transportation security agencies. This inclusion was apparently designed to close the gaps in the visa process identified by the GAO which led to the issuance of visas to those who had done harm to the United States on 9/11. However, USCG, with littoral security responsibility, air and marine assets, and a mission to interdict contraband and illegal immigrants, remains as a stand-alone agency within DHS. As directed in the HSA and upon entry into DHS, the breakup of the legacy U.S. Immigration and Naturalization Service (INS) successfully separated the enforcement and benefits branches of the beleaguered immigration service, placing those functions in separate agencies. However, the similar breakup of Customs directed in the HSA, separating port security and trade enhancement, has never occurred, substituting one multi-function agency with border security enforcement functions for another.

## **B. WHAT BECAME OF THE BORDER AND TRANSPORTATION SECURITY DIRECTORATE MANDATE?**

The HSA called for a BTS Directorate that bore a great resemblance to the original agency envisioned by the Hart-Rudman Commission, bringing the key border security elements under a single cohort as separate agencies, minus the U.S. Coast Guard, and including vital visa security tasks from the Department of State. However, within 10 weeks of the enactment of the HSA, the reorganization directive memo signed by President Bush effectively negated the single umbrella leadership of the BTS Directorate, splintering the border and transportation security agencies and their supporting arms in a manner that had never been envisioned prior to the creation of the Department. USCS was renamed U. S. Customs and Border Protection. The enforcement support operations of both INS and the USCS were carved out and placed under ICE to create a separate, stand-alone agency. Despite the mandate in HSA Section 412 that non-enforcement departments of Customs were to be retained in Department of Treasury, such as the Regulations and Rulings and Trade divisions, those functions were transferred to DHS as well, into U.S. Customs and Border Protection. Because the reorganization took effect before the affected operational units entered the Department, the HSA was never implemented.

The resulting structure, in place today and outlined below, leaves border security with operations conducted under the leadership of two departments and four agencies, all with individual agency viewpoints and priorities, without the over-arching leadership or single agency policy guidance position designated in the BTS Undersecretary position

### **1. Today's Border Security Agencies**

#### ***a. U.S. Customs and Border Protection (CBP)***

CBP houses the U.S. Border Patrol, Immigration Inspectors, Customs Inspectors, and Shadow Wolves. Customs and Border Patrol's air and marine assets are now combined and operating as CBP Air and Marine operations. CBP also supports the Visa Security Program through detail assignments.

The Border Patrol was brought into DHS in a single agency, nearly intact. The Border Patrol's investigations units, such as the Anti-Smuggling Unit, were dispatched to ICE, and the air and marine wings were co-mingled with Customs units. The mission of the Border Patrol, however, preventing entry into the United States without inspection between the ports of entry, was not changed or co-mingled with other agency assets. The Customs Shadow Wolves were assigned to the Border Patrol in the early days of DHS' operations, but were subsequently reassigned to Customs/CBP Field Operations.

***b. U.S. Immigration and Customs Enforcement (ICE)***

ICE houses INS' Detention and Removal Operations, now known as Enforcement Removal Operations (ERO), the former anti-smuggling unit of the Border Patrol, and the investigative functions of both INS and USCS. ICE was created wholly by the Bush reorganization memo of January 30, 2003. ICE's mission is described as the investigative arm of DHS with the mission of criminal enforcement of laws governing "border control, customs, trade, and immigration." ICE has retained the original duties of INS Detention and Removal and interior immigration enforcement and Customs trade investigations. Homeland Security Investigations (HSI), a branch of ICE, investigates immigration crime, including human and other contraband smuggling, financial and cyber crimes, and export enforcement issues, as well as protecting critical infrastructure industries that are vulnerable to sabotage, attack or exploitation. HSI also oversees the agency's international affairs operations and intelligence functions (Martin, 2003, p. 23). In addition to the combined INS and Customs investigative functions, ICE is also responsible for the Visa Security Program (VSP). The HSA enhanced co-responsibility for visa issuance between DHS and DOS, representing the first time that immigration law enforcement agencies have had a direct role in the review of applications for entry into the United States overseas before issuance by the DOS.

***c. The Laws—Designations and Duties***

Immigration law enforcement duties and agency functions are described in 8 CFR, Aliens and Nationality, Part 287—Field Officers; Powers and Duties, the

Immigration and Nationality Act, Section 287; and 8 U.S.C, Chapter 15. The duties of Border Patrol Agents, including aircraft pilots; Immigration Inspectors; Special Agents; Deportation Officers; Immigration Enforcement Agents and the supervisors of those individuals, as well as their authority to enforce immigration laws, patrol the external boundary of the United States and within a reasonable distance thereof (100 miles), make arrests, issue detainers, conduct site inspections, carry firearms, and conduct other immigration law enforcement functions are fully outlined, with many of these duties and arrest authorities extended to Immigration Officers and Adjudications Officers of U.S. Citizenship and Immigration Services as well. Agents may also “search for noncitizens on “private lands, but not dwellings” within 25 miles from the border” (NPZ Law Group, 2012). The CFR does not include terrorists or terrorism in the sections regarding field officers’ powers and duties. The VSP, mandated under Section 428 of the HSA, has descriptive duties found in 8 U.S.C., Chapter 15.

The duties of CBP Officers, combined Customs Inspectors carrying out Customs functions of duty and tariff collections, inspections of inbound goods to the United States, are described in 19 CFR, Customs Duties. This CFR contains a delegation of authority from the Secretary of the Treasury to the Secretary of DHS to continue the traditional customs activities of fee and tariff collections directed to be retained in Treasury by the HSA. CBP Officers monitor entrance at the ports of entry and may conduct searches of those individuals who are entering the United States, and their effects in their possession (NPZ Law Group, 2012). The CFR does not include terrorists or terrorism in the descriptions of Customs Officers’ duties.

## **2. Department of Defense**

### ***a. The U.S. Coast Guard***

The U.S. Coast Guard organized and serving under the authority of Title 14 of the United States Code that states that the Coast Guard, “...shall be a military service and branch of the armed forces of the United States at all times. The Coast Guard shall be a service in the Department of Homeland Security, except when operating as a service in the Navy” (Title 14, United States Code 2012, Section 1). Title 14 language



continues that beyond the former notion of the Coast Guard under the Navy only in time of war, but in time of emergency.

This is a better definition of the status of the Coast Guard than one which defines it as a service under the Treasury Department in time of peace, because the President is authorized to place the Coast Guard under the Navy in time of emergency, which could be in time of peace. (Title 14, United States Code 2012, Section 1)

No discussion of the border security enterprise should be considered complete without inclusion of the Coast Guard. The Congressional Research Service includes the Coast Guard as one of the “key actors in this (DHS border security) effort” along with CBP, including the U.S. Border Patrol (Congressional Research Service I, 2005, p. 3). Assigned to duties of an equal if not greater role in border and transportation security than CBP and ICE, the Coast Guard, like the U.S. Border Patrol, moved in toto into DHS but continues operating separately from CBP and ICE.

The Coast Guard’s statistics for 2012 in areas of border and transportation security similar to CBP show the Coast Guard was responsible for interdicting 107 metric tons of cocaine and marijuana bound toward the U.S., interdicting 2955 migrants; screening 29.5 million crewmembers and passengers prior to arrival in U.S. ports; identification of more than 275 individuals with terrorism or criminal “associations for further vetting;” detention of 191 suspected smugglers; and completion of more than 25,500 cargo container inspections (United States Coast Guard 2013; Posture Statement 2013). The Coast Guard monitors and protects more than 350 ports and 95,000 miles of coastline, or our water borders, including the Great Lakes (United States Coast Guard 2013 Posture Statement, 2013).

***b. The U.S. Military and National Guard Forces***

Assets of various states’ National Guard units, as well as Active Duty military members, have been deployed to the southwest border in support of the Border Patrol since the 1980s (Mason, 2010, p. 1). While there is ongoing discussion on the use of the military raising the issue of the *Posse Comitatus Act* preventing such duties, that argument may not be well-founded. The U.S. Constitution, Article I, § 9, clause 15 states

“The Congress shall have Power To ... provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,” Title X Active Duty forces have been dispatched to assist CBP. Additional information of DOD’s Title X expanded role in law enforcement, lead in drug interdiction; National Guard, to include all states, Puerto Rico, Guam, and the Virgin Islands; and as reserve components of DOD; 2009 legislation remains in committee that would further codify this role. This more strongly-developed interaction could be closer to becoming reality with the passage of the National Guard Empowerment and State-National Defense Integration Act (S.1025). This act has given the Chief of the National Guard Bureau a full seat on the Joint Chiefs of Staff. The U.S. military does have general authority to “provide *support* to federal, state, and local law enforcement agencies (LEAs) in counterdrug and counterterrorism efforts, and in combating certain border-related immigration and smuggling crimes under 10 U.S.C. §374(b)” (Mason, 2010, p. 3). Title X deployment and assistance is underway currently along the Southwest Border with the assistance of Army North. Because the National Guard units are owned by the States, with a supporting role of active duty forces under Title 32, their flexibility of assistance parameters may be greater than the Title X forces, and has been used repeatedly along the border.

### **C. BORDER SECURITY AGENCY PROBLEMS DUE TO THE CURRENT STRUCTURE**

The structure of the border and transportation security agencies under President Bush’s reorganization plan appeared to be problematic from the outset. The Senate Committee on Homeland Security and Governmental Affairs convened its first hearing on January 26, 2005 to focus on concerns surrounding lack of a clear strategy forward for DHS. The hearing also addressed the question of whether or not DHS is properly configured, referring to recommendations of The Heritage Foundation and CSIS that CBP and ICE be merged, and referred to “a muddled division of responsibility between DHS and other agencies and departments” (Senate Committee on Homeland Security and Governmental Affairs, 2005, p. 2–3).

Similarly, the House Security Committee's Subcommittee on Management, Integration and Oversight was called on March 5, 2005, with the agenda of focusing on what Chairman Mike Rogers called, "...one of the most important management challenges facing the Department and involves one of the most important functions, protecting our borders and enforcing our immigration and customs laws" (House Homeland Security Committee Subcommittee on Management, Integration and Oversight, 2005, 1). Chairman Rogers stated that the division of the immigration functions into two bureaus must be explored by the committee to determine, "...if the separation has caused more operational, administrative, and budgetary problems that negatively impact the Homeland Security missions of these agencies" (House Homeland Security Committee Subcommittee on Management, Integration and Oversight, 2005, p. 1). The Chairman said that there are expectations of growing pains with all reorganizations, but that two years after the formation of DHS, the concerns with the CBP and ICE structure created by the reorganization "...seem to be growing and not receding." Those questions became the focus of the reviews of border and transportation security by the GAO, the DHS IG, and non-governmental agencies over the next several years.

Following the Senate and House hearings in January and March 2005 on the progress and problems of DHS, the DHS OIG undertook an investigation of the structure of the BTS, releasing its report in November 2005. The Senate directed a simultaneous GAO report to be undertaken on DHS, with the focus on the BTS.

The GAO concluded that the new border security agencies within DHS were facing the same management challenges that those agencies faced within INS, according to testimony delivered to the House Committee on the Judiciary's Subcommittee on Immigration, Border Security and Claims on May 5, 2005, to discuss management and potential structural changes. The GAO had reviewed the current ICE and CBP structure to offer insight into how the agencies could meet their mission with INS and Customs investigators "...blending two vastly different workforces, each with its own culture,

policies, procedures and mission priorities” (House Homeland Security Committee Subcommittee on Management, Integration and Oversight, 2005, p. 1) with the continuing management challenges they face.

The GAO identified the concerns of DHS management challenges as clarity of mission, strategic planning, organizational alignment, performance measures and leadership focus on accountability (House Homeland Security Committee Subcommittee on Management, Integration and Oversight, 2005, p. 2). The testimony focused on two questions: Have ICE and CBP encountered similar management challenges to those encountered at INS?; and What factors might be considered in addressing some of the management challenges that exist at ICE and CBP?

In its inquiry, GAO “raised concerns” of how well guidance about operational activities was disseminated to CBP, and ICE officers. GAO found that “the lack of program guidance has adversely impacted ICE’s ability to efficiently and effectively perform its mission” (House Homeland Security Committee Subcommittee on Management, Integration and Oversight, 2005, 1). While concerns about shared services and payroll are management issues, operational issues such as the ability to review post custody review of records, meeting the requirements of *Zadvydas V. Davis*, 533 U.S. 678 (2001), and manage investigation case records are also impacted. GAO concluded that, “DHS’s failure to effectively address its management challenges and program risks could have serious consequences for our national security” (House Homeland Security Committee Subcommittee on Management, Integration and Oversight, 2005, p. 12).

The separation of immigration enforcement functions under CBP and ICE was also the topic of a DHS IG Review, released in November 2004. The IG concluded that the agencies should be merged into a single agency to capitalize upon the joint capabilities in immigration enforcement that had developed in the U.S. Immigration and Naturalization and U.S. Customs Services (Skinner, 2005, p. 8). The DHS IG determined that the current CBP/ICE structure has multiple flaws across the spectrum of border enforcement and security operations of the United States, including three major areas,

“...coordination between apprehension and Detention and Removal (now known as Enforcement and Removal) efforts, coordination between interdiction and investigative efforts, and coordination of intelligence activities” (Skinner, 2005, p. 2).

The BTS Directorate’s authority and responsibilities for a single border agency was immediately altered by the establishment of CBP and ICE with all budgetary and operational control ceded to the CBP Commissioner and ICE Assistant Secretary. As the DHS IG report noted in a 2005, the creation ICE and CBP with their own Assistant Secretary and Commissioner, respectively, left the BTS with little operational authority or direction over funding (Skinner, 2005).

The IG review encompassed not just the border security agencies, but all border and transportation security enforcement-related agencies including CBP, ICE, Federal Protective Service, Transportation Security Administration, Federal Air Marshalls Service, the Forensic Document Laboratory, and the U.S. Secret Service. The reviewers concluded that all of the agencies are misaligned and should be rejoined or realigned before all of the legacy workforces retire to facilitate the establishment of functional new organizations. The review found no logical reason for the “unnatural separation of border enforcement functions” could be identified or learned during their interviews. The review concluded that “ICE was established not with a focus on supporting a particular mission but rather on building an institutional foundation large enough to justify a new organization” (Skinner, 2005, p. 19).

The findings of the 2005 review were extremely ominous for even the illusion of border security. Regarding halting illegal activity across the border, “For deterrence to work, aliens considering illegal entry into the United States must fear the prospect of actual apprehension and removal” (Skinner, 2005, p. 4); that does not appear to be a real threat under the current organization, according to the OIG. For example, ICE, which contains INS Detention and Removal Operations (since renamed Enforcement and Removal Operations) had taken on an agenda of functions and funding plans without coordinating those efforts with CBP. DHS was not forcing cooperation between the two agencies, which led to reduced support assets for enforcement operations. As a result, the need to support Border Patrol Agents with adequate bed space to house apprehended

illegal aliens in detention awaiting expedited removal had resulted in CBP having to reduce or eliminate border sweep operations (Skinner, 2005, p. 28).

The border and transportation security agencies appeared to be on unique trajectories from the outset. ICE assumed an independent interior enforcement agenda early after its creation. As CBP's apprehension capabilities began to grow in 2004 with the hiring of additional Border Patrol Agents, ERO was placed on a hiring freeze, reducing the level of support available for heightened apprehension operations. When the Arizona Border Control Initiative was launched in 2004, the expected apprehensions and plans revealed a requirement for operational support of 100 ERO officers. Only 13 ERO offices were sent on detail to Arizona, and no additional hiring took place (Skinner, 2005, p. 30).

ERO now has sole discretion in non-mandatory detention decisions rather than serving as an enforcement supporting arm,. Because ICE has not focused investigations on alien smuggling investigations, the Border Patrol has reconstituted the Alien Smuggling Unit that was transferred to ICE when INS assets were distributed at the founding of DHS (Skinner, 2005, p. 51). CBP expanded its overall investigation capabilities which were passed to ICE from both Customs and INS in 2002. Significantly, in 2004, CBP enforcement officers' reach was expanded beyond the Ports of Entry (Skinner, 2005, p. 50). The expressed lack of confidence in ICE by CBP officers and Border Patrols Agents to manage controlled deliveries has resulted in reduced enforcement operations of that nature since 2004 (Skinner, 2005, p. 53). The separation of the immigration enforcement functions has resulted in inefficient development of redundancies, according to the OIG. Due to a new and separate agenda on the part of ICE, CBP reported the amount of case referrals made to ICE for further investigation, calling instead upon local law enforcement or turning over the cases to the FBI or DEA (Skinner, 2005, p. 5). The separation of the United States Visitor and Immigration Status Indicator Technology (US-VISIT) program from ICE and CBP was a BTS decision, not part of the Bush reorganization, which further polarized the immigration enforcement arms of DHS. That valuable tool, if integrated with CBP, could be put to use in controlling entry into the United States. A highly supportive arm of INS

enforcement, the Forensic Document Laboratory, was recommended for re-integration with CBP as well (Skinner, 2005, p. 68–69).

A follow-on study of DHS's success in implementing the findings of the 2005 report was released in April 2007. The tone of the update was considerably less aggressive than the language of the initial report. Of the 14 recommendations made by the IG in 2005, six recommendations were considered to be resolved but remain open for further review. The IG found improved coordination in many instances between CBP and ICE, but those coordination recommendations remain open. DHS has not implemented the primary recommendation of the OIG that the agencies providing border security be remerged into a single agency.

In reviewing and analyzing the negative impact of separating ICE assets from their parent organizations, and not remarked upon by the GAO writers, were the findings that the areas in which the auditors found the greatest success and improvement in coordination were in the offices in which ICE and CBP officers are now co-located. Areas of the country in which the OIG found that DHS policies regarding ICE and CBP interaction are not reaching the field and where communication and cooperation are lowest are those in which ICE and CBP maintain separate office locations (Skinner, 2007). This area echoes an inquiry into CBP operations conducted by the GAO in 2004, and the comments of the officers interviewed that there was exceptionally good communication between ICE and CBP, but that the relationships were based upon their long-standing relationships built under INS (Stana, 2004).

In March 2005, the Congressional Research Service (CRS) released a three-part analytical review of border and transportation security. CRS noted that the HSA “consolidated many of the federal agencies responsible for border and transportation security into a single department.” They also found that the agencies involved in the BTS enterprise do not communicate with each other, suffer from inadequate technology for internal communication and that critical databases needed to “...keep bad people out of country were not (and to some extent still are not) integrated” (Congressional Research Service II, 2005, p. 3). CRS reiterated David Martin's observations that there are separate categories of border needs: “people-related border security and goods-related

border security” (Congressional Research Service II, 2005, p. 3). CRS espoused a “layered approach...or purposeful overlapping of programs and policies” to attain security with the free flow of trade and travel. This goal may not be attainable under the current structure since “current programs and policies in place, however, deflect some layering” (Congressional Research Service II, 2005, p. 21). The analyses offered by CRS are contrary to the focus on border and transportation security operations envisioned by the HSA and the nature of reports of by the GAO, which have provided negative findings when uncovering overlapping or redundant operations.

#### **D. INDIVIDUAL BORDER SECURITY AGENCIES AND PROGRAMS**

All of the border security agencies have been closely scrutinized by the American public, Congress, their own Inspectors General and the GAO since the early days of the Department’s existence.

##### **1. The U.S. Coast Guard**

As a standing military branch and one of the organizations that entered DHS in its entirety, the Coast Guard was presumed to be the agency around which the Department would be built by some early reviewers of the pending HSA (Daalder, et al., 2002, p. 34). The Hart-Rudman Commission recommended a Homeland Security agency built around FEMA, calling it “the necessary core of the National Homeland Security Agency” (Hart-Rudman Commission, 2001, p. 15). Some reviewing the pending HSA felt that FEMA should not even be included in the planned Department at the outset (Daalder, et al., 2002, ii, p. vi), and referred, instead, to the Coast Guard’s grade of A in overall management on Government Executive’s (GE) 2000 federal report card, with similar findings in 2001; FEMA received Bs in the same GE evaluations and the Customs Service, previously reviewed in 1999, received an overall C, with one B in financial management. *Government Executive* said of the Coast Guard, “top-notch planning and performance budgeting overcome short staffing and fraying equipment” (Government Executive, 2000). More recently, however, reports reveal that the Coast Guard may not be faring well under the stewardship and structure of DHS. Coast Guard Commandant Robert Papp was quoted as being critical of President Obama’s proposed budget



restrictions (Sorcher, 2012). The GAO reported that the reductions in the Coast Guard's 2011 budget were a detriment to the service's ability to replace and update its aging fleet, and maintain combat readiness, while it has been successfully reducing the risk of terrorism and undergoing an organizational redesign (Caldwell, 2010, 3). This may be a direct outcome of not creating the more border security-focused organization recommended by the Hart-Rudman Commission, which was based largely on the focus of the Coast Guard being one of the three agencies that would receive fuller funding and attention in a streamlined organization.

The *National Journal's* Insider Poll of April 2012 showed the majority of the Insiders agreed with the Commandant when he said the restrictions would leave the Coast Guard "overstretched and outdated" (Sorcher, 2012). One of the Insiders said the overseas operations of the Coast Guard should be carried out by the Navy. Another said Adm. Papp was late in his request for funds, adding, "The ship carrying the trillions for the overhyped wars on terror and drugs has already sailed, leaving behind a country largely bankrupt" (Sorcher, 2012). The Insiders in this poll number 87 and include retired Coast Guard Commandant Admiral Thad Allen, Sandy Berger, former DHS Secretary Michael Chertoff, Richard Clarke, Richard Danzig, Trent Lott, Lawrence Korb, and James Jay Carafano; the quotes are not attributed.

## **2. The Visa Security Program**

The Visa Security Program (VSP), directed in Section 428 of the HSA, assigned under ICE, continues to draw criticism from GAO auditors. Section 428 specifically directs DHS overseas officers to:

- Provide expert advice and training to consular officers regarding specific security threats relating to the adjudication of individual visa applications of classes of applications;
- Review visa applications either on the initiative of the employee of the department (DHS) or at the request of a consular officer, or other persons charged with adjudicating applications; and
- Conduct investigations with respect to consular matters under the jurisdiction of the Secretary of DHS (Homeland Security Act of 2002, as amended 2008, 2002, §428).

The VSP presents another hole in the requirement for metrics demonstrating control of the borders—a hole that is rarely if ever discussed publicly since most eyes are focused on the southwest land border. Visa security has been an issue of concern by the GAO since well before 9/11. In 1997, GAO identified concern for issuance of “the U.S. passport and visa, the world’s most sought-after identity documents” (Nelson, 1997, p. 1), and defined State’s visa issuance process as “the first defense against fraudulent entry into the United States” (Nelson, 1997, p. 1). GAO completed an additional review of the visa process following the release of two Department of State IG reports regarding the World Trade Center bombing of 1993 and the means by which Sheik Abdel Rahman gained entry into this country. Concerns over visa issuance increased after GAO determined that 13 of the 9/11 hijackers had entered the U.S. with visas issued with no interviews by consular officers. Additionally, of the 15 hijackers’ visa applications that could be located, none had been completed correctly (Eggen, 2002).

In its report of March 2011 to the U.S. Senate Committee on Homeland Security and Government Affairs, GAO found what could best be termed as inconsistent application of the VSP and no means for ICE to determine the program’s success because ICE’s VSP tracking system “does not gather comprehensive data on all the performance measures needed to evaluate VSP mission effectiveness” (Ford, 2011, p. 1). Initially enacted in Saudi Arabia, with scheduled increases in the number of countries in which the VSP would be implemented, interest in and concern about the program increased in 2009 after the attempted bombing of Northwest Airlines flight 253 by “a Nigerian citizen in possession of a valid U.S. visa” (Ford, 2011).

Following the GAO’s 2005 report on VSP progress (U.S. GAO, 2005), ICE announced a five-year expansion plan of the VSP and a tracking system. As of December 2010, however, ICE had established VSP units at 19 posts in 15 countries. Despite issuance of multiple MOUs regarding visa issuance, instructions to create SOPs for posts, chains of command and dispute resolutions, and DOS cables on interactions with DHS , the program appears fraught with inconsistency and questionable results due to ICE’s inconsistent participation in the VSP. This generalization and a true review of

the VSP are difficult because ICE has not created a system to track the results of its activity.

VSP could also be seen as an unnecessary redundancy in the visa security and issuance process. DOS regional security offices assist the consular section, as well as FBI agents overseas and USCIS international offices. However, reviews of the DOS visa issuance process by the GAO, prior to 9/11 and the creation of DHS, found that cooperation in security issues was less than optimal.

In 1997, DOS' visa security was identified as suffering from multiple issues, including technical problems that limited the availability and usefulness of the automated data base and inadequate cooperation by some key U.S. agencies in DOS's lookout committees. While controlling immigration to the United States was primarily the INS responsibility, DOS assisted INS by issuing visas to citizens of other countries who want to visit the U.S. and IDing persons who should be excluded from the U.S.

GAO completed a review visa security in 1997. They found that following first WTC bombing of 1993, DOS directed formation of committees with representatives from consular, political, and other "appropriate" agencies. These committees were designed to ensure that the names of suspected terrorist and others ineligible for a visa are identified and put into the lookout system. Embassy officials questioned the value of the committees, citing lack of cooperation from some agencies. Some agencies were reluctant to provide to the consular sections the names of suspected terrorists or others the U.S. may wish to exclude. They cited sensitivity of the information and restrictions on sharing information in part because, "information entered into CLASS (Consular Lookout and Support System) could be traced to the originating agency and compromise its work" (Nelson, 1997, p. 4).

Nelson testified that the border security and inspection process remains vulnerable with respect to validating a visa. There was no automated mechanism for transmitting data about nonimmigrant visa issuance to ports of entry. INS did not have the equipment to read the encrypted codes on DOS's machine-readable visas.

The 2007 VSP plan “identified three primary mission objectives to enhance national security and public safety” (Ford, 2011, p. 11). The VSP was created to identify and counteract threats before they reach the United States; identify unknown threats to Homeland Security; and maximize the law enforcement and counterterrorism value of the visa process (Ford, 2011, p. 11). Today’s VSP faces many of the same challenges faced since long before 9/11. The first key challenge is limited guidance from both ICE and DOS headquarters. Another challenge is lack of standards for providing advice and training to consular officers. Since ICE officers are posted on 30 day details to the VSP, and are assigned additional work during that time period, there is limited continuity and knowledge of operations by ICE officers. Those officers do not receive country-specific or language training prior to assignment to VSP billets (Ford, 2011, 14, p. 23). Since the DHS secretary has not delegated authority to refuse visas to posts, cases with irreconcilable differences between DOS and DHS must be forwarded to the DHS Secretary for decision (Ford, 2011, p. 18). The reports on the VSP and TSA overseas functions dovetail to present a picture of limited security and intelligence being gathered on travelers to the U.S. This is a particularly problematic situation since “most of the serious terrorist attempts against the U.S. in the last decade have originated overseas” (U.S. House of Representatives, 2011, p. 3).

### **3. The U.S. Border Patrol**

When the Border Patrol’s Southwest Border Strategy was implemented in 1994, one indicator of security success was the improved quality of life reported along the border communities. “When increased INS enforcement resulted in apprehensions declining in certain communities, some of the communities reported experiencing lower crime levels, civic and economic improvements and an improved quality of life” (Stana, 2001, p. 3).

“When apprehensions surged in communities in which the illegal alien traffic was reportedly pushed following successful implementation of the Southwest Border Strategy, officials and residences in one community reported experiencing loss of business, destruction of private property, and environmental degradation” Under INS,

border enforcement success was measured in high numbers of apprehensions and reduced remissions, followed by lower apprehension rates in the targeted areas during consistent times of the year.

The DHS IG found that the inability of CBP to coordinate detention and removal operations with ICE led to restrictions on apprehensions. How prevalent that issue remains may have a huge impact on how Border Patrol agents are able to complete apprehensions, thus possibly lowering apprehension figures.

The IG stated, “For deterrence to work, aliens considering illegal entry into the United States must fear the prospect of actual apprehension and removal” (Skinner, 2005, p. 4). The DHS IG noted that the knowledge that the Border Patrol could not detain an alien can lead directly to increased illegal entry of Mexicans and Other than Mexican (OTM) immigrants. Mexican aliens can be voluntarily repatriated after apprehension. OTM illegal aliens must be detained and processed for Expedited Removal. If DRO does not provide bed space and other detention requirements and assistance, Border Patrol apprehension efforts are directly affected (Skinner, 2005, p. 28–35). Border operations and agents maintain a positive face as enforcers when reports of possible illegal aliens are acted upon and when border ranch owners no longer fear for their safety and property due to a halt to illegal crossings on their land.

In addition to limited detention space, the OIG found that ERO is no longer performing support functions such as transporting apprehended aliens. The result of this has been that some Border Patrol Agents had to obtain commercial driver’s licenses to fulfill the duties of ERO agents, resulting in reduced Agent strength on the line and developing redundancy to ERO/ICE functions (Skinner, 2005, p. 38).

The challenge for review and analysis of the success of ICE and CBP structures based upon comparative review of the HSA is that these agencies were not mandated by the HSA, but created by presidential directive without further clarifying language as to how they should interact and their mission responsibilities.

**E. CONCLUSIONS REGARDING THE BORDER SECURITY AGENCY STRUCTURE AND SECURITY PROGRAMS**

The HSA was successful in breaking up the Immigration and Naturalization Service, long-suffering from mission contradiction of benefits and enforcement, a backlog of immigration benefits processing, and lack of resources to meet the mandates imposed upon it by Congress while under the Department of Justice

While the duality of the border roles of INS dissipated with the creation of USCIS, the split nature of CBP was multiplied. CBP has maintained the mission of detecting and preventing illegal entry and smuggling through the ports of entry, as well as the U.S. Customs functions of promoting free and legal trade through the Ports of Entry

The GAO released a report on March 30, 2011, with findings that despite reviews and multiple reports completed between 2007 and 2011, and improvements in many areas, weaknesses remain for border security both between the ports of entry and with inspection procedures at the ports of entry. Further, the report notes “significant gaps” in information and resource sharing within DHS for operations (Stana, 2011, p. i).

It seems clear that the division of supporting branches from the primary operational units and the mingling of dissimilar functions are not producing the level of security envisioned by the framers of the HSA, or the Hart-Rudman commission.

#### **IV. THE BORDER SECURITY AGENCIES ARE CONTINUING TO FACE CHALLENGES CREATED BY THEIR STRUCTURE**

The Hart-Rudman Commission recommended a streamlined border security agency with the stated intention that the affected agencies would be THE focus of leadership and funding. The HSA brought multiple entities into DHS, but provided a single security leadership point with a Border and Transportation Security Directorate Undersecretary. The reorganization of January 2003 collapsed that overarching border and transportation security focus, both fracturing the existing organizations and throwing disparate functions into new organizational structures. These challenges have resulted in the agencies' inability to provide reliable metrics to demonstrate the success of the work of their agents and programs.

##### **A. BORDER SECURITY STRUCTURE STRIVING TO MEET TWO GOALS**

The initial DHS OIG report which critically viewed the structure of border security agencies in a manner other than that mandated by the HSA was An Assessment of the Proposal to Merge Customs and Border Protection with Immigration and Customs Enforcement, OIG-06-04, (Skinner, 2005). That was followed by Detention and Removal of Illegal Aliens, U.S. Immigration and Customs Enforcement (ICE) (Skinner, 2006); and DHS' Progress in Addressing Coordination Challenges Between Customs and Border Protection and Immigration and Customs Enforcement (Skinner, 2007).

The structure of CBP has perpetuated the same need for a single agency to balance enforcement against benefits which INS faced for many years prior to DHS' creation. CBP must focus on border enforcements as well as other trade and tariff issues, unable to focus solely on border security. A primary example of this is the continuation of the revenue collection duties by CBP officers continuing the duties of the legacy Customs Service. A Letter of Agreement authorized in HSA § 412, Retention of Customs Revenue Functions by Secretary of the Treasury, now appears as 19 CFR Part 0: Transferred or Delegated Authority 0.1. The continuation of Customs collections duties, now combined with immigration law enforcement at the ports of entry, may be self-

defeating and diluting law enforcement. The Congressional Research Service noted, “CBP must manage the border in such a way that the institution of enhanced security measures does not unduly restrict or delay the processing of legitimate travel and trade” (Finklea, 2010, p. 34).

## **B. CONTINUED CO-MINGLING OF IMMIGRATION AND CUSTOMS INSPECTIONS**

On January 26, 2005, the Senate Committee on Homeland Security and Governmental Affairs, with the confirmation hearings of a new DHS Secretary pending, held its first ever hearing entitled “Department of Homeland Security: The Road Ahead” (Governmental Affairs, 2013). Several issues regarding DHS were addressed, including the structural problem of CBP and ICE separation. Senator Susan Collins termed it a “muddled division of responsibility between DHS and other agencies,” and multiple layers of bureaucracy within DHS. Senator Joseph Lieberman noted in his opening remarks that, three years after the passage of the HSA, “the absence of a well-designed strategy, a homeland security strategy, is one of the Department’s most significant shortcomings.” He added that, “We cannot tolerate a Department where lines of authority do not align with responsibilities.” During his testimony to the committee, DHS IG Richard Skinner outlined continuing problems his office found within DHS, including visa security and use of stolen passports to enter the U.S.

Dr. James Jay Carafano of the Heritage Foundation testified in the hearing and reiterated the Foundation’s previous recommendation that ICE and CBP should be merged. Findings of a team from the CSIS and the Heritage Foundation contained about 40 recommendations, that the border enforcement agencies within DHS should be merged. Carafano asked the committee, referring to a separate CBP and ICE, “...what you are intentionally doing is creating opportunities for disconnects and gaps between investigative operations and ongoing operations in one and the other. And why are you creating a need for coordination when you do not need one?”



During a hearing by the House Subcommittee on Management, Integration and Oversight of the Committee on Homeland Security on March 9, 2005, Congressman Mike Rogers opened the hearing stating the purpose was to discuss whether or not the separation of CBP and ICE had created “more operational, administrative, and budgetary problems that negatively impact the Homeland Security missions of these agencies” (Subcommittee on Management, 2005). All of the witnesses questioned the structure, questioning why ICE and CBP had been split initially. The concerns focused on the disparate roles of Customs and Immigration laws being enforced within the same agency, which is ongoing today.

### **C. ATTEMPTS AT UNIFYING THE BORDER SECURITY APPARATUS**

#### **1. The One Face at the Border (OFAB) Initiative—2003**

Efforts were made early in DHS’ history to create a structure to develop synergy and a unified border security structure. The most notable example is the One Face at the Border (OFAB) initiative, launched in September 2003 under DHS Secretary Tom Ridge. This plan was designed to eliminate both the visible and the unseen cultural differences between immigration and customs inspectors at the ports of entry. Deborah Waller Meyers, Senior Policy Analyst at the Migration Policy Institute, undertook an in-depth study of the OFAB initiative in 2005 as a result of a “fruitless search for information and analysis about the merger of the border agencies to date...” and as a follow up to her earlier research at the U.S. borders (Meyers, 2005, p. 2). Ms. Meyers’ research questions were succinct: “Has the merger been a success? Have the previously separate functions truly merged? What have been the advantages and disadvantages of the attempted integration to date? What obstacles need to be overcome to more fully achieve stated goals?” This study was released four months before DHS OIG-06-04. The Meyers report began with a more optimistic view of the single inspection agency than the opinions released later that year by the DHS OIG, and the state of the agency in the years to come.

The advantages of merging the inspections units appeared at that time to be many, according to Meyers. They included a single point of contact to travelers, seemingly reducing redundancy of efforts, ensuring all ports were operating under the same threat level guidelines, and the promise of single policies in areas such as use of force, firearms, canines, and personal searches. The writer appeared initially to have embraced the promise of a single staffing pool at the ports of entry to enhance operating hours, equalizing pay between the inspection units and cross training that, even if not completed, “has given legacy employees a window into the world of those who used to be in other agencies and thus more respect for the complexity of the work, the mission, and the necessary knowledge base” (Meyers, 2005, p. 11–13). The author fails to explain how, since these inspectors had, in many cases, been working side by side for years at the ports of entry while members of their legacy agencies, they were unaware of the differences of the intricacies of the codes of law each was enforcing, or how they suddenly developed a new knowledge or new-found respect for each other without cross-training.

There is a history of suggestions that immigration and customs inspections could be co-mingled, all of which were dismissed and not implemented. J. William Gadsby had testified to the House of Representatives on December 10, 1993; his testimony was released as GAO/T-GGD-94-34, *Border Management: Dual Management Structure at Entry Ports Should End*. The testimony alluded to multiple efforts to merge the Border Patrol, Immigration Inspections, and Customs Inspections dating into the late 1970s, all with the same negative result. Gadsby persisted in his recommendation to join the inspectors as a move toward the future, noting, “Over the past 20 years, numerous study groups have recommended specific actions to overcome findings of fragmented border control programs and interagency rivalries, conflicts and jurisdictional disputes” (Gadsby, 1993, p. 3). The reasoning for the lack of success of the inspection co-mingling notion was clarified by former INS Chief Counsel David Martin. In Martin’s legal analyses of DHS published in 2003, also by the Migration Policy Institute, he pointed out that, “the reorganization seems premised on the notion that the process involved, or the generic type of job (inspection), is more important than the substance of the laws that are

being applied. But,” he continued, “is the inspection of persons, for example, really so similar to the inspection of goods or plants or animals” (Martin, 2003, p. 8).

Meyers conceded several weaknesses in the OFAB based upon her interviews with CBP officers. Her research revealed there are duty shifts at ports of entry in which no inspector with immigration expertise was on duty, during which “wrongful returns to other countries, mistakes on I-94 (Arrival/Departure Record) entry forms, (and) unnecessary detentions (Martin, 2003, p. 16) took place.” There was also a prevalent feeling reported by CBP officers, that “CBP headquarters has failed to use and does not seem to value the expertise of employees from the legacy agencies and does not really understand the jobs in the field.” This was evidenced by respondents noting that “four out of twenty-one Field Operations Offices nationwide are headed by legacy INS employees, reflecting perceptions of the limited value placed on immigration expertise and the inequity in promotion opportunities” (Martin, 2003, p. 17). These observations have led to CBP employees feeling that “the face of CBP is basically a “customs” face.

The writer identified three reasons for concern with the OFAB and CBP initiatives. First, the new CBP patch and uniform change further enhanced the view among employees interviewed that OFAB was largely symbolic, or a customs agency-only change. The second concern is that INS presence in the new agency was “further diluted” by attorneys from INS general counsel and other support employees with immigration backgrounds in other offices throughout DHS agencies, not within CBP. Finally, those interviewed noted that “new expertise is not being developed” and that “new integrated training (of CBP officers) is creating generalists who lack the specialized knowledge or expertise necessary to engage in even one, much less all three, of the legacy missions” (Martin, 2003, p. 18–19). Similar observations are found throughout the 54-page report, and are enhanced by subsequent GAO and IG findings. The lack of specialization of inspections training is not simply a matter of administrative concern, and no “...inspector should conduct an expedited removal interview, where the stakes are potentially high (for the immigrant), without specialized training and significant experience applying the immigration laws” (Martin, 2003, p. 9).

Appreciative Inquiry presumes that any organization already has the capacity to cooperate among its existing structure and members and can learn from its own past if the organization has any history. The problem Barnett and Fry find most often is that “the ‘learn from it’ idea has been almost ignored for the sake of “moving on” and that most change is only a rehashing of the status quo (Barrett & Fry, 2005, p. 53–54). Perhaps that is what occurred when the HSA was drafted and later, when CBP and ICE were created. The appearance is that the USCS felt that INS support personnel and immigration attorneys had little or nothing to offer the new organization, so no structure was created to accommodate those positions. Similarly, it appears that INS leadership and specialized immigration law training are not considered valuable assets, with only 4 of 21 Field Office Director positions filled by INS leadership in the new agency.

## **2. Training of CBP Officers**

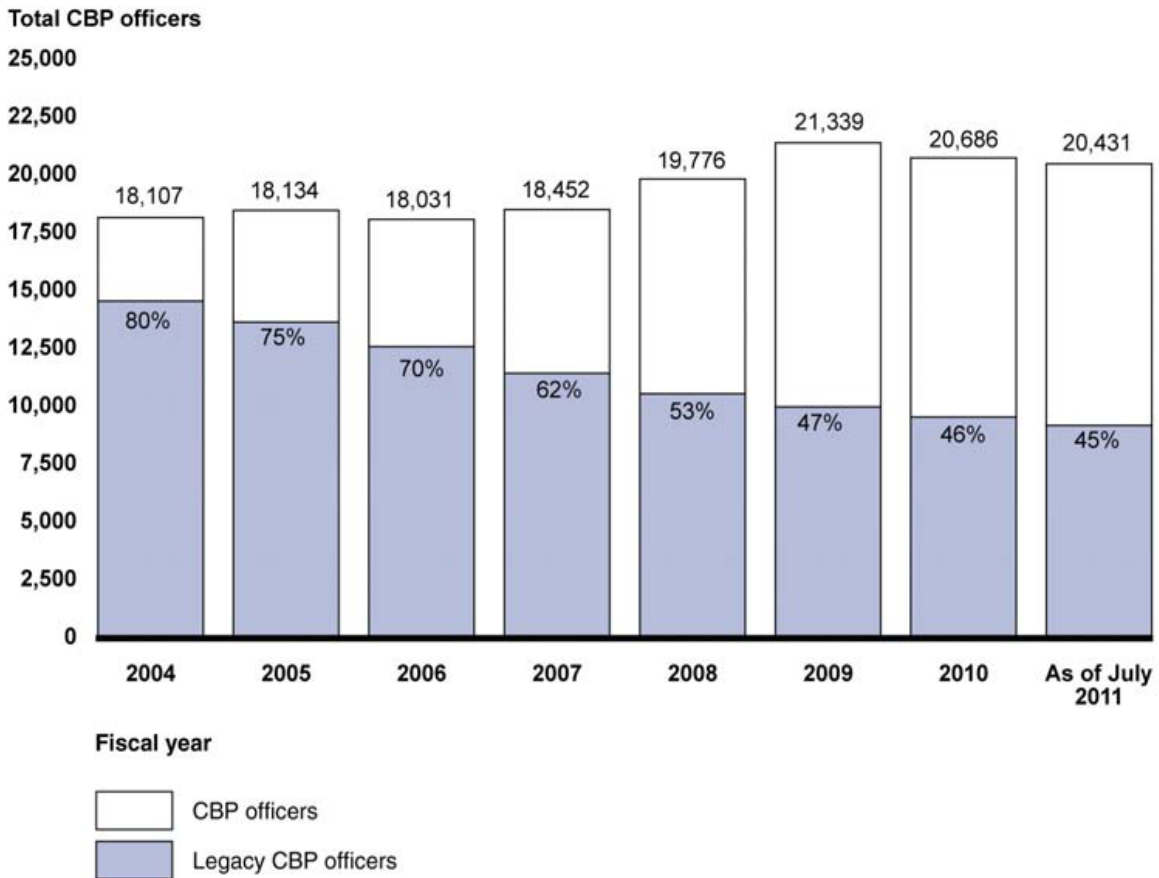
In her review of the OFAB, Meyers noted the concerns expressed by the CBP officers, with whom she spoke of the force being comprised of “generalists.” The promise of OFAB appears not to have been realized, while concerns expressed by the CBP officers regarding only a general knowledge of the laws they are charged with enforcing appear to be very real.

In 1997, GAO reported, in a letter to Senator Dianne Feinstein, that U.S. Customs Inspectors underwent some initial on the job training, with newly hired inspectors sent to the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia, “as soon as possible after being hired” (U.S. General Accounting Office, 1997, p. 7). Once at FLETC, the Inspectors underwent an 11-week course in “the basic knowledge and practice necessary to enforce all of Customs’ responsibilities (ibid)” including training in Customs law, firearms, and physical training, as well as drug interdiction. Following the FLETC training, Customs Inspectors received “Southern Border Interdiction Training” in the field, which included additional six days of training in “cargo concealment and examination techniques; technology training in using x-ray and fiber-optic scopes to

search gas tanks and other enclosed spaces; and hands-on training with actual cargo at the Columbia Bridge cargo facility in Laredo, Texas” (U.S. General Accounting Office, 1997).

An inspection report by the Department of Justice OIG of March 1998 showed that Immigration Inspectors received 15 weeks of training in five modules including Module I, Immigration Law; Module II, operational specific training for inspections operations; Module III, law enforcement to include firearms, arrest techniques, constitutional law and drivers training; and Module IV, Spanish language training (Bromwich, 1998, p. 5–6).

The CBP officers discussing training with Meyers in 2005 were both legacy USCS and INS immigration inspectors, as well as newly-hired CBP officers. In 2003, CBP created a “multiyear cross-training program (Stana, 2011, p. 10) designed to ensure that the legacy officers could perform both immigration and customs inspections, as well as have a rudimentary knowledge to allow them to forward agricultural products for expert inspection by an agricultural inspector as necessary. It is interesting to note that while customs and immigration inspectors are apparently considered to be interchangeable, a certain level of expertise is acknowledged by agricultural inspectors under the Department of Agriculture. The initial CBP officer training implemented in 2004 included a composite course totaling 15 weeks to cover the training required for both customs and immigration disciplines and law enforcement. The mandatory update review of curriculum was completed in 2009, which resulted in an increased academy training program from 15 to 18 weeks being launched in 2011, joined with a 4-week pre-academy on the job training program and a 34-week post academy on the job probationary period/post academy training cycle. These changes may address the concerns somewhat of generalists. The initial courses begun in 2004 trained CBP officers to complete 75 critical tasks, while the 2009 analysis determined that there are a total of 138 critical tasks for which CBP officers must receive training. No mention was made of legacy immigration inspectors and agricultural inspectors’ training completion. These figures are noteworthy for border security in that the CBP inspections workforce was comprised of 45 percent legacy officers as of July 2011 (see Figure 3).



Source: CBP data.

Figure 3. Percentage of Legacy Officers in the Workforce, Fiscal Year 2004 to July 16, 2011 (from GAO, 2011)

More importantly, it appears, that the gap in training standards has resulted in three workforce levels of expertise, made more problematic because, as GAO reports, “...more than 4,000 (legacy) customs officers have not completed the immigration fundamentals, immigration law, and agricultural fundamentals courses,” nor has CBP completed, nor does it intend to complete an evaluation of the effectiveness of the training for those who have completed the courses (Stana, 2011). Additionally, the CBP officers trained between 2004 and 2011 do not possess the expertise of the legacy officers in the fields of immigration or customs, nor the additional training of those entering training since 2011, and “...CBP has not conducted an analysis of possible skill gaps that may exist between identified critical skills all incumbent officers should possess and incumbent officers’ current skills” (Stana, 2011, p. 16). This can have significant

implications for border security if inspectors are not uniformly and correctly trained in fraudulent document identification or ensuring standards for admissibility to the United States have been met.

The GAO issued an update on CBP training on August 28, 2013. GAO reported finding improvements in the plans developed by CBP for training of all inspecting officers.

### **3. The Second Stage Review—2005**

On March 12, 2005, prior to his assuming leadership of DHS, Secretary-designate Chertoff advised Congress that he would launch a Second Stage Review (2SR) of DHS. The results of the review were released in a speech and via DHS news release on July 13, 2005; no written report on the 2SR process and reforms was issued (Relyea and Hogue, 2005, p. 1). The highly-anticipated results of the review revealed Secretary Chertoff's intention to make no substantive structural changes to DHS operational units. The plans were condensed in six points:

- Increase overall preparedness particularly for catastrophic events
- Create better systems to move people and goods more securely
- Strengthen border security and reforming immigration processes
- Enhance information sharing with out partners, particularly with state, local, tribal and private sector leadership
- Improve financial, human resource, procurement and information technology management systems, and
- Realign the DHS organization to maximize mission performance (Chertoff, Homeland Security Secretary Michael Chertoff Announces Six-Point Agenda for Department of Homeland Security, 2005)

While a realignment of the DHS organization was listed in the review results, the organizational realignment was limited to the DHS headquarters offices. The end result, intended or not, was the creation of a central policy office at the expense of elimination of the single remaining point of operational synergy for border security within the department, the Operational Integration Staff (OIS).

The OIS was created by Secretary Ridge, perhaps to fill the void created by the reorganization which nullified the role of the BTS Directorate. The OIS was dissolved through 2006 Congressional appropriations language which stated, “*Operational Integration Staff*”- The Committee does not recommend direct funding for the Operational Integration staff, as proposed in the budget. The Committee expects the new Office of Policy, Planning, and International Affairs to perform integration and coordination functions” (United States Senate, 2005, p. 9). This appropriations decision was reached after Secretary Chertoff announced creation of a new Office of Policy, Planning and International Affairs which, he said, “will work with component leadership and other federal partners to translate intelligence and policy into actions - and to ensure that those actions are joint, well-coordinated and executed in a timely fashion” (DHS Office of the Press Secretary, 2005). Additionally, the last FTE positions in the BTS were transferred to the Office of Policy with the presumption that the BTS missions would continue in the new Policy Office.

The primary difference between the newly-created DHS policy office and the original BTS Directorate is that BTS was created to focus on border and transportation security issues. The new secretary placed all DHS operations, including border and transportation security, under a single DHS operational authority with no specific area focus for coordinating border and transportation security below the secretary’s office. Despite Congressional interest in the DHS operational structure, including the merger of ICE and CBP, it was not discussed in the 2SR plan.

On July 14, 2005, Democrats of the Homeland Security Committee issued a report critiquing 2SR entitled, “Protecting America Against Terrorists: The Case for a Comprehensive Reorganization of the Department of Homeland Security.” Ranking member Bennie G. Thompson was joined by Congressmen Zoe Lofgren, and 11 others (Thompson, 2005). The comments were not ascribed to specific members. The members were critical of the 2SR stating that the changes were “... not comprehensive” (Thompson, 2005, p. 1). The report commented upon what it called “...some glaring omissions in the 2SR” (Thompson, 2005, p. 2). The committee also expressed concern that the “flatter” organizational structure to which the Secretary referred in his changes



could lead to political staff in the Secretary's office having too much control over daily operation of law enforcement and screening agencies, such as ICE and CBP (Thompson, 2005, 7). In addition to concerns about TSA operations, the committee report said, "The Secretary's refusal to merge Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), is a mistake" (Thompson, 2005, p. 9). The report echoed the comments of previous reviews, that the "separation of these two agencies has caused numerous problems with border security and investigations," (Thompson, 2005, p. 9), and states that merging the two will "bring together under one roof all of the tools of effective border and immigration enforcement" (Thompson, 2005, p. 9). The Congressional Research Service released a review of 2SR on August 19, 2005, noting the focus on "organizational and managerial lines of authority matters" as related in the 2SR, with no mention of operational changes or improvements (Hogue, 2005).

In his testimony before the Committee on Government Reform Subcommittee on National Security, Emerging Threats, and International Relations, DHS IG Richard Skinner addressed the members regarding the DHS OIG report recommending merging CBP and ICE, OIG-06-04, which had been released in November 2005 (Skinner, 2006). Skinner referred to the 2SR saying, "and while much of the focus has been on the Department's decision not to consolidate the two organizations (ICE and CBP) following the Secretary's 2SR, in our opinion the real focus of management and those overseeing those programs should be on resolving the underlying issues hampering the effectiveness of both CBP and ICE." Skinner's testimony reiterated many of the concerns expressed in the OIG report of 2005. The CRS follow-up report to its August 2005 review of the 2SR, released on September 22, 2006, focused on the implementation of the managerial positions created in the 2SR, with no further analysis of operational concerns of border security structure. There has been no change to the border security agencies' organizational structure since the 2SR was completed.

The appearance of crossed lines of roles and responsibilities may be abetted with somewhat misleading releases of information regarding the security structure. For instance, a CRS report of January 25, 2007, focused on two immigration enforcement organizations, CBP and ICE, and immigration benefits administrators USCIS (Wasem,

2007). This report was prepared as Congress was weighing immigration reform. The report misstated the mandate of the HSA, stating that U.S. Customs Service was to remain intact (Wasem, 2007, p. 7). The U.S. Customs Services was, in fact, transferred to DHS under the original HSA; however, all non-enforcement functions of USCS were directed to remain with the U.S. Treasury Department. USCS and INS were directed, under the HSA to be disassembled between enforcement and non-enforcement functions and a new, border security/enforcement agency was directed by the HSA. Seemingly minor errors in reporting to Congress of this type may have a multiplying detrimental effect on policy as staffs change and those reviewing the structure may not have the time to conduct more in-depth research to understand the organization "...at its premise."

#### **D. BORDER SECURITY EFFORTS THAT COULD SHOW MEASUREABLE SUCCESS**

On September 11, 2011, to coincide with the 10th anniversary of the New York City and Pentagon attacks, GAO released a compendium report, Department of Homeland Security, Progress Made and Work Remaining in Implementing Homeland Security Missions 10 Years after 9/11 (Berrick, 2011), GAO-11-881. In the Highlights section of the report, the GAO reported completion of more than 1,000 products reviewing DHS operations since 2003, making more than 1,500 recommendations, about half of which have been addressed, with work continuing on others (Berrick, 2011, i). GAO credited the border security agencies with a number of key achievements, including implementation of US-VISIT and Visa Security; expanded inspection of travelers and cargo as ports of entry; expanded security efforts between the ports of entry; and expansion in immigration and customs enforcement programs (Berrick, 2011, p. 1–15).

The entrances of visitors to the United States are captured through US-VISIT program. The portion of that system capturing the records of those who have not exited the United States when required and feeds that information to agencies automatically has not been completed. Records must be, "...electronically and manually compare(ed with) Arrival and Departure Information System records" (Gambler, 2013, p. 17). Those records would provide quick identification of overstays remaining in the United States after their authorized visitor status has ended.

The Secure Border Initiative, known familiarly as SBINet, was designed to provide expanded security on the borders between the ports of entry. SBInet was cancelled in January 2011 after billions of dollars were spent without system completion. SBInet was replaced with the Arizona Border Surveillance Technology Plan (The Plan) for the Arizona border. GAO reports similar findings of management of The Plan. GAO has testified that CBP “did not document the analysis justifying the specific types, quantities, and deployment locations of border surveillance technologies (Gambler, 2013, p. 17). The effectiveness of The Plan can not be fully assessed, according to the GAO. The state of these programs may be directly related to the structure of DHS relating to border security, with multiple task focuses.

The Department’s holistic nature may be leading to a lack of oversight when a smaller border security agency or directorate could devote full resources and leadership attention to these issues and programs. Part of this may be due to the HSA itself in its mandates to developing technological applications to as many areas as possible of the border security enterprise without a review and determination of how technological assets should be applied. The Appreciative Inquiry writers warn that “When we face large challenges, we passively wait for some expert to provide a technical solution...The unintended consequence of such faith in technological advances is the surrender of our own imagination, or own collective ability to fashion a creative solution” (Barrett & Fry, 2005, p. 47).

There is evidence of the Border Patrol’s continuing success along the Southwest Border. For instance, a 2011 report by the United Nations on transnational crime concluded that smuggling immigrants has become more lucrative. This is most likely a result of more successful border security. In southern Mexico, long before reaching the Mexican/American border, x-ray machines are finding illegal immigrants packed tightly together sitting and standing upright to be transported in 18-wheelers to the United States. The U.N. reports that smuggling immigrants into the U.S. across the Mexico border is now a \$6.6B business annually, while illegal drug running is a \$10B to \$29B annual business, by comparison. This estimate does not include an additional \$1B paid by non-Mexicans to cross from Guatemala. “There are more and more people coming from all

other regions of the world using the Central American and Mexican corridor to reach the North American market,” according to Antonio Mazzitelli of the regional U.N. Office on Drugs and Crime (Corcoran, 2011). Mazzitelli noted that while the majority of the immigrants are Guatemalan, there were also immigrants from India, Nepal, and China. According to the U.N. report, 95 percent of Mexicans crossing into the U.S. illegally are using smugglers to assist their entry. The U.N. report estimates that the migrants are paying from \$7,000 to \$30,000 for smuggled passage, depending upon where they started their travels.

## **E. THE FUTURE OF BORDER SECURITY UNDER CURRENT DISCUSSION**

### **1. The Secure Border Act of 2011**

Various pieces of legislation, appropriations, and directives have greatly altered the HSA since its passage. The Secure Border Act of 2011 (SBA 11), however, was reported as “The Senate Homeland Security and Governmental Affairs Committee’s ... first-ever DHS authorization bill to eliminate and consolidate some DHS offices and improve management functions for everything from acquisition and technology to human resources” (Miller, 2011). In an interview with Federal News Radio, Senator Lieberman said, “We’re basically going back and looking at how this department has functioned since it began eight years ago. Some of the offices authorized then never really materialized, or we have concluded that they don’t do enough that is worth their existence...” Senator Collins noted more than 70 hearings on DHS since its inception formed the basis of the new bill.

Concern regarding a security strategy and the metrics in use for the evaluation of Homeland Security efforts have risen to the level that the House unanimously passed H.R.1299, the Secure Border Act of 2011 (SBA 11), on May 30, 2012. SBA 11 was introduced on March 31, 2011, and requires DHS to submit “a comprehensive strategy for gaining, within five years, operational control of the international borders between the ports of entry of the United States” (H.R 1299, 2012), within 180 days after passage.

Operational Control in SBA 11 is specified to use the same definition as found in the Secure Fence Act of 2006 (8 U.S.C. §1701 Note):

(b) Operational Control Defined—In this section, the term 'operational control' means the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband.

In addition, SBA 11 requires DHS to develop metrics to “measure the effectiveness of security at ports of entry” within 180 days. It also orders the Department of Energy National Laboratory to evaluate the measurement system that will be used, ensure its suitability and validity. The bill was amended to include the requirement that DHS follow the recommendations found in GAO-11-97, Enhanced DHS Oversight and Assessment of Interagency Coordination Is Needed for the Northern Border.

## **2. Border Security Metrics Related to Comprehensive Immigration Reform**

One of the key aspects of implementation of S.744 and H.R.15, considering comprehensive immigration reform, is demonstrable security of our borders. Multiple reports contend that the current structure of the border agencies make creating those metrics impossible.

GAO has completed multiple reports with repeated findings that DHS has not demonstrated control of the borders. In March 2013, GAO testified to the Senate Committee on Homeland Security and Governmental Affairs that there are differences between Border Patrol reports of activity sector to sector (Gambler 2013, p. 6). The situation is worsened because “agency officials do not compare these numbers with the amount of cross-border illegal activity (under the purview of ICE)” (Gambler, 2013, p. 7).

The Council on Foreign Relations explained the problem simply in its May 2013 report, Managing Illegal Immigration to the United States. Any immigrant attempting to enter the U.S. between the ports of entry is by definition, entering illegally, and under the purview of the Border Patrol. Those who attempt illegal entry at sea or on the coasts

would fall under the purview of the USCG. When someone enters the U.S. legally but violates the conditions of their visa, that would fall under the purview of ICE. The report notes that “all of these organizations collect data through their own information systems,” “and report selected data on their activities independently of each other” (Roberts, 2013, p. 18). This report studied various means of collecting reliable data on border security and found that DHS is not able employing any of these methods due to the differences in the agencies.

### **3. Conclusions**

Multiple attempts have been made to “fix” the border security apparatus created by the 2003 reorganization with what could be termed no more than band-aids. Secretary Ridge attempted to replace the lost synergy point of the BTS Directorate, in an effort quickly undone by his successor and Congressional appropriation. Secretary Ridge also created the One Face at the Border Initiative in an attempt to portray a unified border inspection service at the ports of entry. However, badges, patches, and uniform changes could not cover the loss of specialized training and limited implementation of the knowledge and skills of those employees with immigration expertise, both inspectors and legacy INS counsel, within the new Customs-led service.

## V. CONCLUSIONS AND RECOMMENDATIONS

Congress has directed numerous investigations and conducted multiple hearings aimed at identifying problems with the current border security structure. Regardless of the findings, there has never been Congressional follow up to either enforce implementation of the Homeland Security Act (HSA) or replace the structure created by President Bush's 2003 reorganization. The HSA itself has not been altered regarding border security except through budgetary allocation. The recommendations of the IG, the GAO, and reviewers from immigration policy organizations to congressional committees illustrate that a fully integrated border security agency should be implemented. Yet the border security functions continue to be in place with competing leadership chains, priorities, and budgets. This problematic consolidation of dissimilar functions has added to the inability for the Department to provide the consistent and reliable metrics illustrating border security upon which comprehensive immigration review benefits are intended to rest. The time is now to construct a new way of fully embracing the original designs of the HSA.

The continuing issues faced by the border security agencies, as identified by the GAO, the DHS OIG, and other reviewers are those which were predicted, in part, by groups that reviewed the Homeland Security Act and the proposed agency structure and inclusion while the legislation was pending. It is time to review and renew the border security aspects of the HSA with a greater sense of urgency and commitment. With ten years of experience and numerous recommendations developed over that time, a new effort is needed to improve on the persistent challenges facing border security efforts.

After the first decade of DHS' existence, it is most responsible to ask if the border security model initially prescribed by Congress and codified in the HSA under an overarching border security directorate, or one more similar to that recommended by the Hart-Rudman Commission, should be implemented. The path forward begins with a full recognition of the strengths of the agencies with a nexus to border security within the executive branch could be more fully identified and maximized to create the border security enterprise envisioned by Congress.

**Recommendation—Align border and transportation security agencies into a separate border security agency outside of DHS**

A blueprint for a single border and transportation security agency includes disassembly of the existing CBP and ICE, placement of all components into a border and transportation security directorate comprised of the U.S. Border Patrol, customs inspectors, enforcement investigations, detention and removal operations support, border security intelligence, air and marine operations, the U.S. Coast Guard, and the Transportation Security Administration. For some analysts, the latter may be a step too far. However, the HSA mandated the sunset of the TSA as a stand-alone agency in 2005. Like so many other neglected Congressional mandates, this provision has never been enacted and TSA remains a separate agency. As noted by the DHS OIG in 2005, if reconstituting of the border security agencies is to be undertaken, it should begin as soon as possible, before all legacy civilian employees of the affected agencies have retired, to assist in the transition envisioned in 2002 and continue the relationships that remain. As of 2012, GAO research shows that 45 percent of the CBP work force are legacy agency employees. Reconciling the border and transportation security structure to the mandate of the HSA could gather the collective branches of those agencies toward a stated and manageable common agency goal.

Full development of a border security agency would require additional steps, including removal of trade management and tariff collection functions and other non-enforcement branches still located within CBP. These functions should be returned to the Department of Treasury as directed in Section 412 of the original HSA, minus the collection authority delegation currently in place in 19 CFR.

Of course, some aspects of the HSA should be reevaluated before implementation - particularly those referring to employment of technology at every turn possible. Under the HSA, all efforts to safeguard our nation - prevent terrorist attacks; prevent the entry of illegal immigrants and weapons of mass destruction into the United States; ensure safety in our ports and skies; and the gathering and sharing of meaningful intelligence—rely upon the best technological aids available. According to recent experience, the department appears to be falling short in technological solution development related to



border security. The highly covered SBINet failure is one costly example of how policy direction in the HSA mandates action without problem definition and risk assessment. This can be viewed as failure of development, failure of resource allocation for development, or failure of oversight of technological programs under development, all while seemingly meeting a HSA mandate.

For instance, a key difference between the National Border Patrol Strategy (NS), undertaken in 2005 under CBP (Haddal, 2010), and the Southwest Border Strategy (SWBS), implemented under INS in 1994, is the NS's increased effort to primarily employ enhanced technological devices and systems to cover the border and interdict illegal aliens, weapons of mass destruction, illegal narcotics and other contraband, rather than using the SWBS formula of employing technology in support of traditional manpower. The metrics delivered to Congress during implementation of the SWBS were reviewed annually by the GAO and found acceptable, while the results of more recent and current efforts are not as well received, and in some cases, nearly dismissed (Gambler, 2013). The excessive focus on technology in the new strategy developed in the 2000s actually reverses gains made earlier in developing key metrics to guide border security performance. The GAO noted the positive results of the SWBS, as confirmed by the Sandia National Laboratory, in December 1994 due to demonstrable physical changes to the border and reductions in apprehensions in selected portions of the border (Ekstrand, 1994). In 2013, however, GAO testified to Congress that numbers of apprehensions and other indicators of border control vary between Border Patrol Sectors, and the numbers being reported by the Border Patrol and CBP.

Another possible area for reconsideration is the Visa Security Program. As discussed, this may be a mandate which is redundant to other safeguards and practices already in place and draining valuable resources. The success of this program cannot be demonstrated.

As discussed in Chapter III, a clearly-defined border security-focused structure could provide more meaningful guidance for training, duty, and deployment scheduling and enable rapid contingency response for Title X and Title 32 forces, components of a

complete border security mandate in the HSA. Assets of various states' National Guard units, as well as Active Duty military members, have been deployed to the southwest border in support of the Border Patrol since the 1980s (Mason, 2010, p. 1).

The SWBS serves again as an example of past practice of the elements of border security enterprise working in concert successfully. The SWBS was a four-phased approach of operations closing the border in a funnel-like approach, moving immigrants gradually to a centralized portion of the desert border, the most inhospitable, with the aim of reducing the attempts to cross the border through Hold The Line (El Paso Sector), Operations Gatekeeper (San Diego Sector) and Safeguard (Tucson Sector), Operation Rio Grande (Rio Grande Valley, Texas, including the Rio Grande, McAllen and Laredo Sectors) and in 1998, expanding Gatekeeper to the El Centro Sector. In the GAO report of 2001, it was noted that the effects of the regional focus of enforcement and interdiction at the border between the ports of entry was being felt by communities on the border. Once illegal alien traffic was deterred from a given area, those towns reported decreases in crime and improved quality of life (Stana, 2001, p. 3). It is most important to note in this discussion that the success under the SWBS was attained when the legacy immigration enforcement functions, which are now dispersed between CBP and ICE, were working in a synchronized operational organization environment. CBP continues to rely upon joint assets such as the El Paso Intelligence Center, a Department of Justice asset, the use of which predates DHS, to the time when the Border Patrol was part of DOJ.

Developing a border and transportation security directorate would also reflect the strategy defined in the Quadrennial Homeland Security Review (QHSR) of 2010. Further tailoring of the Executive Branch of the government along the outline provided by the QHSR could allow a border security agency to be created with full attention to border security issues. The QHSR is extremely comprehensive in its detail and identification of the Homeland Security enterprise as a holistic responsibility of all departments within the executive branch and provides guidance for President Obama to refocus total governmental efforts toward security.

9/11 was the event that spurred Congress and President Bush to create the Office of Homeland Security to ensure that impetus for security would be the focus of all departments. Had a comprehensive, analytical document similar to the QHSR been completed in 2002, prior to the development and passage of the Homeland Security Act, perhaps the legislation and the Department would have been more narrowly-defined in its creation. As the Brookings Institution stated in its pre-HSA passage review, legislation usually implements a strategy, not vice versa. Earlier development of the QHSR and implementation of the recommendations therein anytime in the past ten years may have resulted in a revised DHS mandate focusing more narrowly on border security areas with other departments in the Executive Branch focusing on their areas of expertise and missions, all to create homeland security.

As disparate organizational goals, assignments, and budgets proliferate and deepen, and comprehensive immigration reform continues to be an active debate, this is an opportune time to confront the fact that our border security efforts may not be succeeding as well operationally as desired. The weight of evidence and opinion from the IG, multiple immigration and border security experts argues that the time has come again to implement the vision of the HSA and construct an effective and efficient, fully integrated border security agency.

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