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## Department of Homeland Security Reorganization: The 2SR Initiative



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# Department of Homeland Security Reorganization: The 2SR Initiative

## Summary

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

In one of his first actions as Secretary of Homeland Security Tom Ridge's successor, Michael Chertoff, on March 2, 2005, the day before he was sworn in as Secretary, announced in testimony before the House Appropriations Subcommittee on Homeland Security that he was "initiating a comprehensive review of the Department's organization, operations, and policies." This effort, he said, would begin "within days." The results of that undertaking, which came to be known as the Second Stage Review or 2SR, were made public in mid-July. As Secretary Chertoff explained, 2SR involved the evaluation of a variety of operational and policy issues, and among those was "the DHS organizational structure, to make sure that our organization is best aligned to support our mission." However, no report on the 2SR process and reforms was issued. This report focuses primarily on the conclusions and proposals resulting from 2SR pertaining to organization and managerial lines of authority matters. Initial issues concern the means for realizing the proposed 2SR reorganization; the efficiencies and effectiveness that will result with the proposed flatter, but more sprawling, restructuring; and how new leadership positions will be established, filled, compensated, and situated in the DHS hierarchy. This report will be updated as events warrant.

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

## Background

DHS was mandated by the Homeland Security Act of 2002.<sup>2</sup> The creation of DHS resulted in a reorganization of the executive branch on a scale not experienced since the establishment of the Department of Defense (DOD) half a century earlier.<sup>3</sup> Originally denominated the National Military Establishment at birth in 1947, DOD was given its current name and underwent the first of what would be a series of structural modifications through statutory amendments in 1949.<sup>4</sup> A similarly complex organization, DHS was the product of legislative compromises, and it was anticipated that congressional overseers, as well as department officials, would monitor the management and operations of DHS with a view to adjusting its structure as conditions warranted. In this regard, Section 872 of the Homeland Security Act

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

<sup>2</sup> 116 Stat. 2135; 6 U.S.C. § 101 et seq.; see Harold C. Relyea, “Organizing for Homeland Security,” *Presidential Studies Quarterly*, vol. 33, Sept. 2003, pp. 602-624.

<sup>3</sup> See 61 Stat. 495 at 499.

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

authorizes the Secretary of Homeland Security to reorganize functions and organizational units within DHS, subject to specified limits.<sup>5</sup> Secretary Chertoff would make initial use of this authority to implement some of his 2SR plans. For a period of 12 months after the effective date of the Homeland Security Act, Section 1502 vested the President with temporary authority to prescribe a reorganization plan for DHS, and subsequent modifications of that plan. In late January 2003, as components of DHS were being transferred to the department's operational control, President George W. Bush modified his original reorganization plan for DHS to reconfigure the functions of certain border security agencies into two new components — the Bureau of Customs and Border Protection and the Bureau of Immigration and Customs Enforcement — within the department's Border and Transportation Security Directorate (BTS).<sup>6</sup>

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

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

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<sup>5</sup> 116 Stat. 2243; 6 U.S.C. § 452.

<sup>6</sup> See *Weekly Compilation of Presidential Documents*, vol. 39, Feb. 3, 2003, p. 136; U.S. Department of Homeland Security, "Border Reorganization Remarks by Secretary Ridge," Port of Miami, Miami, FL (Jan. 30, 2003), available at [<http://www.dhs.gov/dhspublic/display?theme=44&content=419&print=true>]; U.S. Department of Homeland Security, "DHS Announces Border Security Reorganization," Washington, DC (undated), available at [<http://www.dhs.gov/dhspublic/display?theme=44&content=422&print=true>]; U.S. Department of Homeland Security, "Border Reorganization Fact Sheet," Washington, DC (Jan. 30, 2003), available at [<http://www.dhs.gov/dhspublic/display?theme=43&content=4236&print=true>].

<sup>7</sup> U.S. Department of Homeland Security, "Statement by Secretary of Homeland Security Michael Chertoff before the House Appropriations Homeland Security Subcommittee," Washington, DC (Mar. 2, 2005), available at [<http://www.dhs.gov/dhspublic/display?theme=45&content=4381&print=true>]; Chris Strohm, "New DHS Secretary Launches Total (continued...)"

## The 2SR Initiative

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

1. Increase preparedness, with particular focus on catastrophic events.
2. Strengthen border security and interior enforcement and reform immigration processes.
3. Harden transportation security without sacrificing mobility.
4. Enhance information sharing with our partners, particularly with state, local and tribal governments and the private sector.
5. Improve DHS stewardship, particularly with stronger financial, human resource, procurement and information technology management.
6. Re-align the DHS organization to maximize mission performance.

“In the weeks and months to come,” said the Secretary, “the Department will launch specific policy initiatives in a number of key areas” relative to the six-point agenda.<sup>8</sup>

## Reorganization Proposals

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

**Policy.** Secretary Chertoff “proposed creation of a central policy office led by an Under Secretary for Policy,” which “will bring together our international affairs

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<sup>7</sup> (...continued)

Review of Operations,” *GovExec.com Daily Briefing*, Mar. 2, 2003, available at [<http://www.Govexec.com/dailyfed/0305/030205c1.htm>].

<sup>8</sup> U.S. Department of Homeland Security, “Secretary Michael Chertoff, U.S. Department of Homeland Security Second Stage Review Remarks,” pp. 2-3.

<sup>9</sup> *Ibid.*, p. 6.

staff, a significant and new strategic planning capability, DHS-wide policy development assets, a senior policy advisor focused on refugee asylum policies, and enhanced private sector liaison resources. Collectively,” he continued, “the Policy Directorate will strengthen the Department’s ability to develop and plan vital policies.” Such an office, he noted, “is not a new idea — it builds in part upon the foundational work of the Border and Transportation [Directorate] policy staff, which is to be folded into the new policy directorate.”<sup>10</sup>

The authors of an August 17, 2004, Heritage Foundation report were among the first to propose an Under Secretary of Policy for DHS and a consolidation of the department’s policy analysis and development offices under the direction of such an officer.<sup>11</sup> The recommendation was reiterated in more elaborate form in a December 13, 2004, *Heritage Special Report* on DHS reform.<sup>12</sup> At a January 26, 2005, hearing of the Senate Committee on Homeland Security and Governmental Affairs, the chair of the panel, Senator Susan Collins, observed that “there seemed to be unanimity on the need for an Under Secretary for Policy.”<sup>13</sup>

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

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

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<sup>10</sup> Ibid., pp. 6-7.

<sup>11</sup> James Jay Carafano, Richard Weitz, and Alane Kochems, “Department of Homeland Security Needs Under Secretary for Policy,” *Heritage Foundation Backgrounder No. 1788* (Washington: Aug. 17, 2004).

<sup>12</sup> James Jay Carafano and David Heyman, “DHS 2.0: Rethinking the Department of Homeland Security,” *Heritage Special Report SR-02* (Washington: Dec. 13, 2004).

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

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

departmental engagement in policy development and provide clear leadership on policy initiatives.<sup>15</sup>

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

In compliance with Section 872 of the Homeland Security Act authorizing him to reorganize functions and organizational units within DHS, subject to specified limits,<sup>18</sup> Secretary Chertoff sent a July 13, 2005, letter to Congress "with notification of the reallocation of functions and the establishment, consolidation and alteration of organizational units within the Department of Homeland Security," and indicating he intended "to implement these changes on October 1, 2005."<sup>19</sup> He noted the effort to establish OPPIA under the leadership of an Assistant Secretary, and indicated he had "also asked Congress for legislation that would elevate this Assistant Secretary to an Under Secretary within the Department." The Under Secretary would head the Directorate for Policy. He also identified various "existing organizational units that ... will be relocated to this new centralized policy office, including: the Office of International Affairs, the Special Assistant to the Secretary for Private Sector Coordination, the Border and Transportation Security Policy and Planning Office and elements of the Border and Transportation Security Office of International Enforcement, the Homeland Security Advisory Committee, and the Office of Immigration Statistics." He added that "a strategic policy planning office and a refugee policy coordinator will be established within the new policy apparatus."

**Intelligence.** In his July 13, 2005, 2SR remarks, Secretary Chertoff announced "that the Assistant Secretary for Information Analysis will be designated

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

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

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

<sup>18</sup> See 116 Stat. 2243; 6 U.S.C. § 452; CRS Report RS21450, *Homeland Security: Scope of the Secretary's Reorganization Authority*, by Stephen R. Vina.

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



as the Chief Intelligence Officer,” who “will head a strengthened Information Analysis division that will report directly to me,” and “will ensure that intelligence is coordinated, fused and analyzed within the Department so that we have a common operational picture. It will also provide,” he continued, “a primary connection between DHS and others within the intelligence community — and a primary source of information for our state, local, and private sector partners.”<sup>20</sup>

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

TTIC has the primary responsibility ... for terrorism analysis (except information relating solely to purely domestic terrorism) and is responsible for the day-to-day terrorism analysis provided to the President and other senior policymakers. ... IAIP has the primary responsibility for matching the assessment of the risk posed by identified threats and terrorist capabilities to our Nation’s vulnerabilities [and] ... for providing the full range of intelligence support ... to the DHS Secretary, other DHS leadership, and the rest of DHS.<sup>23</sup>

The Intelligence Reform and Terrorism Prevention Act of 2004 transferred TTIC to the newly created National Counterterrorism Center (NCTC),<sup>24</sup> which was designated “the primary organization ... for analyzing and integrating all intelligence

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<sup>20</sup> U.S. Department of Homeland Security, “Secretary Michael Chertoff, U.S. Department of Homeland Security Second Stage Review Remarks,” p. 7.

<sup>21</sup> 116 Stat. 2146; 6 U.S.C. § 121(d)(1).

<sup>22</sup> *Weekly Compilation of Presidential Documents*, vol. 39, Feb. 3, 2003, p. 113.

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

<sup>24</sup> P.L. 108-458, Sec. 1092; 118 Stat. 3697.

possessed or acquired by the United States Government pertaining to terrorism and counterterrorism, excepting intelligence pertaining exclusively to domestic terrorists and domestic counterterrorism,” and, among other duties, conducting “strategic operational planning for counterterrorism activities, integrating all instruments of national power, including ... homeland security ... activities,” and assigning “roles and responsibilities as part of its strategic operational planning duties to lead Departments or agencies, as appropriate, for counterterrorism activities that are consistent with applicable law.”<sup>25</sup>

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

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

Regarding the relationship of the DHS Chief Intelligence Officer and IA with the larger intelligence community, Secretary Chertoff, testifying at a July 14 hearing

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<sup>25</sup> P.L. 108-458, Sec. 1021; 118 Stat. 3672.

<sup>26</sup> H.Rept. 109-79, p. 103.

<sup>27</sup> S.Rept. 109-83, pp. 83-84.

<sup>28</sup> U.S. Department of Homeland Security, letter from Secretary Michael Chertoff to the Honorable Christopher Cox, pp. 2-3.

of the Senate Committee on Homeland Security and Governmental Affairs, suggested that they would become better participants in the intelligence community by having more to contribute as a result of gathering and integrating intelligence from all of the department's components.<sup>29</sup> He reiterated that comment at a July 25 hearing of the House Committee on Homeland Security, saying:

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

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

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

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

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

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

<sup>31</sup> *Ibid.*, pp. 13-14.

<sup>32</sup> U.S. Department of Homeland Security, "Secretary Michael Chertoff, U.S. Department of Homeland Security Second Stage Review Remarks," p. 7.

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

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

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

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

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<sup>33</sup> U.S. Department of Homeland Security, letter from Secretary Michael Chertoff to the Honorable Christopher Cox, pp. 3-4.

<sup>34</sup> U.S. Department of Homeland Security, “Secretary Michael Chertoff, U.S. Department of Homeland Security Second Stage Review Remarks,” p. 7.

<sup>35</sup> *Ibid.*, pp. 7-8.

response and recovery, portions of FEMA — the U.S. Fire Administration, “the hazardous materials training and assistance program, the chemical stockpile emergency preparedness program, the radiological emergency preparedness program and the BioShield program” — would be transferred to the Preparedness Directorate.<sup>36</sup>

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

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

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

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

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

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

The idea with a chief medical officer is precisely to give us somebody who owns the entirety of this system, of response with respect to health issues. That

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<sup>36</sup> U.S. Department of Homeland Security, letter from Secretary Michael Chertoff to the Honorable Christopher Cox, pp. 4-5.

<sup>37</sup> Congressional Quarterly, “Senate Homeland Security and Governmental Affairs Committee Holds Hearing on Review of [sic] Department of Homeland Security Organization,” pp. 21-22.

<sup>38</sup> Congressional Quarterly, “House Homeland Security Committee Holds Hearing on Review of Department of Homeland Security Organization,” p. 8.

<sup>39</sup> *Ibid.*, p. 21.

would be prevention, protection and response and recovery, because in many cases, particularly dealing with biological threats, response and recovery is a very, very important element of our defense strategy. ... So he's going to be someone who's acutely aware of the interface between first responders and the health recovery system in the emergency type of environment ... someone who is going to apply the science of medicine and other scientific disciplines to the reality of dealing with a threat or a hazard in an emergency type of situation.<sup>40</sup>

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

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

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<sup>40</sup> Ibid., p. 24.

<sup>41</sup> U.S. Department of Homeland Security, letter from Secretary Michael Chertoff to the Honorable Christopher Cox, p. 5.

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

reporting status “in order to integrate security concerns more effectively with management functions across the Department.”<sup>43</sup>

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

... what this does is it enhancing [sic] the ability of the National Capital to participate in our preparedness planning and including the biopreparedness planning, using the perspective that he has, you know, drawn from the unique challenges that you face in this particular city, given the fact that it’s the seat of government.

So I actually don’t view it as diminishing the role of that office, but actually as enhancing its ability to touch and influence many of the preparedness functions that we need to use that will be of direct significance to protecting the Capital of the country.<sup>44</sup>

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

In testimony before the House Committee on Homeland Security on July 25, Secretary Chertoff commented briefly on plans to relocate the Federal Protective Service (FPS) and the Federal Air Marshal Service (FAMS). Concerning the first of these, he said: “I think part of the consideration of putting FPS in ICE was that FPS does have a law enforcement or police function, and ICE is a law enforcement organization.” Regarding the latter, he indicated that “it was our judgment that

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<sup>43</sup> U.S. Department of Homeland Security, letter from Secretary Michael Chertoff to the Honorable Christopher Cox, pp. 5-7.

<sup>44</sup> Congressional Quarterly, “Senate Homeland Security and Governmental Affairs Committee Holds Hearing on Review of [sic] Department of Homeland Security Organization,” p. 24.

<sup>45</sup> *Ibid.*, p. 33.

particularly because we were going to move FAMS out of ICE and back to TSA, that would enable the leadership of ICE to focus a little bit more on FPS.”<sup>46</sup>

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

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

What seemed to be important was to get them to operationally work together but to do it with the other components as well, with Coast Guard, for example, and with — even with infrastructure protection, and that’s where having an operations and a planning and policy shop department-wide I think supplies the answer.

When we sat down to talk about a border security strategy, what we needed to do was to build a plan that was comprehensive, that took us from the beginning of the process through the end, and that spanned, among other things, the role of CBP, ICE and Coast Guard. Putting together a tool that allows us to

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<sup>46</sup> Congressional Quarterly, “House Homeland Security Committee Holds Hearing on Review of Department of Homeland Security Organization,” p. 31.

<sup>47</sup> Carafano and Heyman, “DHS 2.0: Rethinking the Department of Homeland Security,” *Heritage Special Report SR-02*, pp. 15-16.

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

<sup>49</sup> H.Rept. 109-71 Part 1, p. 78.



do that — which is what we’ve recommended — I think will address the problems that have been identified.<sup>50</sup>

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

First of all, part of our proposed restructuring involves having a common department-wide policy and planning shop and operations shop, which gives us not only the ability to unify operations and policy between CBP and ICE, but across the department, including, for example, Coast Guard, which often intersects with them as you get into maritime areas, and therefore should be part of the same coordination function.

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It seemed to me that you are dealing with functionally different issues when you are dealing with CBP, which deals principally with inspection and with border patrol agents, and on the other hand you have your detention and removal folks and your investigators at ICE, and those are different functions.

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So, given the upside of a merger, and considering the possible downside, including the huge cost that’s involved any time you do a massive reorganization, I think it was our judgment that the case had not been made that a merger would cure the issues that have to be addressed. There is no question there are issues of coordination and finance that have to be addressed, and we are addressing them, but I think at this point I’m confident that what we’re doing will remedy the existing problems.<sup>51</sup>

## Early Organizational Issues

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

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<sup>50</sup> Congressional Quarterly, “Senate Homeland Security and Governmental Affairs Committee Holds Hearing on Review of [sic] Department of Homeland Security Organization,” pp. 15-16.

<sup>51</sup> Congressional Quarterly, “House Homeland Security Committee Holds Hearing on Review of Department of Homeland Security Organization,” pp. 17-18.

... as I review your plan, you are intending to make some truly fundamental changes to the department without requesting legislative authority to do so. Your list of legislative changes is very narrow.

I think you're pushing the boundaries on that. And I hope you will work with the committee so that we can draft a more comprehensive reauthorization bill. I think many of the changes you're proposing really should be done by law and not just administratively. So, that's an issue we'll be pursuing with you.<sup>52</sup>

The issue underlying the comment made by Senator Collins involves Secretary Chertoff's interpretation of his reorganization authority. His interpretation is seemingly revealed in the text of a footnote in his July 13, 2005, reorganization notification letter to Congress, which states: "Section 872 of the Homeland Security Act of 2002 provides *broad* reorganization authority and permits the Secretary to alter or consolidate existing organizational units, to establish new organizational units or to allocate or reallocate functions within the Department."<sup>53</sup> Senator Collin's comment suggests that she does not regard the reorganization authority conveyed at Section 872 to be broad in scope, or at least not as broad as the Secretary was asserting. Moreover, the expressed agreement with her closing comments by Senator Joseph Lieberman, the ranking minority member of the committee, would appear to imply that he, too, does not regard the Secretary's reorganization authority to be broad.<sup>54</sup>

Section 872 of the Homeland Security Act (HSA) provides that the "Secretary may allocate or reallocate functions among the officers of the Department, and may establish, consolidate, alter, or discontinue *organizational units* within the Department, but only ... after the expiration of 60 days after providing notice of such action to the appropriate congressional committees, which shall include an explanation of the rationale for the action," and subject to certain limitations specified in the section. These limitations include no abolition of "any agency, entity, organizational unit, program, or function established or required to be maintained by the [Homeland Security] Act" or "by statute."<sup>55</sup> Noting that the term "organizational units" is not defined in the act, a CRS legal analysis of the section is instructive regarding its scope.

[I]n applying canons of statutory construction to the HSA, it appears Congress intended an *organizational unit* to be something smaller than an agency or other statutorily created entity. In the limitation provision of §872(b)(1), for example, Congress placed the term *organizational units* after the terms *agency*

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<sup>52</sup> Congressional Quarterly, "Senate Homeland Security and Governmental Affairs Committee Holds Hearing on Review or [sic] Department of Homeland Security Organization," p. 49.

<sup>53</sup> U.S. Department of Homeland Security, letter from Secretary Michael Chertoff to the Honorable Christopher Cox, p. 1 note (emphasis added).

<sup>54</sup> Congressional Quarterly, "Senate Homeland Security and Governmental Affairs Committee Holds Hearing on Review or [sic] Department of Homeland Security Organization," p. 50.

<sup>55</sup> 116 Stat. 2243; 6 U.S.C. § 452 (emphasis added).

and *entity*, but before the terms *program* and *function*. This placement suggests Congress may have intended an *organizational unit* to be smaller than an *agency* and *entity* on the general assumption that things of a higher order are named at the beginning of an enumeration and that Congress does not intend to be superfluous. In §471(b) of the HSA, Congress again suggests that an *organizational unit* may be a small administratively created structure. Section 471(b) authorizes the Secretary (through the President's Reorganization Plan) to reorganize the functions or organizational units *within* the Bureau of Citizenship and Immigration Services. Because the provision places an organizational unit *within* the Bureau, it appears Congress intended the term to be something smaller than a bureau.

The definition of the term *organizational units*, in essence, affects the Secretary's authority to reorganize DHS. Because §872(a) only allows the Secretary to establish, consolidate, alter, or discontinue *organizational units* within the Department, it might be argued that the Secretary is only allowed to establish, consolidate, alter, or discontinue units smaller than an agency, entity, or bureau. An *office*, *advisory committee*, or *laboratory*, for example, might arguably qualify as something smaller than an agency, entity, or bureau. Changes to structures other than *organizational units* would apparently need to be categorized as a reallocation of *functions* among the officers of the Department or be conducted pursuant to new legislative action to avoid an unauthorized action. Nonetheless, because the term *organizational units* is not defined in the HSA or discussed in any relevant legislative history, the scope of the term is not completely clear.<sup>56</sup>

**Increased Direct Reports.** Secretary Chertoff contends that his reorganization of DHS has resulted in a "flattening" of the department.<sup>57</sup> However, his plan substitutes one hierarchical directorate, Policy, for another, BTS, and transforms another directorate, IAIP, into one for Preparedness. Furthermore, his restructuring results in some 27 lines of reporting to the Secretary/Deputy Secretary, instead of the previous 22 lines, with seven of these new lines coming from operating agencies. This new arrangement raises two issues which the minority members of the House Committee on Homeland Security articulated in a July 2005 report.

While reorganization of operational functions is generally a good idea, if the Secretary's office is not structured in a way that will channel the oversight of all these agencies, a Secretary less able or influential than Secretary Chertoff may become overwhelmed.

Additionally, such a "flatter" structure could lead to political staff in the Secretary's office having too much control over daily operations of law enforcement and screening agencies, such as ICE, CBP, and TSA.<sup>58</sup>

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<sup>56</sup> CRS Report RS21450, *Homeland Security: Scope of the Secretary's Reorganization Authority* (Aug. 9, 2005), p. 3 (emphasis in original).

<sup>57</sup> Congressional Quarterly, "Senate Homeland Security and Governmental Affairs Committee Holds Hearing on Review of [sic] Department of Homeland Security Organization," p. 38.

<sup>58</sup> Rep. Bennie G. Thompson, et al. (minority members), House Committee on Homeland Security (continued...)

**Other Concerns.** This report, which commended Secretary Chertoff for undertaking 2SR, also reflected frustration with his failure to provide adequate details regarding his proposals, with the result that aspects of the roles of the Assistant Secretary for Cybersecurity and Telecommunications, the Chief Medical Officer, and the Chief Intelligence Officer were unclear and raised important questions.<sup>59</sup> It also expressed concern about the Preparedness Directorate, specifically that “the structure advocated by the Secretary may create harmful competition between infrastructure protection, cybersecurity, and first-responder needs.”<sup>60</sup> The failure to merge CBP and ICE, as recommended by the December 2004 *Heritage Special Report*, was regarded to be “a mistake.”<sup>61</sup> Similarly, the Secretary’s failure to seek strengthened investigative powers for the DHS Privacy Officer, as well as a five-year term of office and authority to submit reports directly to Congress, was also viewed as “a mistake.”<sup>62</sup> The report was critical of the Secretary, as well, for ignoring Government Accountability Office (GAO) and DHS Inspector General assessments supporting the elevation of “offices in the Management Directorate, which includes the Chief Procurement Officer (CPO) and the Chief Information Officer (CIO), and the Chief Financial Officer, to a level above the other directorates,” and thereby the strengthening their positions in the department’s hierarchy.<sup>63</sup> Finally, the report noted that “Congress mandates that the Department of Defense (DOD) submit a Quadrennial Defense Review (QDR) every four years to focus on the strategic needs of the Pentagon for the next 20 years,” and lamented that “Secretary Chertoff has not indicated he will put in place a long-term planning system like a QDR.”<sup>64</sup>

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<sup>58</sup> (...continued)

Security, *Protecting America Against Terrorists: The Case for a Comprehensive Reorganization of the Department of Homeland Security* (Washington: n.d.), p. 7.

<sup>59</sup> *Ibid.*, pp. 2-5.

<sup>60</sup> *Ibid.*, p. 5.

<sup>61</sup> *Ibid.*, p. 9.

<sup>62</sup> *Ibid.*, pp. 9-10.

<sup>63</sup> *Ibid.*, p. 10; see U.S. Department of Homeland Security, Office of the Inspector General, *Improvements Needed to DHS’ Information Technology Management Structure*, OIG-04-29 (Washington: July 2004); U.S. Department of Homeland Security, Office of the Inspector General, *Major Management Challenges Facing the Department of Homeland Security*, OIG-05-06 (Washington: Dec. 2004); U.S. Government Accountability Office, *Department of Homeland Security: A Comprehensive and Sustained Approach Needed to Achieve Management Integration*, GAO Report GAO-05-139 (Washington: Mar. 2005); the Department of Homeland Security Financial Accountability Act of 2004 effectively modified the DHS CFO position so that this official reports directly to the Secretary, instead of through the Under Secretary for Management, with the result that CFO appears to hold co-equal status with, but not higher status than, the heads of the directorates (118 stat. 1275).

<sup>64</sup> Thompson, et al. (minority members), House Committee on Homeland Security, *Protecting America Against Terrorists: The Case for a Comprehensive Reorganization of the Department of Homeland Security*, pp. 12-13.

## Early Leadership Issues

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

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

The Constitution also provides Congress with considerable discretion over which officers of the United States will be appointed by the President with the advice and consent of the Senate (PAS positions), and which may be appointed by the President alone (PA positions), the courts, or agency heads.<sup>65</sup> Congress has often created departmental leadership positions as PAS positions; this approach has several institutional advantages for Congress. For example, it often allows Senators to have a role in the selection of the nominee and in determining the fitness of the selected individual for the role to which he or she has been nominated. In addition, confirmation hearings provide Senators with an opportunity to conduct oversight over agencies and programs, and to extract a pledge that the nominee will appear before committees of Congress when summoned. This commitment may not be necessary, under most circumstances, to obtain testimony. An argument could be made that Congress has the authority to call most officers with operational duties, regardless of appointment status, before its committees. As a practical matter,

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<sup>65</sup> The appointment process for federal government leadership positions is guided by the Constitution, which provides that "[the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments" (Article II, Sec. 2, cl. 2). In a 1976 opinion, the GAO Comptroller General presumably reasoned that this provision indicates that all officers of the United States are to be PAS positions unless Congress affirmatively delegates that authority (Comp. Gen. Dec. No. B-183012, 56 Comp. Gen. 137). With regard to which positions would be considered "Officers" under this clause, the Supreme Court has held that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed" above (*Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

however, the commitment obtained at the time of confirmation may make this process easier for Congress. Absent such a commitment, an Assistant Secretary, for example, may defer to an Under Secretary when requested to appear before a congressional committee.

In some cases, Congress has elected to assign appointment authority to the President alone. Most of the positions to which appointments are made in this way are in the White House Office. These are generally positions in close proximity to the President, whose incumbents are often privy to confidential policy discussions conducted by leaders of agencies in the Executive Office of the President. By and large, officials appointed in this manner act as advisers, rather than implementing the law. Although PA positions are unusual outside of that context, the Homeland Security Act created seven such positions in the new department.<sup>66</sup> As a result, Congress may have less influence regarding the kinds of individuals appointed to fill these positions and the ways in which they address their responsibilities.

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

**PAS Assistant Secretaries.** The Homeland Security Act created up to 12 Assistant Secretary positions, with no specified functions, to which appointment was to be made by the President with the advice and consent of the Senate (PAS positions).<sup>67</sup> In general, the act provided that the statutory Assistant Secretaries are compensated at Level IV of the Executive Schedule.<sup>68</sup> From the time the department was established to the end of June 2005, the President had submitted nominations to Assistant Secretary positions with the following titles and organizational locations:

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

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<sup>66</sup> Those positions are Director of the United States Secret Service, Chief Information Officer, Chief Human Capital Officer, Chief Financial Officer, Officer for Civil Rights and Liberties, Assistant Secretary for Information Analysis, and Assistant Secretary for Infrastructure Protection. (P.L. 107-296, §§ 103(e), 201(b), 702, 703, 704, and 705; 6 U.S.C. §§ 113(d) and 121(b).)

<sup>67</sup> P.L. 107-296, § 103(a)(8); 6 U.S.C. § 113(a)(8). Generally, where Assistant Secretary functions are not specified in statute, the President specifies functions or a title with each nomination to such a position. For at least one department (State), Congress has mandated that the President take this step (22 U.S.C. § 2651a(c)(3)).

<sup>68</sup> P.L. 107-296, § 1702(a)(4); 5 U.S.C. § 5315.

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

The new OPPIA would initially be headed by an Assistant Secretary appointed through the advice and consent process — presumably one of the 12 available under the Homeland Security Act. The President submitted a nomination to this position on July 14, 2005, coincident with the rollout of the Secretary's 2SR proposal. Secretary Chertoff has requested that Congress elevate this position to the Under Secretary level.<sup>69</sup> During the time the OPPIA would be headed by an Assistant Secretary, this officer would oversee the offices of several other Assistant Secretaries. It is unusual, however, to have an Assistant Secretary report to another Assistant Secretary.

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

- Assistant Secretary for Cyber Security and Telecommunications;
- Assistant Secretary for Grants and Training;
- Assistant Secretary for International Affairs;
- Assistant Secretary for Private Sector; and
- Assistant Secretary for Strategic Plans.<sup>70</sup>

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

**PA Assistant Secretaries.** The Homeland Security Act also established two additional Assistant Secretary positions to which appointment was to be made by the President alone.<sup>71</sup> The creation of Assistant Secretary positions as PA, rather than PAS, positions was a departure from prior practices in the other departments. The President, in his signing statement, endorsed the view that these positions were distinct from the positions discussed above, stating:

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<sup>69</sup> U.S. Department of Homeland Security, letter from Secretary Michael to the Honorable Christopher Cox, p. 2.

<sup>70</sup> U.S. Department of Homeland Security, "Department of Homeland Security Organization Chart (proposed end state)," available at [<http://www.dhs.gov/interweb/assetlibrary/DHSOrgChart.htm>].

<sup>71</sup> P.L. 107-296 § 201(b); 6 U.S.C. § 121(b).

The text and structure of the Act make clear that these two presidentially appointed Assistant Secretary positions were created in addition to the 12 unspecified Assistant Secretary positions, and the executive branch shall construe the relevant provisions accordingly.<sup>72</sup>

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

Under Secretary Chertoff's proposal, the Assistant Secretary for Infrastructure Protection would report to the new Under Secretary for Preparedness.<sup>73</sup> The Secretary's proposal, as initially released, did not indicate what, if any, changes would be made to the authorities and responsibilities of this Assistant Secretary as a result of this new reporting arrangement, or whether such changes could be made under the Secretary's existing reorganization authority.

Secretary Chertoff's proposal would elevate "the Information Analysis resources ... to be a stand-alone office reporting directly to the Secretary." The "renamed Office of Intelligence and Analysis (IA) [would] provide intelligence information in support of the Department and [would] disseminate information and intelligence to our State and local partners." The Secretary would "designate the Assistant Secretary for Information Analysis as the Chief Intelligence Officer."<sup>74</sup> Consequently, the proposed change would alter the organizational location, hierarchical level, responsibilities, and title of this office.

**SES Assistant Secretaries.** In addition to the Assistant Secretary positions authorized by the Homeland Security Act, at least two others have been administratively created within DHS as non-career Senior Executive Service (SES) positions.<sup>75</sup> SES positions are often created for program and other middle-level managers. These positions, Assistant Secretary for Public Affairs and Assistant Secretary for Legislative Affairs, have been filled through appointment by the Secretary of Homeland Security.

As previously noted, under Secretary Chertoff's reorganization proposal, a new Office of Legislative and Intergovernmental Affairs would "assume those responsibilities presently charged to the Office of Legislative Affairs" and include the "intergovernmental coordination resources of the State and Local Government

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<sup>72</sup> *Weekly Compilation of Presidential Documents*, vol. 38, Nov. 25, 2002, p. 2092.

<sup>73</sup> U.S. Department of Homeland Security, "Homeland Security Secretary Michael Chertoff Announces Six-Point Agenda for Department of Homeland Security," press release, available at [<http://www.dhs.gov/dhspublic/display?content=4598>].

<sup>74</sup> U.S. Department of Homeland Security, letter from Secretary Michael to the Honorable Christopher Cox, p. 3.

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



Coordination and Preparedness Office.” The new office would be headed by an Assistant Secretary for Congressional and Intergovernmental Affairs.

**Other Proposed Positions.** Secretary Chertoff’s reorganization proposal would create several other leadership positions. These include the Director of Operations Coordination, the Director of the Federal Emergency Management Agency (FEMA),<sup>76</sup> the head of the Domestic Nuclear Detection Office, and the Chief Medical Officer. The first three of these positions would report directly to the Secretary, and the Chief Medical Officer would report to the Under Secretary for Preparedness.

The proposal, as initially released, did not request that Congress establish these positions in statute, and the appointment authority and the compensation level were not specified. The President might elect to create one or more of these positions using existing statutory Assistant Secretary slots, in which case the affected position(s) would be appointed by the President with the advice and consent of the Senate and compensated at Level IV of the Executive Schedule. Alternatively, the Secretary might create the positions administratively as SES positions. As previously noted, however, it would be unusual for a Secretary to create administratively high-level positions with significant authority for implementing law.

Comments attributed to Secretary Chertoff suggest that a new Chief Medical Officer has been selected, but the appointment authority remains unclear. A press release of July 14, 2005, states: “Today Secretary Michael Chertoff announced the appointment of Jeffrey W. Runge, M.D., as the Department’s new Chief Medical Officer. Dr. Runge currently serves as Administrator of the National Highway Traffic Safety Administration ....”<sup>77</sup> In contrast, on July 25, at a House Committee on Homeland Security hearing, the Secretary said:

Maybe I can just touch briefly on the chief medical officer. The idea with a chief medical officer is precisely to give us somebody who owns the entirety of this system, of response with respect to health issues. ... Give that ownership to one

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<sup>76</sup> Before it became part of DHS, FEMA was headed by a director appointed by the President with the advice and consent of the Senate and compensated at Level II of the Executive Schedule (5 U.S.C. App. Reorganization Plan No. 3 of 1978, § 102). This position was not explicitly transferred to the new department by the Homeland Security Act, however, and the act provided that except “as otherwise provided in this Act, whenever all the functions vested by law in any agency have been transferred pursuant to this Act, each position and office the incumbent of which was authorized to receive compensation at the rates prescribed for an office or position at level II, III, IV, or V, of the Executive Schedule, shall terminate” (P.L. 107-296 § 1513; 6 U.S.C. 553). It could be argued, therefore, that the FEMA director position was to be terminated at that time. FEMA information sometimes refers to Michael Brown, Under Secretary for Emergencies, Preparedness, and Response, as the Director of FEMA (e.g., [<http://www.fema.gov/news/newsrelease.fema?id=17223>]). It is unclear whether this usage of the title of “director” indicates that DHS has determined that the original position continued to exist after the transition.

<sup>77</sup> U.S. Department of Homeland Security, “Secretary Michael Chertoff Announces the New Chief Medical Officer for the Department of Homeland Security,” press release, July 14, 2005, available at [<http://www.dhs.gov/dhspublic/display?content=4622>].

person or one set of people and, a particular individual who *I think the president has announced his intent to nominate* is someone who actually has a background as an emergency room physician.<sup>78</sup>

The first of these statements suggests that an appointment has already been made to the position, which indicates that the position was created administratively, with the appointment made by the Secretary, and not subject to Senate confirmation. The second statement suggests that the Chief Medical Officer would be a PAS position for which the President plans to make a nomination. Since the Chief Medical Officer has not been established by Congress as a PAS position, the Secretary would likely be using one of the statutory Assistant Secretary positions for this purpose. The status of this position, however, remains unclear.

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

Congress establishes departments and agencies, and, to whatever degree it chooses, the internal organization of agencies. Congress might elect to establish, in statute, DHS leadership positions, the means by which appointments would be made to these positions, and the department's leadership hierarchy. In doing so, Congress might opt to codify none, some, or all of the Secretary's proposed reorganization. Alternatively, Congress might take a lesser role in this reorganization effort, and evaluate the outcome in the course of later oversight.

## Legislation

No legislation has been introduced at this time to implement the DHS reorganization proposed by Secretary Chertoff as a result of his 2SR initiative.

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<sup>78</sup> Congressional Quarterly, "House Homeland Security Committee Holds Hearing on Review of Department of Homeland Security Organization," p. 24 (emphasis added).

## **Appendix 1: 2SR Initiative Chronology**

- March 2, 2005 - Secretary of Homeland Security-designate Michael Chertoff, in testimony before the Subcommittee on Homeland Security of the House Committee on Appropriations, announced that he was initiating a comprehensive review of the organization, operations, and policies of the Department of Homeland Security (DHS).
- July 13, 2005 - Secretary of Homeland Security Michael Chertoff announced a six-point agenda for DHS, which resulted from a Second Stage Review or 2SR that he had initiated, and was designed to ensure that the department's policies, operations, and structures are best aligned to address potential threats to the nation, both today and in the immediate future.
- July 14, 2005 - Secretary of Homeland Security Chertoff testified before the House Committee on Homeland Security regarding his reform agenda for DHS resulting from 2SR.
- Secretary Chertoff testified before the Senate Committee on Homeland Security and Governmental Affairs regarding his reform agenda for DHS resulting from 2SR.
- July 19, 2005 - Secretary Chertoff testified before the Senate Committee on Commerce, Science, and Transportation regarding his reform agenda for DHS resulting from 2SR.
- July 25, 2005 - Secretary of Homeland Security Chertoff testified further before the House Committee on Homeland Security regarding his reform agenda for DHS resulting from 2SR.

## Appendix 2: Glossary

2SR	Second Stage Review
BTS	Border and Transportation Security Directorate
CBP	Customs and Border Protection Bureau
CIA	Central Intelligence Agency
CIO	Chief Information Officer/Chief Intelligence Officer
CPO	Chief Procurement Officer
DHS	Department of Homeland Security
DNDO	Domestic Nuclear Detection Office
DOD	Department of Defense
EP&R	Emergency Preparedness and Response Directorate
FAMS	Federal Air Marshal Service
FBI	Federal Bureau of Investigation
FEMA	Federal Emergency Management Agency
FPS	Federal Protective Service
GAO	Government Accountability Office
HSA	Homeland Security Act of 2002
IA	Office of Intelligence and Analysis
IAIP	Information Analysis and Infrastructure Protection Directorate
ICE	Immigration and Customs Enforcement Bureau
NCTC	National Counterterrorism Center
OCST	Office of Cyber Security and Telecommunications
OLIA	Office of Legislative and Intergovernmental Affairs
ONCRC	Office of the National Capital Region Coordination

OOC	Office of Operations Coordination
OPPIA	Office of Policy, Planning, and International Affairs
PA	Presidentially appointed position
PAS	Presidentially appointed, Senate confirmed position
QDR	Quadrennial Defense Review
SES	Senior Executive Service
TSA	Transportation Security Administration
TSC	Terrorist Screening Center
TTIC	Terrorist Threat Integration Center
USCG	United States Coast Guard
USCIS	United States Citizenship and Immigration Services
USSS	United States Secret Service