



CRISIS BUREAUCRACY:
HOMELAND SECURITY AND THE POLITICAL
DESIGN OF LEGAL MANDATES

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Policymakers fight over bureaucratic structure because it helps shape the legal interpretations and regulatory decisions of agencies through which modern governments operate. In this Article, we update positive political theories of bureaucratic structure to encompass two new issues with important implications for lawyers and political scientists: the significance of legislative responses to a crisis and the uncertainty surrounding major bureaucratic reorganizations. The resulting perspective affords a better understanding of how agencies interpret their legal mandates and deploy their administrative discretion.

We apply the theory to the creation of the Department of Homeland Security. Two principal questions surrounding this creation are (1) why the President changed from opposing the creation of a new department to supporting it and (2) why his plan for such a department was far beyond the scope of any other existing proposal. We argue that the President changed his mind in part because he did not want to be on the losing side of a major legislative battle. But more significantly, the President supported the massive new Department in part to further domestic policy priorities unrelated to homeland security. By moving a large set of agencies within the Department and instilling them with new

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homeland security responsibilities without additional budgets, the President forced these agencies to move resources out of their legacy mandates. Perversely, these goals appear to have been accomplished at the expense of homeland security.

Finally, we briefly discuss more general implications of our perspective: first, previous reorganizations (such as FDR's creation of a Federal Security Agency and Carter's creation of an Energy Department) also seem to reflect politicians' efforts to enhance their control of administrative functions by making bureaucratic changes, and particularly by mixing domestic and national security functions; and, second, our analysis raises questions about some of the most often asserted justifications for judicial deference to agency legal interpretations.

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INTRODUCTION

Modern governments implement most legal mandates through bureaucracies. Politicians delegate authority by crafting legislative compromises, which lawyers and judges then seek to interpret. But bureaucratic agencies are often the entities that most directly wield the power to spend money, impose penalties, provide public services, and regulate individuals and

organizations. Consequently, a central question in public law concerns who exactly controls the bureaucracy's power to interpret and execute law. Although legal scholars are consumed by normative debates concerning who *should* exercise such control, those debates are difficult to resolve or even follow in the abstract without some knowledge of the techniques used in the political process to control bureaucratic power over legal interpretations and over the execution of regulatory mandates.¹

Surprisingly, the creation or reorganization of bureaucratic units—such as the new Department of Homeland Security (DHS)—remains among the least-understood techniques for controlling bureaucracies.² We know politicians may create or reorganize agencies for multiple reasons: to appear as if they are addressing a salient policy,³ to please organized interests most likely to be directly impacted by the agencies,⁴ to create procedures that bias agency policy in particular directions,⁵ and (perhaps more occasionally) genuinely to address a major problem of public concern in a prescriptively defensible manner.⁶ We know far less, however, about how these different potential motivations interact, how agency structure is affected by major crises such as the September 11 terrorist attacks, or why politicians allocate different chunks of legal responsibility to distinct bureaucratic units.⁷

1. For just a few thought-provoking examples of this sprawling genre, see Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001); Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NW. U. L. REV. 1239 (2002); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580 (2006).

2. See, e.g., KAREN M. HULT, AGENCY MERGER AND BUREAUCRATIC REDESIGN 5 (1987) ("Despite the popularity of reorganization, the jury deciding its impact is still out—and is sharply divided.").

3. See R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION (1990); JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (1995).

4. See Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. 1, 7-11 (1994); Barry R. Weingast, *Regulation, Reregulation, and Deregulation: The Political Foundations of Agency Clientele Relationships*, 44 LAW & CONTEMP. PROBS. 147, 151 (1981).

5. Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 254 (1987).

6. AMY B. ZEGART, FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC 140-48 (1999) (discussing how the structure of the Joint Staff, through the Goldwater-Nichols reforms, was engineered to be more functional than it had been before).

7. See, e.g., DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946-1997 (2003) (emphasizing the extent of uncertainty regarding why Presidents choose specific designs for agencies and reorganization plans); JAMES Q. WILSON, BUREAUCRACY 264 (1989) (discussing the difficulty in assessing the range of motivations for specific reorganization plans because "presidents have taken to reorganizations the way overweight people take to fad diets").

These gaps are evident in the persistence of many unsolved puzzles about the largest government reorganization in a half-century—the creation of the DHS.⁸ For instance, why did the President support the creation of DHS after initially opposing it? Why did the Department become so vast, including in the reorganization a wide range of components with little or no responsibility for homeland security? We also understand little about whether the crisis enabled or forced politicians to forge a bureaucracy that actually enhanced the government's capacity to undertake security-related functions. Even as the creation and operation of DHS continues to inspire controversy, policymakers and scholars have yet to address these questions.⁹ Nor have they been resolved in the wide-ranging criticisms leveled at DHS following the Katrina disaster, or in light of the national security threats the Department was nominally designed to address.¹⁰

The colossal new DHS melded the functions of twenty-two previously existing agencies, from Treasury's Customs Service, to Agriculture's Plum Island Animal Disease Center, to the previously independent Federal Emergency Management Agency (FEMA). Upon its creation, the Department gained regulatory authority over transportation security and matters as disparate as marine ecosystems and refugee admissions. Its ranks swelled with nearly a quarter of a million federal employees ranging from border inspectors to environmental compliance officers. Nothing of this scope had happened in the United States since the creation of the Department of Defense a half-century earlier.¹¹

Even for reorganizations of smaller scope than that of the DHS or the Defense Department, the structural changes are unlikely to be solely symbolic, devoid of legal and policy consequences. Such an assumption ignores the aggressive infighting over structure among legislators, the executive branch,

8. Regarding the size and scope of the reorganization that resulted in DHS, see Donald F. Kettl, *Overview*, in *THE DEPARTMENT OF HOMELAND SECURITY'S FIRST YEAR: A REPORT CARD 1* (Donald F. Kettl ed., 2004) (“[A]t its inception on March 1, 2003, the DHS brought together twenty-two federal agencies and more than 170,000 employees—the largest restructuring since the creation of the Department of Defense [in 1947] . . .”).

9. For a cogent account of the creation of DHS that nonetheless fails to address these questions, see DONALD F. KETTL, *SYSTEM UNDER STRESS: HOMELAND SECURITY AND AMERICAN POLITICS* (2004). Although Kettl notes that the President shifted his position regarding the creation of DHS, he does not address why the President proposed such a massive reorganization. Nor is his explanation of the President's change in position, which focuses on events such as the testimony of FBI whistleblower Colleen Rowley, entirely convincing (because the President changed positions on the creation of DHS well before Rowley's congressional testimony). *Id.* at 48.

10. For criticisms involving the response of DHS and its bureaus to Katrina, see, for example, DOUGLAS BRINKLEY, *THE GREAT DELUGE* 227-78 (2006). For criticisms of DHS, see, for example, Spencer Hsu, *DHS Terror Research Agency Struggling*, WASH. POST, Aug. 20, 2006, at A8; Eric Lipton & Matthew L. Wald, *Focused on 9/11, U.S. is Seen to Lag on New Threats*, N.Y. TIMES, Aug. 12, 2006, at A1. See also sources cited *infra* Part III.E.

11. See Kettl, *supra* note 8.

and organized interests.¹² Ignoring the significance of changes in bureaucratic structure also neglects the findings of work in political science and sociology,¹³ and the legal doctrines vesting valuable discretion to interpret statutes in specific administrative agencies.¹⁴ Yet we are only beginning to understand precisely how changes in structure shape the implementation of legal mandates, and how those changes would affect legislative bargaining over the contours of agencies such as DHS.

We propose to address these questions by combining a detailed analysis of the legislative process creating DHS with a new theory of the impact of bureaucratic structure on the execution of legal mandates. Our theoretical approach extends existing accounts of bureaucratic structure to address key features of the DHS case that also arise in other cases of bureaucratic change, especially the role of crises in loosening the constraints of organizational interests and the impact of senior legislators guarding their committee jurisdiction.¹⁵ In the process, our analysis fills several gaps in the legal and political science literature concerning some matters, such as how reorganizations differ from familiar procedural techniques for controlling the bureaucracy, including environmental impact requirements or cost benefit analyses; how reorganizations may be enacted despite their adverse impact on the performance of widely held goals; and how Presidents, legislators, and organized interests sometimes bargain about bureaucratic structure in the shadow of an engaged, rather than disconnected, mass public.

12. See RICHARD POLENBERG, *REORGANIZING ROOSEVELT'S GOVERNMENT: THE CONTROVERSY OVER EXECUTIVE REORGANIZATION 1936-1939* (1966); PETER SZANTON, *FEDERAL REORGANIZATION: WHAT HAVE WE LEARNED?* (1981); ZEGART, *supra* note 6. In a related vein, scholars of race, property, education, and economic geography would naturally question the analogous assumption that changes in geographic lines of territorial jurisdiction—where one city or county ends and another begins—are of little consequence. For an insightful discussion of the path-dependent social impact of territorial subdivisions, see Richard Thompson Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999).

13. Regarding the impact of structure on organizational culture, see David M. Kreps, *Corporate Culture and Economic Theory*, in PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 90, 109-10 (James E. Alt & Kenneth A. Shepsle eds., 1990); CHARLES PERROW, *COMPLEX ORGANIZATIONS* (1986). More generally, see Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? 267 (John E. Chubb & Paul E. Peterson eds., 1989). For a review of the political science and political economy literature on the political implications of bureaucratic changes, see Barry R. Weingast, *Caught in the Middle: The President, Congress, and the Political-Bureaucratic System*, in THE EXECUTIVE BRANCH 312 (Joel D. Aberbach & Mark A. Peterson eds., 2005).

14. See Jerry Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005).

15. Existing work in political science, and particularly in the field of positive political theory, provides important insights into how political officials use various ex ante and ex post techniques to control bureaucratic policy implementation, and, in particular, how they use bureaucratic structure to serve their political goals. There is a wide-ranging literature on this topic in political science and, more recently, in positive political theory and the law. See *infra* note 109.

As crises enlarge windows of opportunity for legislative action, policy changes in the area of concern—in our case, homeland security—can be driven by the efforts of politicians trying to affect regulatory and administrative activities in a different domain. Changes in the nature and scope of security policy may powerfully affect other legal and policy domains, such as the Coast Guard's environmental regulatory functions or the application of immigration laws. Moreover, politicians use the occasion of legislation to force changes in other areas having little to do with the principal issue being addressed.¹⁶ While these themes are particularly relevant in the context of national and homeland security, they also hold important implications for the more-often-studied aspects of bureaucratic politics, affecting domains such as pharmaceutical and environmental regulation. In fact, politicians may endeavor to achieve policy- or control-related goals by strategically mixing security and nonsecurity functions within the same bureaucracy.

Against this theoretical backdrop, our account also yields answers to the DHS-specific questions. We argue that the President changed his mind about the reorganization in part because he did not want to be on the losing side of a major issue. But, more importantly, the Administration appears to have supported reorganization on such a massive scale to further domestic policy priorities independent of homeland security. By moving a large set of agencies to the new Department and giving them new homeland security responsibilities without the promise of additional budgets, the President all but forced these agencies to draw resources away from their legacy mandates.

Though such changes have unquestionably become part of the President's own legacy, fixing the precise extent to which he and his top advisers consciously schemed to weaken domestic legacy mandates without regard for a corresponding homeland security benefit must await the judgment of history. But our analysis does establish three crucial realities. First, the Administration eventually pressed for the largest possible Department despite the security-related risks of the merger identified by some of the Administration's own aides. Second, many of the key players participating in or affected by the Department's creation—including legislators and bureau employees—explicitly grasped how the merger threatened legacy mandates. Third, key features of the legislative progression culminating in the creation of DHS—in particular, the President's pledge of revenue neutrality and the White House's willingness to consider including agencies such as the Nuclear Regulatory

16. Examples abound. For instance, in dealing with the savings and loan crisis, Congress allowed the magnitude of losses from savings and loans to rise by failing to produce legislation in 1986. The conflict stemmed from differences in what add-ons should be included in the legislation, such as housing benefits or unrelated features of bank regulation. Similarly, the major savings and loan bailout legislation in 1989 greatly increased the costs of dealing with that crisis by prescribing other benefits as part of the legislation, notably, housing and urban redevelopment. See Thomas Romer & Barry R. Weingast, *Political Foundations of the Thrift Debacle*, in *POLITICS AND ECONOMICS IN THE EIGHTIES* 175, 192-201 (Alberto Alesina & Geoffrey Carliner eds., 1991).

Commission and the Federal Aviation Administration—make little sense without assuming that the White House harbored the goal of affecting the performance of legacy mandates, even if doing so failed to yield a corresponding security benefit. At a minimum, these realities suggest that the Administration became the fertile soil in which arguments supporting reorganization became deeply rooted—arguments that had glaring prescriptive problems, yet happened to serve many of the White House’s political objectives.

From a prescriptive point of view, our conclusions are sobering. Our analysis shows how the merger adversely affected even those legal mandates plainly relevant to homeland security.¹⁷ More generally, we explain how decisions about whether to create a new security agency, what scope and size to give it, and how to organize congressional jurisdiction over it are unlikely to have been driven primarily by meaningful prescriptive concerns. Yet such decisions are also unlikely to be merely *symbolic*. They can powerfully (and covertly) reshape how laws are implemented while making it more difficult for government to achieve broadly shared prescriptive goals. Marginal improvements depend on solving problems of legislative oversight, and on whether competent bureaucrats will succeed in forging autonomy and capacity in a world unlikely to support it. While these scenarios remain elusive, our analysis does not yield a blanket condemnation of bureaucracies created through high-profile reorganizations. Bureaucracies forged in crisis may not be inexorably doomed to fail in carrying out their legal responsibilities, and there may yet be reasons to defer to their legal interpretations. Instead, we highlight the difficulties in averting such failure.

Our argument proceeds as follows. Part I presents the homeland security story since just before September 11. Part II develops our theory of bureaucratic organization and performance, with an emphasis on policy change in response to crises. Part III applies the theory to the creation of DHS and related legislative enactments, providing empirical support for the theoretical conclusions. Our purpose there is not merely to demonstrate how the architecture of DHS was politicized, but to elucidate more specifically in what manner political considerations shaped the agency’s structure, and to what effect. Part IV discusses extensions and implications. We conclude by discussing promising avenues for further research and noting that the prospects

17. *See infra* Part III.E. Our claim is not that DHS is entirely dysfunctional, or that it is responsible for the full extent of the disaster following the flooding in New Orleans that resulted from Hurricane Katrina. Instead we contend that the prescriptive case for the creation of DHS is unpersuasive, that its creation entailed transition costs of uncertain duration and extent (a fact recognized even by many of its proponents), and that a plausible case can be made that specific difficulties—such as those faced by the TSA or FEMA during and after the Katrina crisis—were exacerbated by the creation of DHS. Regarding the background degree of expert uncertainty permeating analyses of the policy implications of particular legal and policy changes, see PHILIP E. TETLOCK, *EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW?* (2005).

for improving homeland security depend crucially on understanding the political forces that constantly pervade, and often warp, the work of organizations entrusted with this crucial mandate.

I. THE EVOLUTION OF HOMELAND SECURITY AFTER SEPTEMBER 11

Public bureaucracies decide where dams are built, whether nuclear power plants will add to energy production, how intelligence operations are conducted, who gets turned away at the border, and what environmental standards must be met. As with the imaginary lines that subdivide metropolitan areas into distinct jurisdictions, enormous practical significance flows from the legal rules allocating power among bureaucracies. Lurking behind the design of those rules may be a complex political story.

In this Part, we begin tracing such a story. We describe the interwoven origins of DHS and the sprawling statute (the Homeland Security Act, or HSA) from which the new Department was forged. We discuss the political context and substance of the Act at length for two reasons. First, our story contrasts with certain canonical descriptions of legislative developments following the September 11 terrorist attacks, which tend to emphasize resolute presidential leadership and relative legislative passivity.¹⁸ In contrast, our account reveals presidential policy reversals, the centrality of congressional bargaining even in the midst of a crisis, and the resulting statutory intricacies governing the new cabinet agency. Second, certain puzzles emerge from the story of the Act and the Department, setting the stage for our analysis in the sections that follow.

A. *The Status Quo Before September 11*

The end of the Cold War dramatically affected debates about American security. By the middle of 2001, American policymakers had largely altered a national security argot once replete with references to a balance of power, containment, and mutually assured destruction. Instead the rhetoric of national security policymakers and analysts increasingly focused on terrorism, asymmetric warfare, and above all “homeland security.”¹⁹ Terrorist attackers

18. See, e.g., Lewis H. Lapham, *Exit Strategies*, HARPER'S MAG., Jan. 1, 2006, at 7 (emphasizing the extent to which the post-September 11 era appears to involve “a cowed legislature”); Julie Mason, *White House Watch: Burnout on the Bush Team?*, HOUSTON CHRON., Mar. 19, 2006, at A14 (observing that after September 11, Congress kept a “rubber stamp” on hand for the White House).

19. The term was generally taken to refer to the security of the American homeland, its infrastructure, and its population from a full range of man-made threats. See U.S. COMM'N ON NAT'L SEC. IN THE 21ST CENTURY, SEEKING A NATIONAL STRATEGY: A CONCERT FOR PRESERVING SECURITY AND PROMOTING FREEDOM 13-15 (2000), available at <http://www.au.af.mil/au/awc/awcgate/nssg/phaseII.pdf> (describing homeland defense as a preeminent security goal); FIRST ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS OF THE ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM

had struck several times during the previous eight years, most notably at the World Trade Center in 1993 and in Oklahoma City in 1995.²⁰ Numerous blue-ribbon commissions had called for heightened attention to the threat of terrorism.²¹ In response, the new President-elect created a structure within the White House National Security Council (NSC) to coordinate matters involving terrorism, its prevention, and the nation's ability to prepare and respond to such attacks.²² Unlike previous directives, the focus was primarily on attacks targeting the United States itself.²³

The perceived need for coordination arose in part from the sprawling nature of modern government. Numerous bureaus were responsible for preventing, preparing for, and responding to man-made threats against the United States.²⁴ Homeland security encompassed aspects of the work of the Departments of State and Defense, as well as the NSC.²⁵ Rounding out the coterie of national security bureaucracies were agencies devoted to intelligence, criminal investigation, and prosecution. The Central Intelligence Agency (CIA)

INVOLVING WEAPONS OF MASS DESTRUCTION 7 (1999), available at <http://www.rand.org/nsrd/terrpanel/terror.pdf> (discussing funding for "domestic preparedness and homeland defense"). The reports of these high-level blue-ribbon panels contrast sharply with the prevailing rhetoric describing U.S. national security challenges from just a few years earlier. See, e.g., OFFICE OF THE SEC'Y OF DEF., U.S. DEPT. OF DEF., QUADRENNIAL DEFENSE REVIEW (1997), available at <http://www.fas.org/man/docs/qdr/> (failing to emphasize terrorism or homeland security as preeminent security challenges).

20. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 71-82 (2004) [hereinafter COMMISSION REPORT].

21. See Amy B. Zegart, *September 11 and the Adaptation Failure of U.S. Intelligence Agencies*, INT'L SECURITY, Spring 2005, at 78, 85.

22. See COMMISSION REPORT, *supra* note 20, at 100-02. See generally Combating Terrorism, Presidential Decision Directive/NSC-62 (May 22, 1998) [hereinafter Presidential Decision Directive 62], available at <http://www.fas.org/irp/offdocs/pdd-62.htm>; Memorandum on Critical Infrastructure Protection, Presidential Decision Directive/NSC-63 (May 22, 1998) [hereinafter Presidential Decision Directive 63], available at <http://www.fas.org/irp/offdocs/pdd/pdd-63.htm>.

23. See Presidential Decision Directive 62, *supra* note 22; Presidential Decision Directive 63, *supra* note 22.

24. See generally *id.*; OFFICE OF THE FED. REGISTER, U.S. GOVERNMENT MANUAL: 2000-2001 (2000) [hereinafter GOVERNMENT MANUAL] (describing separate law enforcement, national security, and disaster relief missions for different government agencies). The identification of "homeland security" primarily with terrorism and similar man-made threats is derived from the Bush Administration's own budget analyses. See, e.g., OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2003, at 23 (2002) ("To develop the homeland security budget, the Office of Homeland Security . . . identified those activities *that are focused on combating and protecting against terrorism and occur within the United States and its territories.*" (emphasis added)). By using this definition, we do not mean to imply that it is a reasonable one. Indeed, as indicated by our discussion below on Hurricane Katrina in Part III.E and our analysis of the prescriptive merits of the Department's creation, there are considerable grounds for questioning the exclusion of major natural disasters from the definition of homeland security.

25. See COMMISSION REPORT, *supra* note 20, at 93-102.

combined an explicit core function of intelligence-gathering with its covert operations.²⁶ By 2001, it had multiple task forces working on terrorism-related issues. An elaborate group focused almost entirely on Osama bin Laden and al Qaeda.²⁷ Specialized intelligence entities, such as the National Security Agency (NSA), further complemented these activities by engaging in electronic eavesdropping outside the United States and gathering considerable signals intelligence. Homeland security and terrorism prevention were also considered the province of federal special agents and the law enforcement agencies for which they worked. As hearings in three Senate committees during the week of May 7, 2001, demonstrated, law enforcement agencies were routinely considered to be responsible for protecting the American public.²⁸ The Federal Bureau of Investigation (FBI) commanded vast budgets and statutory responsibility, serving as the lead counterterrorism law enforcement agency.²⁹ Foreign attacks on American interests, such as the bombing of the U.S.S. Cole in Yemen, invariably led to the deployment of an FBI team.

Several other bureaus also performed missions relevant to homeland security. A host of specialized law enforcement agencies existed, such as the Immigration and Naturalization Service (INS) and the Drug Enforcement Administration (DEA). The INS served multiple inspection, detention, investigation, quasi-adjudication, and policy functions related to controlling the flow of people into the country. Customs had the similarly daunting task of preventing prohibited items, including drugs and explosives, from entering the nation.³⁰ Within the U.S. Treasury Department, Customs was one of the largest bureaus in terms of budget, staff, and enforcement responsibilities. Like INS, it performed more than just investigative functions (e.g., tracking down money launderers, drug traffickers, and illicit brokers of technology subject to export

26. *See id.* at 88-91.

27. *See* RICHARD A. CLARKE, *AGAINST ALL ENEMIES* 167-71 (2004); *see also* LAWRENCE WRIGHT, *THE LOOMING TOWER* 3 (2006) (describing the existence of CIA and FBI offices “tracking the activities of . . . Osama bin Laden, whose name had arisen as the master financier of terror”).

28. The Senate Armed Services, Appropriations, and Intelligence committees held hearings analyzing the work of the approximately forty different agencies responsible for combating domestic terrorism. *See, e.g., Terrorism and U.S. Government Capabilities: Hearing Before the Subcomm. on Commerce, State, and the Judiciary of the S. Comm. on Appropriations*, 107th Cong. 6-7 (2001) (statement of Paul H. O’Neill, Sec’y of the Treasury).

29. *See* COMMISSION REPORT, *supra* note 20, at 74, 82 (“For countering terrorism, the dominant agency under Justice is the Federal Bureau of Investigation . . . [T]he FBI and the Justice Department . . . took on the lead role in addressing terrorism because they were asked to do so.”).

30. Customs was also responsible for trade-related revenue collection and the implementation of hundreds of legal mandates related to trade regulation. *See* U.S. GEN. ACCOUNTING OFFICE, *CUSTOMS SERVICE: COMMENTS ON STRATEGIC PLAN AND RESOURCE ALLOCATION PROCESS* (1997) (statement of Norman Rabkin, Dir., Admin. of Justice Issues, Gen. Gov’t Div.), available at <http://www.gao.gov/archive/1998/gg98015t.pdf>.

controls). It also played a regulatory function. While INS regulated the entry of people, Customs controlled the vast flow of goods into (and, in theory, out of) the United States. The Secret Service investigated counterfeiting and fraud-related financial crimes in addition to serving its most visible role of protecting the President. In addition to collecting excise taxes, the Bureau of Alcohol, Tobacco, and Firearms had become a law enforcement agency focused on firearms and explosives, with a wealth of technical expertise on these subjects unrivalled elsewhere in the federal government.³¹

Transportation and coastal security were handled largely through a tangle of overlapping functions nominally overseen from within the Department of Transportation. The Federal Aviation Administration (FAA) looked after the security of the aviation infrastructure, imposing (among other things) mandates on airlines and airports requiring them to pay for employees to screen passengers and their luggage. The Coast Guard similarly shared with Customs responsibility for key aspects of port security. It also performed coastal search and rescue operations along with a multitude of safety, rate-setting, and environmental regulatory functions.³²

Presumably, the work of these agencies could forestall a disaster that would have had to be handled by emergency response bureaucracies, who together formed the final pillar of homeland security—emergency response.³³ Of these, the Federal Emergency Management Agency (FEMA) was the most important. In addition to fielding emergency response teams and serving as a conduit for disaster relief money, FEMA also encompassed insurance programs to help mitigate the longer-term impact of various natural disasters.³⁴

Three features characterized the homeland security status quo before the September 11 attacks. First, policymakers assumed homeland security bureaucracies to be capable of operating reasonably effectively even though they had largely separate reporting structures and bureaucratic identities. Though some legislators and independent commissions complained about the fragmentation of responsibility for security-related problems, legislators tolerated the decentralization of bureaucratic power over national and homeland security.³⁵ Second, the description of the agencies above demonstrates that virtually *every* bureaucratic unit that had a role to play in

31. See COMMISSION REPORT, *supra* note 20, at 82 (“The [Bureau of Alcohol, Tobacco, and Firearms’s] laboratories and analysis were critical . . .”).

32. See GOVERNMENT MANUAL, *supra* note 24, at 308-35.

33. See *id.*

34. See Gary L. Wamsley & Aaron D. Schroeder, *Escalating in a Quagmire: The Changing Dynamics of the Emergency Management Policy Subsystem*, 56 PUB. ADMIN. REV. 235, 238-39 (1996). These efforts complement those of state and local responders who are likely to nearly always be the first on the scene in response to a terrorist attack. See Charles R. Wise & Rania Nader, *Organizing the Federal System for Homeland Security: Problems, Issues, and Dilemmas*, 62 PUB. ADMIN. REV. 44, 46 (2002).

35. See *House Speaker Forms Terrorism Panel*, 197 AEROSPACE DAILY & DEF. REP. 254 (2001).

homeland security also had separate functions—such as INS’s role in providing immigration services—that were different in scope and, therefore, potentially in conflict with security. Finally, enormous variation existed in the degree of coordination across relevant units. Some problems were undeniable, such as the relationship between the FBI and the CIA (and, for that matter, between the FBI and just about everyone else). But there were also apparent successes, as when federal officials foiled a plot to bomb traffic tunnels leading into New York City and some of its major landmarks.

B. *Shocks and Responses: The Immediate Aftermath*

The Administration’s initial response to the September 11 attack focused on proposing substantive legal changes. Working groups at the Justice Department soon pulled together legislative proposals from preceding years to fashion an outline of what would become the USA PATRIOT Act (Patriot Act).³⁶ The White House supported federal agents’ aggressive use of immigration and material witness authority to detain scores of people almost immediately following the attacks, and the President used his authority under the International Emergency Economic Powers Act (IEEPA) to block the assets of various individuals and organizations suspected of being tied to terrorists.³⁷

The White House staff also oversaw the implementation of two noteworthy changes in organizational structure, though its approach to each demonstrated a great deal of caution about major changes in the allocation of bureaucratic jurisdiction. On October 8, using existing statutory authority, the President created the position of Homeland Security Advisor within the Executive Office of the President and appointed Pennsylvania Governor Tom Ridge to fill it. Ridge sought to build a structure around his position to match the President’s ambitious rhetoric that the new Office of Homeland Security would “coordinate” policy by creating a Homeland Security Council, paralleling the structure of the National Security Council.³⁸

An implicit presumption that underlay the creation of Ridge’s office concerned the value of coordinating separate agencies mixing homeland

36. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.). So eager was the Department to craft the new bill that Attorney General Ashcroft discussed it on Sunday morning talk shows even before the Chairman of the House Judiciary Committee or the White House Counsel’s Office had any copies of the proposal. See STEVEN BRILL, *AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 12 ERA* 73-74 (2003).

37. See BRILL, *supra* note 36, at 148.

38. See generally BRILL, *supra* note 36, at 54 (noting how presidential advisers characterized their agenda as “not to reorganize all those agencies, but to hire a heavyweight to come work in the White House and *coordinate* them”); KETTL, *supra* note 9; Tom Ridge, *U.S. Is More Secure*, USA TODAY, Feb. 2, 2004, at 11A (describing homeland security measures and their progress).

security missions with other functions. White House officials presumed a gap to exist not only in the provision of advice, but in the extent of coordination among a great many agencies and bureaus.³⁹ These officials believed that success in the arena of homeland security depended on enhancing such coordination.⁴⁰ Ridge sought to provide that coordination, or at least the trappings of it. But even delivering the image of greater coordination to the public proved daunting. The National Counterterrorism Coordinator structure set up at the NSC now had a mandate overlapping with that of the new Homeland Security Office (HSO). There were no precedents for how to resolve the potential jurisdictional conflicts, nor was it obvious precisely what it meant for Ridge to coordinate, what his role would be in a crisis, or whether the conflict between the NSC and the HSO would prove a major impediment to the goal of coordination.⁴¹

Sensing disarray, some legislators proposed alternative structures. They insisted that the new Homeland Security Advisor should be subject to Senate confirmation and have statutory powers over budgets. Senator Bob Graham, a Democrat from Florida, introduced a bill to transform Ridge's entity into a new National Office for Combating Terrorism to achieve the aforementioned purposes.⁴² Other legislators went even further, reiterating occasional calls made earlier by selected legislators and blue-ribbon commissions for the creation of a new cabinet department focused on domestic security.⁴³

The President strongly opposed these efforts. Instead, White House aides emphasized the advantages of the status quo. From October 2001 until at least March of 2002, the White House Press Secretary insisted that creating a cabinet department was unnecessary and possibly counterproductive.⁴⁴ Unfortunately for the White House, the performance of the new Office during the anthrax attacks belied the President's argument that coordination had been sufficiently

39. For a discussion of the potential benefits and costs of centralized control, see *infra* Part II. For an interesting exploration of those benefits and costs in the context of intelligence agencies, see Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies*, 94 CAL. L. REV. 1655 (Dec. 2006).

40. It is worth noting that in this context the definition of "success" is not obvious; gauging success is complicated because the absence of attacks does not prove success. One possible formulation for success is: (a) measurable improvement in homeland security (traditionally defined to encompass man-made threats from both nonstate actors and more conventional geostrategic actors), (b) with neutral or positive political payoffs with the mass public, and (c) no corresponding, politically costly reduction in the effectiveness of other government programs. See generally DEP'T OF HOMELAND SEC., PERFORMANCE AND ACCOUNTABILITY REPORT: FISCAL YEAR 2005, at 123-32 (2005).

41. See BRILL, *supra* note 36, at 54 ("[T]hat coordinating would be a lot harder than it sounded."); KETTL, *supra* note 9, at 49-56.

42. S. 1449, 107th Cong. § 1 (2001).

43. See Alison Mitchell, *A Nation Challenged: The Security Chief; Disputes Erupt on Ridge's Needs for His Job*, N.Y. TIMES, Nov. 4, 2001, at B1.

44. Ari Fleischer, White House Press Sec'y, Press Briefing (Oct. 2, 2001) (transcript available at <http://www.whitehouse.gov/news/releases/2001/10/20011002-11.html>).

bolstered by the creation of Ridge's Office. During the anthrax episode, some observers described Ridge's response as tentative and uncertain.⁴⁵ Despite the new Homeland Security Advisor's declaration that he was in charge of the response, Health and Human Services Secretary Tommy Thompson appeared to contradict Ridge. During this difficult period, however, despite both the criticisms and the absence of formal budget authority, Ridge pressed for, and helped the White House achieve, a \$1.2 billion increase in the immigration enforcement budget.⁴⁶

A second structural change took shape in response to discussions between Congress and a reluctant White House. These negotiations culminated in the creation of a new federal bureaucracy to consolidate responsibility for transportation security.⁴⁷ Upon its creation in 2002, the Transportation Security Administration (TSA) assumed complicated responsibilities over the security of the nation's transportation infrastructure.⁴⁸ The White House initially opposed the idea. The President preferred to forego creating a new bureaucracy and to keep the screeners private. Whether that opposition was rooted in ideology or in concern for the organized interests likely to be affected, the Administration later abandoned its reluctance and endorsed the idea. Some observers with access to the deliberation now report that the Administration's acquiescence reflected not only mounting pressure from congressional Democrats but also the recognition that the mass public was unlikely to trust private screeners given their inability to prevent the hijackings.⁴⁹ The new law placed TSA within the Transportation Department. The new agency's creation was also accompanied by an initial dismemberment of the FAA's security capacity (provoking bitter opposition by some employees at the FAA),⁵⁰ lodging it elsewhere in the Transportation Department.

45. See Victoria Sutton, *Biodefense: Who's in Charge?*, 13 HEALTH MATRIX 117 (2003).

46. The Coast Guard also received a funding increase of \$282 million in 2002. Jonathan Thessin, Note, *Recent Developments: Department of Homeland Security*, 40 HARV. J. LEGIS. 513, 518 n.39 (2003); see also *infra* Part III (discussing the pressures interfering with continued performance of the Coast Guard's legacy missions following the creation of the Department of Homeland Security).

47. See Wendy Haynes, *Seeing Around Corners: Crafting the New Department of Homeland Security*, 21 REV. POL'Y RES. 369, 375-76 (2004).

48. See KETTL, *supra* note 9, at 80.

49. See BRILL, *supra* note 36, at 166 (noting "widespread media reports and public disgust about the low quality of the airport screening force"); CLARKE, *supra* note 27, at 245; KETTL, *supra* note 9, at 46-47.

50. See BRILL, *supra* note 36 at 506 (discussing how new TSA managers perceived attacks on their agency as coming from "staff people at the FAA, who were bitterly jealous that TSA even existed").

C. Initial White House Resistance to Reorganization

Whether TSA would even remain at the Transportation Department would soon become a matter of intense political debate. Well before September 11, a number of legislators and blue-ribbon commissions had called for consolidating some bureaus with a homeland security mandate in a cabinet-level agency.⁵¹ Various plans on Capitol Hill focused on three functions: border security and enforcement, disaster response functions relevant to terrorist attacks, and policymaking activities to facilitate the prevention of attacks.⁵²

Following the attacks, Senator Joseph Lieberman, then serving as Senate Governmental Affairs Committee Chair, re-introduced legislation to centralize certain government functions into a single homeland security department. While some Republican legislators, such as Arlen Specter, expressed some interest, the President did not. He believed that such consolidation would constitute a waste of time at best. On March 19, 2002, for instance, in response to a questioner who asked “[w]hy . . . the White House continue[s] to resist the idea of making the Office of Homeland Security a Cabinet-level department,” Press Secretary Ari Fleischer insisted:

I’m not aware of a single proposal on Capitol Hill that would take every single one of those agencies [dealing with terrorism] out from their current missions and put them under Homeland Security. So even if you took half of them out and put them under a Cabinet level Office of Homeland Security, the White House would still need, in the President’s estimation, an advisor on how to coordinate all that myriad of activities the federal government is involved in. So creating a Cabinet office doesn’t solve the problem. You still will have agencies within the federal government that have to be coordinated.⁵³

Several factors might have made the creation of a new department seem problematic from the President’s perspective. The substantive benefits of a consolidation were unobvious, indeed, highly uncertain—a point to which we return below. Major changes were likely to provoke opposition from powerful legislators whose committees stood to lose some jurisdiction and from the interest groups they served.⁵⁴ Moreover, career officials and political appointees within the Administration were likely to resist the transfer. Opposition among the bureaucracies could have proven politically costly to the President,⁵⁵ increasing the risk that reorganization would backfire and potentially exposing the Administration to criticism in the press or on Capitol

51. See Zegart, *supra* note 21 at 85-87.

52. See KETTL, *supra* note 9.

53. Ari Fleischer, White House Press Sec’y, Press Briefing (Mar. 19, 2002) (transcript available at <http://www.whitehouse.gov/news/releases/2002/03/20020319-7.html>).

54. Note that if this had been a genuine concern, it might still have been possible for the President to negotiate some agreement with the legislators in question.

55. See Interview with Jimmy Gurulé, Professor of Law, Notre Dame Law School, in Stanford, Cal. (Apr. 20, 2004).

Hill.⁵⁶ Critics of previous reorganizations had, after all, pointed out that they had created such problems in the past.⁵⁷ Finally, to the extent that prescriptive concerns mattered at all (something we explore and question below), they might cut sharply *against* the sort of reorganization that might seem superficially appealing to the public. Reorganizations almost inevitably cost money and create friction among people and organizations scrambling to understand the consequences of the new hierarchy under which they must work. Moreover, reorganizations create new authority structures that typically engender friction, which hinders one of the main reasons for reorganization—namely, coordination.

Even in the midst of its crisis mode, White House aides may have appreciated certain risks inherent in taking responsibility for a massive reorganization. In the short run, there was a substantial chance that reorganization would actually decrease agencies' effectiveness in responding to security threats, at a time when the Administration would have thought these would almost certainly persist or grow. Though little is known about the impact of reorganizations on bureaucratic performance, it is widely acknowledged that performance suffers at the outset.⁵⁸ One account of the frantic days following September 11 underscores the extent to which these prescriptive concerns, intermingled with an appreciation of the political costs, *were* on the White House radar screen even two days after the terrorist attack:

By Thursday, Abbot, Kuntz, and Libby [aides to Vice President Cheney] had concluded that the first thing the Bush administration should do would be *not* to reorganize all those agencies, but to hire a heavyweight to come work in the White House and *coordinate* them, much the way Condoleezza Rice, the National Security Advisor, coordinated the various agencies involved in foreign and defense policy. They could never get all the agencies with some role in domestic security into one department, they reasoned, because so many also did so many other, unrelated jobs. (FEMA, for example, administers flood insurance in addition to coordinating the federal response to disasters.)

56. As an example of how Presidents might suffer such criticism from subordinates, consider Richard Clarke's account of the challenges the White House faced in achieving covert action from reluctant bureaucracies:

Whether it was catching war criminals in Yugoslavia or terrorists in Africa and the Middle East, it was the same story. The White House wanted action. The senior military did not and made it almost impossible for the President to overcome their objections. When in 1993 the White House had leaned on the military to snatch Aideed in Somalia, they had bobbled the operation and blamed the White House in off-the-record conversations with reporters and Congressmen. What White House advisor would want a repeat of that?

CLARKE, *supra* note 27, at 145.

57. See, e.g., DEMETRIOS CARALEY, *THE POLITICS OF MILITARY UNIFICATION: A STUDY OF CONFLICT AND THE POLICY PROCESS* 213-44 (1966); SZANTON, *supra* note 12; WILSON, *supra* note 7, at 264-68.

58. See, e.g., Brian Balogh et al., *Making Democracy Work: A Brief History of Twentieth Century Federal Executive Reorganization* 5 (Miller Ctr. of Pub. Affairs Working Paper in American Political Dev., 2002), available at ftp://webstorage1.mcpa.virginia.edu/apd/homeland_security/full_report.pdf.

The goal should be to coordinate whatever they did related to homeland security, rather than spend a lot of time and money dislodging them from their current departments.⁵⁹

The White House emphatically followed that path. In the weeks following the attacks, aides insisted that Ridge's office fit the bill, coordinating both the sprawling federal security apparatus and the thousands of local police and fire departments, from Manhattan to Minnesota to Manhattan Beach, still scrambling to enhance security in their local jurisdictions.⁶⁰

Despite the Democrats' control of the Senate, Congress broadly supported the President in the two months following the attack. The Administration achieved rapid passage of the Patriot Act and a resolution authorizing the use of force abroad in response to the attacks. Even individual Democratic legislators seemed initially inclined to cooperate. Senator Graham, for example, agreed to the President's proposed legislation. The extent of congressional support contributed to an impression of considerable (if not frantic) policy change and implementation. The Administration's burst of activity since September 11—including the Patriot Act, the creation of a large new transportation security bureaucracy, the private sector's thrust to crack a new homeland security market, state and local officials' regional exercises, the invasion of a Central Asian nation, and forging a new White House staff office—seemed to push the limits of what the nation's political machinery could digest in such a short time.

D. *Shaping a Reorganization and Striking Legislative Bargains*

Legislators were not entirely passive participants in the policymaking process, however. Emboldened by White House reluctance and public opinion surveys, a score of legislators called for a new cabinet department focused on homeland security.⁶¹ White House aides thus encountered a more complex political terrain. By late October 2001, Democrat Joseph Lieberman in the Senate and Republican Mac Thornberry in the House led what had begun as an unlikely (if not downright outlandish) crusade to forge agencies into a new super-bureaucracy that began to pick up support among both Republican and Democratic legislators.⁶² The response from the White House through the rest of 2001 and early 2002 remained an emphatic "no."

59. See BRILL, *supra* note 36, at 54. The extent to which the President's aides summarily concluded that social insurance functions were unrelated to domestic security is consistent with the Administration's narrow identification of homeland security with terrorism. See *supra* note 24. Such a position contrasts with the approach taken by the Roosevelt Administration during the 1940s, where public officials relentlessly sought to link social insurance, public health, education, and regulatory programs to the goal of "security" and national defense. See *infra* notes 250-55 and accompanying text.

60. See BRILL, *supra* note 36, at 54-55 (describing the negative reaction of Vice President Cheney's aides to the prospect of creating a new department).

61. See *infra* Part III.A.

62. See Haynes, *supra* note 47, at 374-75.

But this negative response was not the last word from the White House. On June 6, President Bush unveiled his own proposal for the new Department of Homeland Security.⁶³ Hints that something was in the works had appeared beginning in April, when Budget Director Mitch Daniels publicly stated that the President could propose reforms at a later date.⁶⁴ What Daniels did not say was that the President had already set the process in motion. In late 2001 and early 2002, the President had several conversations with Ridge and Chief of Staff Andrew Card about the merits of creating a new department to administer homeland security.⁶⁵ Responding to congressional resistance to an earlier border consolidation plan, the President apparently noted the plan “seems kind of small to me,” and then added:

You know . . . maybe we should stop getting pecked to death like this. *Maybe it's time to think big.* When you do something piecemeal, all the interests here come at you one by one and kill you. Let's just make believe we are re-creating the government from scratch and map out what we'd put in a new homeland department and then maybe we'll go for it.⁶⁶

By March, aides to Ridge, Card, and Daniels were holding secret meetings in an underground White House bunker.⁶⁷ Participants in the meetings now suggest that their deliberations were driven largely by prescriptive concerns about the organizational merits of consolidating various units. The group was also concerned about what could be sold on Capitol Hill, as underscored by the fact that the initial small group soon expanded to include staff from the White House legislative affairs operation.

Although the small amount of information available regarding these early meetings makes it impossible to determine the participants' precise mix of concerns, the discussions soon yielded a rough picture of a department with two significant features. First, it would be significantly larger in scope and size than anything that had been proposed by the Democrats or previous independent commissions. “The PEOC [Presidential Emergency Operations Center] group,” noted one commentator (referring to the underground bunker where White House aides were meeting to plan the new agency), “had now created a mega-agency that far exceeded Senator Lieberman's relatively modest proposal for a Department of Homeland Security, and they weren't finished.”⁶⁸ The working group demonstrated a willingness to contemplate an even larger department by its inclination to consider moving the FBI, the FAA, and ATF into the Department (moves that were ultimately rejected). Precisely why the White House process contemplated and produced such a sprawling

63. See STEPHEN FLYNN, *AMERICA THE VULNERABLE* 139 (2005); see also BRILL, *supra* note 36, at 485-87.

64. See *id.* at 416.

65. See *id.* at 397; Haynes, *supra* note 47, at 372-78.

66. See BRILL, *supra* note 36 at 397 (emphasis added).

67. See *id.* at 377-402.

68. *Id.* at 449.

department is not immediately clear, a matter to which we return in Parts II and III. Second, the PEOC group intended the new department to serve as a showcase for the value of flexibility in presidential control of personnel. The goal of watering down civil service protections appealed to the President's aides, particularly Daniels.⁶⁹

The thirty-five page legislative proposal that emerged from the meetings of the "PEOC group" sought to establish four primary "directorates" at the core of the new Department: border and transportation security, information analysis and critical infrastructure protection, science and technology, and preparedness and emergency response. It included provisions allowing the President to appoint over a half-dozen assistant secretaries without Senate confirmation, and sought to imbue the President with power to redistribute appropriations among several different agencies. It called on political appointees to rewrite civil service protections governing many of the agency's new employees and to replace them with a "flexible" system, presumably vesting greater power over career officials in the hands of political officials.⁷⁰

The starkest feature of the plan was its scope. It sought to move some twenty-two agencies into DHS, despite the fact that not all of their functions conformed to even the most expansive definition of homeland security. The marine environmental portions of the Coast Guard, for instance, were to be entirely absorbed by the Department, as were the revenue collection and trade enforcement functions of the Customs Service, and the agricultural regulatory functions of the Animal and Plant Health Inspection Service (APHIS).⁷¹

In contrast, many previous proposals for the creation of a homeland security agency had considered more modest changes. For example, Republican Representative Mac Thornberry's pre-September 11 bill, introduced in March of that year, essentially advocated moving FEMA, Customs, the Coast Guard, and border patrol to the new Department.⁷² Unlike the President's plan, agencies such as the Secret Service, APHIS, the investigative and regulatory functions of immigration authorities, health-related functions such as the national vaccine stockpile, and the Treasury's Federal Law Enforcement Training Center were left untouched.⁷³ The Administration-supported reorganization's mixing of a wide range of legacy missions with new

69. *See id.*; Haynes, *supra* note 47, at 379-80.

70. *See* White House, Proposed Homeland Security Act of 2002 (June 2002) [hereinafter President's Plan], available at <http://www.whitehouse.gov/deptofhomeland/bill/hsl-bill.pdf>.

71. *See* Eli Lehrer, *The Homeland Security Bureaucracy*, 155 PUB. INT. 71, 77-78 (2004). How FEMA is classified depends, of course, on the extent to which one views responses to accidental and natural disasters as a component of homeland security. Doing so is certainly plausible. Below we note how some of the prescriptive problems associated with the creation of the new Department may involve the adverse impact of focusing on a particular type of man-made security problem (terrorism) at the neglect of others.

72. *See* H.R. 4660, 107th Cong. § 102 (2002).

73. *See* H.R. 1158, 107th Cong. (2001).

homeland security responsibilities raised the question of how the tradeoffs were to be made across these missions.⁷⁴

A flurry of activity followed the White House's June 7 announcement. The White House briefed cabinet members (many of whom were just learning about the plan at that point) and legislative leaders. The President's aides spoke to the media, and at 8 p.m. Eastern Time, the President spoke to the nation about the plan.⁷⁵ The elaborate roll-out confirmed that the President and his staff were now not only joining the chorus of support for the reorganization but sought to lead the reorganization drive. The building blocks of the new proposal broke from past plans in the larger scope of agencies to be included and in the provisions weakening civil service rules. Despite these differences, publicly the plan was premised on the same logic that the alternatives were: the value of centralization.

The Administration's decision to develop that plan did not unfold in a political vacuum. Several factors may have underscored to the White House that it would face rising costs by continuing its opposition to the creation of a new cabinet department. Its legislative affairs staff documented rising support for consolidation among legislators.⁷⁶ Security issues continued holding much of the public's attention, particularly given congressional hearings about the September 11 attacks, and public debate about whether an independent commission would ultimately be created to investigate the attacks, the creation of which the White House opposed.⁷⁷ White House officials may have anticipated risks from opposing a new department along with an independent commission heading into the midterm congressional elections. In addition, creating a new department may have had particularly strong political salience because of its appeal to latent, if potentially superficial, notions of effective governance.⁷⁸ But these developments fail to account for the choices the White House made regarding the size, scope, and prescriptive merits of the new Department.

74. Note how the relevance of this question can be understood in at least two ways: either the legislation itself allows for some flexibility or, as a practical matter, it allows for Department executives to retain some discretion. On the other hand, political pressures would be quite likely to encourage a DHS executive to focus on terrorism because that is the issue that would be most likely to be used to judge her. Cf. WILSON, *supra* note 7, at 197 (explaining that an executive is judged on the appearance of success, including popularity).

75. See BRILL, *supra* note 36, at 486.

76. See CLARKE, *supra* note 27, at 250.

77. See COMMISSION REPORT, *supra* note 20, at 273-74, 540 n.94.

78. Some bureaucratic reforms may be easier to explain to the public, regardless of whether they are in fact more likely to deliver desired behaviors from the bureaucracy. Cf. James H. Kuklinski & Paul J. Quirk, *Reconsidering the Rational Public: Cognition, Heuristics, and Mass Opinion*, in ELEMENTS OF REASON 153 (Arthur Lupia et al. eds., 2000) (suggesting that the difficulty of interpreting information, given the heuristics used by individuals to make sense of the political world, shapes opinion formation).

The President's June announcement found Congress still mired in divisions about the merits of creating a new department. Support remained vigorous among members of the Senate Government Affairs Committee, who had proposed renaming the committee "Homeland Security and Governmental Affairs" and who almost certainly stood to gain prestige, power, and influence if their expectations were fulfilled and the new department fell under their jurisdiction. At the same time, a stubborn core of opposition persisted among lawmakers who had committee jurisdiction to lose, or who saw position-taking opportunities in opposing substantive civil service changes, earmarks, and liability protections in the President's proposal.⁷⁹

With a growing number of legislators joining the President in supporting the creation of a new department, there followed a period of intense bargaining. In the House, Speaker Dennis Hastert and the Republican leadership created a two-track process to evaluate the bill, christened the "Homeland Security Act" (HSA). Over a dozen committees with existing jurisdiction over various aspects of homeland security marked up the bill, but their votes were considered advisory in nature. Meanwhile, Hastert empaneled a Select Committee on Homeland Security, which included most of the chairs of existing committees with jurisdiction over homeland security, to make final decisions on the House version.⁸⁰

Hastert's move was understandable. If the leadership had left the decisionmaking solely to the existing standing committees with existing authority, they would likely oppose the major reorganization that the President

79. *See id.*; Lehrer, *supra* note 71, at 82-83 (discussing budgeting and shifting of resources among agencies). Although a significant consolidation of jurisdiction over homeland security funding into a single subcommittee within legislative appropriations committees was recently achieved, this occurred years after the Department was established and over substantial legislative opposition. Other aspects of homeland security policy (including power over legislative authorization) remain substantially decentralized. *See* John M. Doyle, *HS Jurisdictional Split in Senate Seen as Maritime Industry Headache*, AVIATION WEEK'S HOMELAND SEC. & DEF., Nov. 24, 2004, available at 2004 WLNR 14144805 (noting that, while homeland security appropriations subcommittees already exist in both houses, "less than half of the duties performed by the DHS will come under the new Homeland Security and Governmental Affairs [authorization] Committee"); *see also infra* Part III.A (reviewing the extent of opposition to reorganization among more senior legislators). For an insightful account of the extent of congressional opposition to a previous presidential reorganization effort that threatened the internal allocation of legislative jurisdiction, *see* POLENBERG, *supra* note 12. Divisions among legislators underscore the fact that, on an issue like the potential creation of a new Department of Homeland Security, legislators are likely to divide into several groups: (a) those who sit on committees that oversee bureaucracies that would be moved to the new DHS (these members have something to lose from the reorganization); (b) those members who sit on the committees likely to gain oversight power over the new DHS; and (c) all others, who might evaluate the details of legislative proposals on the basis of potentially desirable position-taking opportunities or specific provisions affecting their political goals. *See infra* Part II.

80. *See Bush Security Plan Seeks Boost in Power*, HOUSTON CHRON., July 16, 2002, at A2; Editorial, *No Quick Homeland Security Fix*, CHI. TRIB., July 17, 2002, at N22.

was now publicly committed to support and that a growing segment of the public appeared to support. Alternatively, if Hastert created his own handpicked committee, existing members and committees would likely be opposed to the result.

The markups revealed widespread concern among the committees regarding potential changes in their jurisdiction. For example, the House Judiciary Committee voted to transfer the Secret Service to the Justice Department, over which it had jurisdiction, instead of letting it go to the new Department. The House committee with jurisdiction over transportation issues sought (like the one in the Senate) to prevent or delay moving the new Transportation Security Agency to the new Department. And many legislators sought to limit the presidential powers in the new bill, such as those allowing the White House to appoint assistant secretaries without Senate confirmation.⁸¹

Although the first stage of advisory markups appears symbolic since the Select Committee would have the final say, the procedure resulting in these votes could also be understood as serving as a critical information collecting device for party leaders who favored the reorganization. The House leadership appeared inclined to support the President's push for reorganization. Nonetheless, the membership was likely to be quite wary of a wholesale redistribution of power within the legislature, which was an almost inevitable consequence of the reorganization legislation. The markups thus allowed the committees to reveal what portions of the proposed changes were politically most costly to them and which were less so. The Select Committee could then take these committee actions into account in its decisions, either by incorporating the committees' changes or by searching for other means to assuage the committees' ostensible concerns. The Select Committee reported its version of the HSA on July 19, 2002, on a straight 5-4 party-line vote. This

81. See, e.g., STAFF OF H. ARMED SERVS. COMM., 107TH CONG., SUMMARY OF EN BLOC MANAGER'S AMENDMENT TO H.R. 5005 (2002), available at <http://www.house.gov/hasc/billsandreports/107thcongress/hr5005mgrsamendssummary.pdf> (illustrating the House Armed Services Committee protecting its jurisdiction); H. COMM. ON THE JUDICIARY, 107TH CONG., VIEWS AND RECOMMENDATIONS ON H.R. 5005, at 5 (2002), available at <http://judiciary.house.gov/Legacy/homeland071502.pdf> (discussing the House Judiciary Committee's efforts to transfer the Secret Service to the Justice Department); STAFF OF H. COMM. ON ENERGY AND COMMERCE, 107TH CONG., THE RECOMMENDATIONS OF THE COMMITTEE ON ENERGY AND COMMERCE TO THE SELECT COMMITTEE ON HOMELAND SECURITY CONCERNING H.R. 5005, at 11 (2002) (chronicling the House Energy and Commerce Committee's efforts to stop the transfer of functions involving nuclear stockpile security and related matters from the Energy Department); Press Release, House Comm. on Transp. and Infrastructure, U.S. House Transportation Committee Leadership's Testimony Before the Select Committee on Homeland Security (July 17, 2002) (showing the House Transportation Committee seeking to delay the transfer of TSA). The provision for presidential appointment of assistant secretaries included in the original draft of the Homeland Security Act that the White House issued was not present in the final Homeland Security Act.

legislation became the basis for the final bill, described below, and passed by the full house on July 26, 2002.⁸²

Partisan divisions on the House Select Committee foreshadowed greater conflict in the Senate, where Democrats controlled the chamber by a tiny margin. Already, the President's June announcement had probably begun to blunt the perception, which Senator Lieberman had intensely sought to foster, that creating the new super-agency was a Democratic initiative. Lieberman now sought to recapture the initiative. In late July, the Senate Governmental Affairs Committee approved a Lieberman-sponsored version of the homeland security bill with civil service provisions more acceptable to the Democrats and provisions transforming Ridge's existing office at the White House into an Office of Counterterrorism with a director subject to Senate Confirmation.⁸³ The Senate then received the House version of the HSA, which gave the President, among other things, the power to exempt parts of government from federal labor management relations statutes.⁸⁴ Lieberman and his allies sought to substitute his new bill for the House version. But Senator Phil Gramm filibustered cloture motions to limit debate.⁸⁵ In the end, Senate Democrats were unable to pass a cloture motion to force a vote on their preferred version of the bill, which would have triggered a House-Senate conference on the creation of the new Department. And they were unwilling to compromise on the civil service provisions. Thus, when the midterm elections arrived, the Senate had not agreed to support the President's and the House Republican leadership's version of the HSA. Ironically, the Democrats were exposed to the charge that they opposed the creation of a department that they had played such a key role in forcing the President to accept.⁸⁶

The elections brought further unwelcome news for the Democrats, who lost the Senate and were dealt an even more lopsided minority in the House. After a final attempt to strip provisions allowing the President to suspend collective bargaining protections, the Democrats compromised and allowed cloture to be invoked in the Senate by a vote of 83 to 16 on November 19, 2002. The Senate then passed the House bill with minor amendments that were approved in the House by voice vote, and the bill was sent to the President on November 22, 2002.⁸⁷

82. See Donald R. Wolfensberger, *Congress and Policymaking in an Age of Terrorism*, in CONGRESS RECONSIDERED 343 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 8th ed. 2005); 58 CONG. Q. ALMANAC PLUS 7-5 (2002).

83. S. 2452, 107th Cong. (2002).

84. H.R. 5005, 107th Cong. (2002); see also CONG. Q. WKLY., July 27, 2002, at 2028.

85. Republicans emphasized that presidential waiver authority to modify the operation of collective bargaining agreements already existed for other departments, and that if anything, a President should have expanded authority to impact the implementation of collective action agreements in the homeland security context. See 148 CONG. REC. H5804 (daily ed. July 26, 2002).

86. See CLARKE, *supra* note 27, at 249-51.

87. With respect to civil service provisions, the law gave the President most of what he

E. The Final Bill

When the President declared victory three days later, he signed a bill that was far more detailed than what the White House had initially proposed. The details reflected protracted presidential bargaining with Congress. On the surface, the final bill established a department that was quite similar to what President Bush had proposed. Consistent with the President's proposal, the core functions of DHS were grouped into four directorates: Border and Transportation Security (including the bulk of the Department's employees and resources), Intelligence and Infrastructure Protection (incorporating some of the smaller infrastructure protection offices absorbed from the Commerce Department's Critical Infrastructure Assurance Office and the FBI), Science and Technology (including the Homeland Security Advanced Research Projects Agency, or HSARPA, initially projected to administer a \$500 million fund supporting innovative research and development projects), and Preparedness (primarily FEMA).⁸⁸ As Appendix Table 1 indicates,⁸⁹ not every agency that the White House working group considered placing within DHS ended up in the Department. The sprawling agency had nonetheless come to encompass functions ranging from international child labor investigations to marine fuel leaks, and included nearly every entity that the President ultimately proposed to move into the new agency.

Despite the White House's relative success, the legislative bargaining process also introduced some important changes. The final Homeland Security Act contained nearly two hundred separate legislative provisions (with some individual provisions stretching over a half-dozen pages). In contrast, the President's original proposal contained fewer than fifty sparsely-written provisions focusing primarily on the structure of the four aforementioned directorates. This disparity reflects complexities lurking beneath the surface of the HSA.

Unlike the original White House bill, for instance, the resulting HSA simultaneously included language explicitly emphasizing the importance of non-homeland security missions along with the terrorism-focused language⁹⁰ and provisions establishing the Secretary's power over the bureaus.⁹¹ It could not have been lost on legislators that the first *three* of the Department's six functions concerned terrorism. At the same time, lawmakers supplemented the

sought, including the power to abrogate, for a period of up to five years, many civil service protections for key DHS employees. Homeland Security Act of 2002, Pub. L. No. 107-296, § 841(a)(2), 116 Stat. 2135, 2229-33. The law allows the Secretary, in conjunction with the Director of the Office of Personnel Management, to prescribe a "human resources management system" for the Department, waiving civil service provisions governing compensation, evaluation, reward, and punishment of employees. *Id.* § 841.

88. President's Plan, *supra* note 70, § 103.

89. *See infra* Appendix Table 1.

90. Homeland Security Act § 101(b)(1)(E).

91. *Id.* § 102.

blanket entreaty for the new Department to “[e]nsure that the functions of the agencies and subdivisions within the Department that are not related directly to securing the homeland are not diminished or neglected except by an explicit Act of Congress” with additional agency-specific language.⁹² In the case of the Coast Guard, legislators actually allowed some (ostensibly limited) diminution of non-homeland security functions, but sought to monitor changes in its non-security regulatory and safety missions by requiring regular reports from the Inspector General and the Secretary.⁹³ The HSA also contained similarly detailed provisions governing a plethora of other agencies transferred to the new Department, specifying (for example) that some revenue-collection regulatory functions of Customs would remain at Treasury⁹⁴ while the Secretary of Homeland Security could administer others,⁹⁵ and providing that FEMA should carry out an “all hazards” mission while simultaneously allowing the Secretary the flexibility to refocus FEMA’s actual operations.⁹⁶

The resulting bill also denied to the White House many of the sweeping presidential powers contained in the original proposal. Despite the united Republican government, the bill did not allow the White House directly to control the timing of agency transfers, to redistribute appropriations among different agencies, or to appoint assistant secretaries without Senate confirmation. The HSA also created a host of research institutes and centers of excellence with mandates to focus on exceedingly broad conceptions of homeland security (including, for example, one center focused on developing new prison-related technologies).⁹⁷ Over time these institutions would almost

92. *Id.* § 101(b)(1)(E).

93. *Id.* § 888(f).

94. *Id.* § 412.

95. *Id.* This provision is illustrative of the legislative compromises by simultaneously including language emphasizing the importance of legacy mandates while actually conferring greater authority on executive officials. The revenue provision does not allow Treasury to retain exclusive control over the revenue-related regulatory functions of Customs. Under the HSA, the Secretary of the Treasury has the power to delegate these functions to the Secretary of Homeland Security, and—where such delegation has not occurred—must consult with the Secretary of Homeland Security on the performance of these functions. *Id.* § 412(a)(1). Thus, even if the Secretary of the Treasury chose not to delegate any of these powers, the law allows Treasury to wield its tariff-related regulatory authority only in consultation with the Department of Homeland Security. The Secretary of Homeland Security, moreover, retains considerable discretion to set enforcement priorities at Customs despite language in sections 413 and 417 placing limited restrictions on the Secretary’s ability to directly diminish or discontinue revenue-related functions. For example, while the Secretary may not directly “reduce the staffing level, or reduce the resources attributable to” functions performed by Customs’ dedicated revenue and trade staff, the Secretary appears to retain authority to affect the priorities of the more than 20,000 employees under the Office of Field Operations that administer ports of entry, thereby changing the amount of information produced about potential revenue and trade violations. *Id.* § 412(b)(1).

96. *Id.* § 507.

97. *Id.* §§ 231-235, 312-313.

certainly serve as conduits for federal spending benefiting particular regions or industries.⁹⁸

Finally, the legislation accomplished a proliferation of other goals, many of which were initially addressed in separate legislative proposals. For instance, although the Justice Department lost virtually all its immigration enforcement power when INS was transferred into the new Department, it gained most of Treasury's Bureau of Alcohol, Tobacco, and Firearms.⁹⁹ Pilots gained a right to be armed.¹⁰⁰ Airlines obtained new insurance and financial protections,¹⁰¹ and the Department gained new regulatory powers to protect manufacturers of "anti-terrorism" technologies from liability.¹⁰²

Together these features evince the importance of four recurring themes associated with the legislative bargaining process. First, although the new bill granted the Secretary of Homeland Security sweeping powers of "direction, authority, and control" over the new Department,¹⁰³ legislators recoiled from granting the President the sweeping powers he had requested to reallocate appropriations, appoint assistant secretaries without confirmation, and control the timing of agency transfers. Second, legislators showed predictable interest in creating conduits for the transfer of federal money to particular regions or industries—in short, pork. Third, lawmakers used the fast-moving HSA to advance discrete legislative projects that allowed them to signal desirable positions to the public (as with the provision arming pilots) or achieve major substantive policy goals sought by organized interests (such as the expansion in airline liability protections). Fourth, even as they ultimately voted for legislation that transferred major agencies into a new bureaucracy, legislators insisted on asserting control over those agencies by including provisions governing how those agencies were supposed to discharge their missions. In particular, legislators showed some awareness that the Department would—true to its name—emphasize homeland security over a plethora of legacy missions.

98. The extent to which legislators across parties collaborated in restraining White House efforts to expand the scope of presidential power illustrates the potential willingness of legislators to prioritize institutional prerogatives (which can translate into policymaking power and electoral advantage) despite partisan differences. For a contrary perspective playing down the possibility of cross-party institutional interests, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

99. Homeland Security Act §§ 451-456, 1111-1115.

100. *Id.* § 1402.

101. *Id.* §§ 1201-1203.

102. *Id.* §§ 862-865; see also Levinson & Pildes, *supra* note 98.

103. Homeland Security Act § 102(a)(2). Although the Secretary of Homeland Security was empowered to delegate many such powers to subordinates, the HSA had the effect of preempting all pre-existing delegations from officials such as the Transportation Secretary to heads of bureaus such as the Coast Guard. See, e.g., 33 C.F.R. § 1.01-70 (1998) (delegating the Secretary of Transportation's authority under CERCLA, the Federal Water Pollution Control Act, and the Oil Pollution Act of 1990 to inferior Coast Guard officials).

In response, lawmakers made modest efforts to stress the continued importance of the agencies' myriad non-homeland security responsibilities.¹⁰⁴

Equally noteworthy is what the bill omitted—congressional organization. The HSA describes the “sense of Congress that each House . . . should review its committee structure in light of the reorganization of responsibilities within the executive branch by the establishment of the Department,”¹⁰⁵ but the bill requires no changes in structure. Thus, as tens of thousands of inspectors, agents, and government employees began a long journey towards their positions in DHS in late November 2002, the congressional oversight structure over the Department's components remained largely unchanged.¹⁰⁶

Earlier the White House had sought to bolster its reorganization plan by arguing that too many congressional committees were involved in overseeing homeland security.¹⁰⁷ It ultimately acquiesced to a status-quo-driven congressional oversight structure. Although the Senate's Homeland Security and Governmental Affairs Committee appears to have gained some degree of jurisdiction at the expense of other committees, the Senate's Appropriations, Judiciary, Armed Services, and Finance Committees (among others) all retain substantial homeland security oversight responsibilities. In the House, even less centralization occurred in the legislative oversight structure. The relative preservation of the status quo in the House probably indicated the leadership's reaction to the repeated standing committee “advisory” markups seeking to limit the size and scope of the Department. Although such votes had not succeeded in limiting the scope of the sprawling new Department, little had changed with respect to congressional oversight as late as mid-2004:

In reality, jurisdiction [over DHS] in both chambers remains allocated to dozens of committees and subcommittees. From January to June 2004, DHS officials testified before 126 hearings, or about 1½ per day of legislative session, not including briefings or other meetings. Secretary Ridge estimated that he has been called to appear before 80 different committees and subcommittees on the Hill¹⁰⁸

104. See, e.g., Homeland Security Act § 101(b)(1)(E).

105. *Id.* § 1503.

106. See KETTL, *supra* note 9, at 42-43 (discussing the importance of congressional oversight structures); see also *Balancing Civil Liberties and National Security Needs: Hearing Before the Subcomm. on Nat'l Security, Emerging Threats, and Int'l Rel. of the H. Comm. on H. Gov't Reform*, 109th Cong. 4 (2006) (testimony of Mary A. Fetchet, Founding Director, Voices of September 11th) (“In the current structure most congressional committees have some jurisdiction over homeland security, making the current system prone to turf battles and inertia. . . . [E]veryone is in charge so no one is in charge.”); Todd J. Gillman, *Quelling Qualms on Security*, DALLAS MORNING NEWS, Jan. 9, 2005, at 12A (discussing House committees' reluctance to yield turf to the newly permanent Homeland Security Committee).

107. See GEORGE W. BUSH, THE DEPARTMENT OF HOMELAND SECURITY 1, 7 fig.3 (2002), <http://www.dhs.gov/xlibrary/assets/book.pdf>.

108. Thomas M. Susman, *Congressional Oversight of Homeland Security*, ADMIN. & REG. NEWS, Fall 2004, at 3.

Potential problems with congressional oversight did little to dampen the political enthusiasm for the new Department when it finally opened its doors in mid-2003. The President had switched from opposing the merger to fashioning—with legislative allies—a new homeland security agency larger than anything previously proposed. Neither the Administration nor members of Congress involved in forging the Department expressed much uncertainty about how well this sprawling arrangement would function. But history would soon extinguish any certainty about the legislation's merits.

II. UPDATING POLITICAL THEORIES OF BUREAUCRATIC ORGANIZATION AND PERFORMANCE: THE POLITICAL-BUREAUCRATIC SYSTEM

To understand the history of DHS, we must begin by considering what politicians want to accomplish when they bargain over the creation of a new bureaucracy. Over the past three decades, political scientists have developed a new approach to studying questions of bureaucratic performance and organization.¹⁰⁹ This perspective emphasizes a series of non-obvious implications about bureaucratic structure, incentives, and performance. In contrast to the traditional literature on bureaucracy,¹¹⁰ which primarily seeks to explain bureaucratic performance and inefficiency from an “internalist” perspective focusing largely on the goals and routines of the bureaucracy itself, the new approach discussed here places greater emphasis on an “externalist” perspective—one based on factors in a bureaucracy's political environment.¹¹¹

109. See, e.g., MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (2d ed. 1989); John Ferejohn & Charles Shipan, *Congressional Influence on the Bureaucracy*, 6 J.L. ECON. & ORG. (Special Issue) 1 (1990); John A. Ferejohn & Charles R. Shipan, *Congressional Influence on Administrative Agencies: A Case Study of Telecommunications Policy*, in CONGRESS RECONSIDERED 393 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 4th ed. 1989); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984); Matthew D. McCubbins, Roger G. Noll & Barry Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Moe, *supra* note 13; Terry M. Moe, *An Assessment of the Positive Theory of 'Congressional Dominance'*, 12 LEGIS. STUD. Q. 475 (1987); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983). Recent surveys of this now vast literature include DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999); JOHN D. HUBER & CHARLES R. SHIPAN, *DELIBERATE DISCRETION? THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY* (2002); Weingast, *supra* note 13, at 312-13.

110. See, e.g., ALVIN W. GOULDNER, *PATTERNS OF INDUSTRIAL BUREAUCRACY* (1954); JAMES G. MARCH & HERBERT A. SIMON, *ORGANIZATIONS* (1993); PHILIP SELZNICK, *TVA AND THE GRASSROOTS: A STUDY IN THE SOCIOLOGY OF FORMAL ORGANIZATION* (1966); HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS* (4th ed. 1997); Herbert Kaufman, *The Direction of Organizational Evolution*, 33 PUB. ADMIN. REV. 300 (1973).

111. The externalist literature also values many “internalist” insights. For instance,

This Part uses insights about the importance of external political dynamics to develop a theory explaining the creation and performance of bureaucracies such as DHS. Our approach refines existing theories by accounting for the impact of crises, and of uncertainty about the prescriptive effects of reorganization. These refinements allow us to better understand the evolution of DHS. They also shed light on the political design of legal mandates at other points in history.

The basic outline of our theory can be summarized briefly. First, interest groups have influence on the policy process because they affect the reelection prospects of political officials.¹¹² Interest group activity implies a bias toward those groups that are active. But this influence is not simply general influence. It works through the political system. Interest groups within the President's support constituency have more influence on the White House than those who are not among that constituency. Similarly, those interests closely connected with important members of the relevant congressional subcommittees that oversee various agencies have more influence on the oversight process. Second, a range of interbranch dynamics shape the legislative process. As lawmakers bargain, key legislators negotiate with organized interest groups and with the President. The resulting congressional process—combining internal negotiations among legislators and pressure from outside interest groups, and bargaining with the President—puts its distinctive stamp on both bureaucratic structure and bureaucratic incentives. Third, a range of intrabranched politics affects design, involving both bureaucratic politics within the executive branch as well as congressional bargaining among committees and among legislators with different vested interests in the existing structure. Fourth, mass politics affects design. The public's level of attentiveness affects the induced preferences of representatives over various institutional design questions. Fifth, a crisis dramatically transforms public attentiveness and can therefore

March and Simon's account of bounded rationality within organizations almost certainly explains why, even in the absence of external constraints, bureaucratic actors create routines that distort organizations' ability to respond to their environments. See DIANE VAUGHAN, *THE CHALLENGER LAUNCH DECISION* 409 (1996) (discussing how "organizational contingencies create prerational forces that shape worldview, normalizing signals of potential danger, resulting in mistakes with harmful human consequences"). Indeed, the strategic political action characteristically associated with the external perspective may interact with the internalist dynamics, as when politicians deliberately place an organizational sub-unit within a larger agency whose mission may shape the sub-unit's priorities in politically desirable ways (hence, for example, the placement of the Office of Foreign Assets Control, or OFAC, in the Treasury Department, an environment likely to make OFAC more sensitive to private sector concerns than had the agency been placed within the Justice or State Departments). Cf. WILSON, *supra* note 7, at 264. Nonetheless, as we note above, there is reason to question the extent to which a purely internalist focus can give a compelling account of public organizations and the hurdles they face, in general, and of the evolution of major federal reorganizations such as those affecting homeland security, in particular. By definition, legislative decisions about structure involve a host of external political actors with competing agendas.

112. See Moe, *supra* note 13, at 287-89.

dramatically change the political pressures on a given issue. Together these factors interact in potentially complex ways.

A. *A Theory of Legislation: Inconsistent Objectives*

The civics textbook view of national legislation is that it is designed to solve various social, economic, and security problems.¹¹³ In practice, legislation rarely addresses these problems particularly well when measured against the standard of what politicians publicly claim their goals to be. The reason is politics.¹¹⁴ First, as designed by the Founders, the separation of powers system assures that the two houses of Congress and the President have different electoral constituencies and therefore respond to different interests. The different constituencies lead officials in the different branches to favor different ways to address each policy issue. Second, legislation requires majority support (and sometimes supermajority, as in a filibuster or veto override), endowing majority pivots with bargaining power. Third, each house of Congress has a range of institutions that grant further bargaining leverage and control of veto gates, notably committees and the majority party leadership.

All these institutional features of national politics combine to grant bargaining power to a range of legislators with divergent goals. Routinely, many such lawmakers use their leverage to alter the legislation in ways that benefit their constituents who may have very narrow interests or interests that conflict with the overall goals of the legislation. Below we survey a series of implications that congressional institutions have for the shape of legislation. For now, we mention one implication that we believe is the most important, namely, the effect of political compromise on the shape of legislation.

Typically, legislation begins with proponents who favor legislation that addresses a particular problem.¹¹⁵ Often, the initial legislation is designed

113. See generally KENNETH PREWITT, AN INTRODUCTION TO AMERICAN GOVERNMENT (2d ed. 1977). Traces of this perspective can also be found in legal scholarship emphasizing the virtues of representative political institutions. See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (emphasizing the extent to which the resolution of political problems through representative political institutions is preferable to the alternatives); cf. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374-80 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958) (positing that statutory interpreters can identify the overarching, coherent purposes of legislation in the course of interpreting statutes because statutes are written by legislators reasonably seeking to solve discrete problems).

114. See such diverse scholars as MARVER BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955); MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS (1985); Sam Peltzman, *Toward a More General Theory of Regulations*, 19 J.L. & ECON. 211 (1976); and George Stigler, *The Theory of Economic Regulation*, BELL J. ECON. & MGMT. SCI., Spring 1971, at 3.

115. This perspective draws on McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3 (1994), and Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative*

efficiently in the sense that, given the sponsors' definition of the problem, the legislative proposal addresses the problem directly and effectively. This proposal is often relatively short. More importantly, the proposal typically has little chance of passing in this form. Opponents seek to preserve the status quo by defeating the legislation in any form.

Although most popular accounts depict legislative struggles between the legislation's proponents and opponents, a critical—indeed, pivotal—third group exists: the moderates. As the moderates go—for or against—so goes the legislation. To succeed, a bill's sponsors must bargain with the moderates for their support. The inherent need to negotiate to pass legislation implies that nearly all successful congressional legislation is the product of legislative compromise between the bill's sponsors and the moderates. Moderates generally seek to pass a weaker form of the legislation, a bill that simply does less of what the sponsors originally proposed. Typically, compromise that brings the moderates on board requires limits on the legislation, including restrictions, exceptions, and cumbersome procedures that afford interested parties the ability to contest or delay the implementation of the legislation's effects. These provisions often compromise the legislation's purpose in the sense that they make it harder to achieve the law's purported goals.¹¹⁶

An example: in the mid-1970s, environmentalists sought to control sulfur-dioxide emissions, a major source of which was sulfur in coal burned to generate electricity. To reduce these emissions, utilities could either switch to low-sulfur coal or add "scrubbers" to their waste stacks that would eliminate the sulfur from the exhaust emissions. Although the prescriptively optimal way to address the problem would have been to allow some utilities to burn low-sulphur coal instead of installing scrubbers, this approach engendered political opposition because it endangered union jobs in the high sulfur coal regions. In the end, supporters of the legislation agreed to compromise with the representatives of the unionized coal regions to require that every utility in the country—regardless of whether it burned high or low sulfur coal—add scrubbers. This requirement at once raised the cost of removing sulfur from emissions, lowered the overall environmental cleanup per dollar spent, but saved union jobs.¹¹⁷

In short, major legislation often approaches incoherence, in the sense that it contains provisions designed to address a particular problem along with provisions that limit the efficacy of those solutions in the form of exceptions, exemptions, limitations, and cumbersome procedures.¹¹⁸ The latter provisions

History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation, 151 U. PA. L. REV. 1417 (2003).

116. See McNollgast, *supra* note 115; Rodriguez & Weingast, *supra* note 115.

117. See BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR, OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION-DOLLAR BAIL-OUT FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT 42-54 (1981).

118. See Rodriguez & Weingast, *supra* note 115, at 1422 ("Because legislator

meant to qualify the act are a necessary feature of the legislation: without them, the legislation would not pass. Put differently, Members of Congress knowingly pass an incoherent measure, in that its provisions are internally inconsistent to the point of profound ambiguity, when they would not be able to pass the more coherent version.

B. *The Political-Bureaucratic System: Institutional Solutions to Delegation Problems*

1. *The imprint of legislative and executive politics on the delegation of statutory authority to bureaucracies*

The divisions among legislators—and between specific legislators and executive branch officials—discussed above have predictable implications for the production of statutes and the structure of the bureaucracies that implement statutes. In particular, previous research identifies the following factors as especially likely to shape legislative bargaining when lawmakers are divided about their goals. The general consequence of this system is goal distortion, the process by which politics inevitably distorts the goals of the legislation as legislators transform a proposal into a vehicle that will pass Congress.

The distributive tendency and goal distortion. An inevitable effect of the legislative process is that benefits from a program must be widespread or the program will not gain sufficient support to pass. Consider legislation designed to alleviate poverty. If the proposal does this efficiently, it will concentrate resources in states and congressional districts with high concentrations of poor people. Because poor people are a relatively small minority of the country—perhaps fifteen percent—the legislation concentrates resources in a small number of congressional districts. This concentration also means that the legislation will have difficulty passing. A small minority of districts benefit from the legislation, while most of the polity gain little while bearing the tax costs of the program.

In reaction to the problem of passage, bill sponsors have a tendency to distribute the funds more widely than efficiency dictates. This *distributive tendency* implies a high likelihood of goal distortion.¹¹⁹ By distributing the funds from a program more widely, this tendency breaks the link between the legislative solution and the problem the program is designed to address. Programs regularly distribute funds widely in a way that distorts their purpose. Some examples include the space program, various urban and housing

preferences and aspirations about the legislation differ, the legislators create a record reflecting these disagreements. Of necessity, therefore, the legislative record for complex acts contains multiple and conflicting views.”); *id.* at 1525-42 (using the Civil Rights Act of 1964 to demonstrate the effects of legislative compromise).

119. See Kenneth A. Shepsle & Barry R. Weingast, *Political Solutions to Market Problems*, 78 AM. POL. SCI. REV. 417 (1984).

programs, the Department of Energy's National Laboratory system, and (as discussed below) DHS's programs to fund emergency preparedness grants as well as research and development.¹²⁰

Multiple veto points. We have already seen that the need to command a majority typically implies legislative compromise that affects both the legislation's goals and the means by which it addresses those goals. Other institutional aspects of Congress work in the same way.

First, at least two committees (one in the House, and one in the Senate) share jurisdiction on any given issue, and often many more committees have somewhat overlapping jurisdiction. Because of these multiple veto points, members can sometimes hold up legislation desired by others as bargaining leverage over legislative issues wholly independent of the legislation. During the consideration of the early legislation addressing the savings and loan crisis of the 1980s, both House and Senate passed versions of legislation aimed at mitigating the growing savings-and-loan problem that would ultimately cost taxpayers several hundred billion dollars. Both versions of the bill contained similar provisions addressing the crisis. But a compromise failed because House bill contained different add-ons to the legislation than the Senate bill. Because members of the two houses could not agree on how to compromise these additional parts, the legislation died in 1986, allowing the problem to mushroom.¹²¹

Second, another type of intrachamber conflict concerns the distribution of power and authority within the chamber. Committee members typically seek to enhance the discretion, scope, and authority of their committees, even at the expense of others.¹²² For example, when a new issue arises that does not readily fit with the existing pattern of authority, members on different committees jockey for control of this issue. Energy provides the canonical example. Prior to the energy crisis of 1973, energy was a relatively minor issue. With the energy crisis, it suddenly became a significant national issue. Within each chamber, a wide range of committees sought to control a piece of this issue. Indeed, negotiations over how to divide this authority within each chamber delayed a national response to the crisis for several years, from 1973 until 1977.

The upshot is simple. As new policy issues emerge and as political support for existing issues evolves, committees negotiate over who has authority on a given issue or a given aspect of an issue. Because the policy preferences on the

120. See, e.g., LINDA R. COHEN & ROGER G. NOLL, *THE TECHNOLOGY PORK BARREL* (1991); MARY A. HOLMAN, *THE POLITICAL ECONOMY OF THE SPACE PROGRAM* (1974); Harold Orlans, 'D & R' Allocations in the United States, 3 *SCI. STUD.* 119 (1973); Patrick S. Roberts, *Shifting Priorities: Congressional Incentives and the Homeland Security Granting Process*, 22 *REV. POL'Y RES.* 437 (2005).

121. See Romer & Weingast, *supra* note 16, at 180, 193-95.

122. DAVID C. KING, *TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION* 11-13 (1997).

different committees jockeying for power can often be quite different, different allocations of authority within the chamber have significant policy implications.

Congressional jurisdictions. Congressional committees and subcommittees are intimately involved in bureaucratic oversight.¹²³ These bodies are not only each chamber's agents charged with overseeing a bureaucracy's implementation of policy, but they put their own stamp of interest on the direction of that policy.

To an important degree, the structure of Congress and the bureaucracy parallel one another. These institutions work together. Moreover, complex policies, such as the environment and energy, are often divided into a great many pieces, with different subcommittees overseeing different portions of a bureaucracy's activities.¹²⁴

Because members on the different subcommittees have different interests, they pull policymaking within their domain in different directions. For policies that are completely independent, this is fine, but when the policies interact—as they must, for example, because of budgetary trade-offs—the inconsistent views on different subcommittees can create potential problems.

These interactions plainly have implications for bureaucratic reorganization. Consider a set of bureaus that work on related policies but were created by different legislation and are overseen by different subcommittees or committees. They are likely to pursue different goals, in part because the legislation creating them differs and in part because the interests of the members of the relevant subcommittees differ.

Suppose that the President seeks to achieve efficiency gains by coordinating the bureaus' activities through a bureaucratic reorganization that combines the two. The degree to which these efficiency gains are realized in practice depends in part on whether there is a parallel congressional reorganization. Allowing the two separate subcommittees with different goals to retain jurisdiction over the different pieces of the now reorganized bureau impedes coordination: the different interests on the two subcommittees lead them to continue to pull the two portions of the reorganized bureau in different directions. Members of each subcommittee face a common pool problem: both prefer the efficiency gains, yet both prefer more benefits from their own portion

123. Indeed, some observers have called the relationship among congressional subcommittees, agencies, and interest groups “cozy little groups,” “subgovernments,” “whirlpools,” and “policy systems.” See FIORINA, *supra* note 109, at 61-62; see also *id.* at 111-12 (“Congress does not react to big government, it creates it.”).

124. See Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves)?*, 54 LAW & CONTEMP. PROBS. 204 (1991). For an account of the interrelationship between bureaucratic actors, interest groups, and their overseers relying on the colorful “iron triangle” metaphor, see Thomas L. Gais et al., *Interest Groups, Iron Triangles and Representative Institutions in American National Government*, 14 BRIT. J. POL. SCI. 161 (1984).

of the whole. Because they control only their portion, each has a tendency to take more for itself. To the extent that coordination achieves an increase in benefits that comes at the expense of one of these pieces, members of the relevant subcommittee will use their oversight powers to work against coordination. In contrast, if the congressional jurisdictions are also reorganized so that one subcommittee now gains sole jurisdiction over the bureau, it will be better able to make coherent trade-offs between the two activities and hence realize the efficiency gains.

Partisan electoral goals. A fourth principle relevant for bureaucratic structure is that each of the two national parties has incentives to use legislation to enhance their members' electoral goals at the expense of the other. The majority party in Congress typically has the advantage.

A particular instance of partisan warfare is "baiting" the opposition on popular legislation. Suppose the public is strongly supportive of some legislation. Because voters rarely follow or understand legislative details, the majority party has an incentive to add extreme components to popular legislation in an effort to bait the minority. They do so in hope that members of the opposition will object to or obstruct the legislation because of these features. Often, the public fails to understand the nuances and instead sees the opposition as simply objecting to the legislation. This gives an electoral issue to majority party candidates who challenge opposition incumbents. Sure, the incumbent will try and explain—"I would have supported the legislation, but this one feature made it objectionable." Such a strategy may succeed in some cases. In others it may have the hollow ring of an excuse.

2. Two theoretical refinements

Despite its usefulness in understanding the broad outlines of how statutes and bureaucracies are designed by the legislature, existing work largely leaves out some crucial elements, notably the role of crises and uncertainty. Consider each in turn.

The role of crises. For our purposes a crisis is (a) a circumstance perceived by the public as an exogenous shock sharply raising demand for policy changes in a particular domain, and (b) costly for politicians to ignore.

A political crisis has four interrelated effects on the forces underlying bureaucratic creation and structure. First, it implies a far more attentive public. Although the public cannot attend to the policy details, an attentive public pressures political officials to address the problem underlying the crisis.¹²⁵

125. See Jon A. Krosnick, *Government Policy and Citizen Passion: A Study of Issue Publics in Contemporary America*, 12 POL. BEHAV. 59 (1990); Jon A. Krosnick & Shibley Telhami, *Public Attitudes Toward Israel: A Study of the Attentive and Issue Publics*, 39 INT'L STUD. Q. 535 (1995); Mark Peffley & Jon Hurwitz, *International Events and Foreign Policy Beliefs: Public Response to Changing Soviet-U.S. Relations*, 36 AM. J. POL. SCI. 431 (1992).

Second, as a consequence of public attentiveness, interest groups often have less power to protect their interests. Whereas interest groups may predominate in the relevant policy areas prior to a crisis—in part because of relatively inattentive public or because the portion of the public that is attentive is a small subset of the larger population—a crisis that brings public attention provides a new set of rewards for public officials to counterbalance the rewards generated by interest groups. In some cases this change allows new interest groups to become relevant, as in contractors following a widely publicized natural disaster.¹²⁶ Third, a crisis typically means a far greater urgency than in most policy areas so that political officials must act fast; failing to do so will leave political officials electorally vulnerable for having failed to address a critical issue in a timely fashion. Finally, these effects are sometimes most pronounced for the President in the sense that he is seen as the national leader.¹²⁷

Taken together, these four effects have several implications for a crisis response. Crisis responses tend to lack deliberation. Because an attentive public demands timely action but cannot understand details or the implications of all bureaucratic-institutional choices, elected officials are tempted to act too quickly so that they can demonstrate their responsiveness, even if their legislation is ill-considered.¹²⁸

As an example, consider the response to the thalidomide episode. Thalidomide was a drug given to pregnant women in the 1950s and early 1960s to reduce the effects of morning sickness, but had disastrous side effects impairing fetal development. Many so-called thalidomide babies were born without arms or legs.¹²⁹

Prior to the thalidomide episode, Senator Estes Kefauver (D-Tenn.) had criticized the drug regulatory process by the Food and Drug Administration (FDA), which had regulatory control over the introduction and oversight of drugs. For several years, he had held hearings and pushed legislation that would force drug manufacturers to prove their drugs were efficacious in that they actually produced the effects that the manufacturers claimed. Of course, the

126. This shift in the policy environment is not necessarily a shift in the inherent concerns of legislators and other politicians, but in their incentives. Even with a constant distribution of concerns among policymakers (e.g., reelection, policy goals, and professional or political advancement), a substantial change in the public's goals and expectations can alter the extent to which politicians can achieve their mix of goals without explicitly satisfying public demands.

127. See LEWIS, *supra* note 7, at 70-87; ZEGART, *supra* note 6, at 15-16 (discussing differences in the President's incentives because he responds to a national constituency).

128. COHEN & NOLL, *supra* note 120, discuss a related phenomenon. They demonstrate how incentives to rush to the politically attractive stage of technological production causes agencies to rush the development stage, compromising the quality of government technological development.

129. See Samuel J. Rascoff & Richard L. Revesz, *The Biases of Risk Tradeoff Analysis: Towards Parity in Environmental and Health-and-Safety Regulation*, 69 U. CHI. L. REV. 1763 (2002).

problem of efficacy is different from the problem of drug safety, which involves side effects.¹³⁰ In the wake of the thalidomide episode, Congress quickly passed Kefauver's proposals even though the episode involved drug safety while the legislation largely addressed the problem of efficacy.

This case exhibits two separate ironies. First, although the 1962 Drug Amendments promoted a laudable policy goal, they may have had some negative effects on the introduction of new drugs in the United States relative to Europe, Canada, and Japan. Second, thalidomide had never been introduced in the United States even under the existing regulatory scheme (the side effects occurred from its distribution in Europe and Canada).¹³¹

Thus, the policy imperative created by a crisis combines with public inattentiveness to policy details to push political officials to act quickly, sometimes more quickly than is advisable. For many officials, it is better to have some policy—any policy—than to accept a delay that eventually yields a policy better aimed at the problem.¹³²

Another effect of crises concerns interest groups. In contrast to the pattern governing legislation and policymaking in ordinary times, crises can make it attractive for politicians to act despite the opposition of interest groups. The policy equilibrium in ordinary times generally reflects the influence of (sometimes competing) interest groups. Crises that draw public attention provide a new source of political rewards to political officials. Public attention thus allows legislators and the President more room to bargain over policy changes given the extent of public demand.

Nonetheless, while this window for policy innovation may occasionally result in prescriptively attractive policies, it is wrong to assume such an outcome is rendered more likely during a crisis. With interest groups less able to stop or water down a legislative change, the President and the legislature take center stage. Presidents may seek new legislative authority to layer political appointees over existing independent agencies, while enterprising legislators lacking the most desirable committee assignments may scheme to

130. See Daniel Carpenter, *The Gatekeeper: Organizational Reputation and Pharmaceutical Regulation at the FDA* (2006) (unpublished manuscript, on file with authors) (providing a detailed qualitative account of the development of the FDA and noting that even an account emphasizing the role of bureaucratic autonomy acknowledged the impact of the thalidomide scare on the FDA's political environment).

131. See Paul J. Quirk, *The Food and Drug Administration*, in *THE POLITICS OF REGULATION* 191 (James Q. Wilson ed., 1980).

132. See generally WILLIAM M. WARDELL & LOUIS LASAGNA, *REGULATION AND DRUG DEVELOPMENT* (1975); Sam Peltzman, *An Evaluation of Consumer Protection Legislation: 1962 Drug Amendments*, 81 J. POL. ECON. 1049 (1973). While there is reason to question the extent to which the 1962 Amendments actually diminished consumer welfare, see Thomas McGuire et al., "An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments": A Comment, 83 J. POL. ECON. 655 (1975), the important point for our purposes is that the policy changes pursued in the wake of the thalidomide scare were only loosely connected to the events that caught the public imagination, and carried underappreciated risks of undesirable side effects.

enhance their own committees' jurisdiction. But, as will emerge below, their competing objectives are likely to lead them to create bureaucracies ill equipped to achieve their stated purposes, except under special conditions. In contrast, politicians might endeavor to build an effective bureaucracy after a crisis if the relevant goals are widely supported, if accurate information is widely available about the relationship between structural or legal changes and the advancement of those goals, and if bureaucratic performance to achieve those goals is easily observable over time. If these conditions exist, a crisis can free politicians from some of the interest group pressures that often contribute to bureaucratic failure. In contrast, in the absence of the aforementioned conditions, crises have the potential to introduce distinctive pathologies into the legislative process as legislators and the President scramble to produce changes simultaneously advancing their political agendas and pleasing a more attentive public.

The role of uncertainty. In their continuing efforts to advance a specific political agenda, Presidents and their staff members may be able to predict certain implications of reorganization, such as those impacting the performance of domestic regulatory mandates.¹³³ By pressing agencies to do more with similar or more constrained resource endowments, for example, reorganizations can subtly force agencies to reshape their activities. From a prescriptive point of view, however, the relationship between bureaucratic institutions and performance is not an exact science. This implies a significant degree of uncertainty about the prescriptive benefits associated with any reorganization. Moreover, when we parse the different costs and benefits, we find that some are far more uncertain than others.

Consider a reorganization ostensibly designed to create greater coordination among agencies with related functions. Putting the agencies together under a single umbrella with greater centralization holds the promise for greater coordination. Reducing redundancy, sharing of information, and coordination of a wide range of many separate activities potentially increases efficiency and total output.

Yet major reorganizations also have a range of potentially negative effects. First, by creating a far larger and more complex organization, massive centralization makes it harder for organizational leaders to master their organization, to understand its separate parts, and to understand the complex ways in which better coordination can be achieved. Even if a new agency were sharply focused on a narrow definition of homeland security, the full scope of activities involving matters such as immigration enforcement would require officials to understand sprawling intricacies.¹³⁴ Second, centralization can

133. See *infra* Part III.

134. An example: although “the core mission of [DHS] is widely viewed by the American people as combating terrorism[,] . . . [o]verwhelmingly, the DHS is involved in the prosecution of traditional kinds of immigration cases.” Transactional Records Access Clearinghouse, Immigration Enforcement: New Findings (Aug. 24, 2005), <http://trac.syr.edu/>

diminish the competition among agencies and risks creating a bureaucracy with a monopoly of control over a massive portion of the government's operation.¹³⁵ Many areas of government feature competition because of the presence of multiple, semi-independent bureaucratic units, including the three branches of the military, the various agencies dealing with agriculture, and the many agencies focused on urban problems. The absence of competition tends to imply less efficient performance. Third, reorganization creates considerable uncertainty for individual bureaucrats by changing career patterns and promotion possibilities. Bureaucrats who lose power, authority, and promotion possibilities are far less likely to work toward the new goals sought by the reorganization. Bureaucratic rivalries within a single organization can often be counterproductive when one group seeks to promote itself over another. Fourth, some scholars suggest that increasing the presence of levels of hierarchy slows down bureaucratic responses to legislative signals designed to control an agency's work through the budget process. Politicians trying to insulate policy from legislative control can therefore use layers of hierarchy to frustrate lawmakers' control of agency actions.¹³⁶ Fifth, on a pragmatic level, reorganization and centralization are likely to decrease efficiency in the short run, as addressing the transaction costs of combining computer systems and designing compatible operating procedures and routines across formerly separate agencies takes considerable time and effort.

While these subtleties may not be apparent to the mass public, particularly not in the midst of a crisis, they suggest that centralization is likely to have two separate effects heightening the difficulty of achieving prescriptive benefits from reorganization. On the negative side, centralization creates two different categories of problems. First, centralization involves large transaction costs as separate agencies merge their activities. Second, greater centralization creates a series of other costs: the agency becomes harder to manage, and sheer size works against the ability of leaders to coordinate so many separate activities; centralization also creates monopolization that reduces incentives for bureaucracies to efficiently carry out their supposed purposes; and new

tracins/latest/131/. Only seven of 37,765 prosecutions arising out of DHS immigration investigations in FY 2004 were classified as involving international terrorism even under the Justice Department's flexible standards for defining that category of prosecutions. *Id.* In FY 2003, only one of 20,771 prosecutions was classified as involving "international terrorism." *Id.*

135. See LEWIS, *supra* note 7, at 7 ("[S]ome amount of redundancy and duplication can be desirable . . . in order to take 'auxiliary precautions' in case some important bureaucratic process breaks down or to induce competition among agencies that will improve performance among all."); RICHARD A. POSNER, *UNCERTAIN SHIELD: THE U.S. INTELLIGENCE SYSTEM IN THE THROES OF REFORM* (2006). Regarding the consequences of diminished competition on efficiency, traditionally defined, see, for example, THRÁINN EGGERTSSON, *ECONOMIC BEHAVIOR AND INSTITUTIONS* 48-58 (1990).

136. See Daniel P. Carpenter, *Adaptive Signal Processing, Hierarchy, and Budgetary Control in Federal Regulation*, 90 AM. POL. SCI. REV. 283 (1996).

hierarchies diminish incentives for those bureaus that lose stature. Moreover, both sets of costs rise with the scope of centralization and reorganization.

On the positive side, reorganization holds promise for greater coordination of effort, potentially allowing the efforts of many previously separate agencies to add up to a whole that is greater than the sum of its parts. Because of the nature of the costs involved in large organizations, the uncertainty surrounding the potential benefits of reorganization rise with the scope of the reorganization.

These two opposing effects imply that the prescriptive question of how to structure bureaucracies to accomplish particular goals is a complex one, made all the more so because the full constellation of relevant interests rarely agree completely on what those goals should be. Reorganization could be complicated from a policy perspective and could have counterintuitive effects.¹³⁷

Although key actors trying to assess the long-term security payoffs of creating the Department would have faced considerable uncertainty, we do not believe that the probabilities of gains and losses are symmetrical. The evidence suggests that reorganizations as complex and massive as that creating the DHS would be beset by large costs with relative certainty, while the benefits are both more uncertain and less likely to outweigh the costs.¹³⁸

C. Theoretical Conclusion: Policies May Not Be Designed to Succeed

In combination, the preceding principles imply that legislative allocations of bureaucratic authority over legal mandates are often, perhaps even typically, not designed to succeed at achieving their stated goals. Barring unusual circumstances, the need to pass legislation through a complex legislative process with many potential veto gates implies that a wide range of interests can hold up the legislation. Their price for allowing the legislation to move forward tends to be that the legislation's proponents alter the proposal in a way that advantages those holding veto power. Unless they choose unusual and difficult-to-sustain strategies, Presidents and legislative leaders are unlikely to jeopardize political gains. In particular, they are unlikely to insist on broadly unpopular but prescriptively attractive statutory details, or to oppose popular statutory changes made possible during a crisis that are prescriptively questionable but deliver partisan or long-sought policy benefits.¹³⁹ Political

137. See Balogh et al., *supra* note 58, at 5, 61-73 (noting findings and providing case studies of the EPA and the Department of Education); WILSON, *supra* note 7, at 23-28.

138. See *supra* Part I.C (discussing the Bush Administration's concerns about transition costs).

139. Although these tendencies exert a strong and even pervasive effect on bureaucratic changes, they do not imply that every politically approved effort to reforge bureaucratic structure has perverse results. Presidential administrations may display a substantial degree of risk aversion. They may differ in their estimates of the political benefits

competition thus routinely distorts the goals of the legislation. Legislation rarely addresses policy problems directly. Indeed, sometimes it is designed to fail. Moe's conclusions about the design of the Occupational Safety and Health Administration (OSHA) during the early 1970s are instructive, and likely generalize to a host of agencies and legal mandates:

While [the creation of OSHA] had the appearance of a systematic attack on the problem, in fact it was an administrative nightmare that did a thorough job of protecting business's interests. Authority was divided among an independent board, the secretary of labor, the states, HEW [the Department of Health, Education, and Welfare], and the courts. This would create confusion, lack of coordination, and multiple veto points. No one was in charge, and the secretary of labor, in particular, was kept weak.¹⁴⁰

The problems associated with OSHA also arise frequently elsewhere in government. Writing and passing of legislation creates pressures that often weaken the link between the goals of legislation and what the legislation actually does. The distributive tendency reflects legislation's tendency to benefit a wide variety of districts rather than concentrate resources where the problem lies. Multiple veto points allow a wide variety of legislators to hold legislation hostage in an effort to gain favorable adjustments. Indeed, the general need for legislative compromise means that almost all legislation is incoherent: the different legislative components often work at cross purposes whereby one section promotes a particular goal and another qualifies and limits the ability of an agency to attain that goal. These tendencies are aggravated by a mismatch between congressional committee jurisdiction and the organization of a bureaucracy. Put simply, the greater the dispersal of jurisdiction, the less coherent bureaucratic policymaking will be. Finally, partisan electoral goals often exacerbate difficulties associated with crafting legislative solutions. Successful efforts to harness statutory substance, budgets, bureaucratic structure, and congressional oversight in genuinely addressing a difficult policy problem must therefore overcome substantial (though perhaps not insurmountable) challenges.

By placing the focus beyond position-taking and emphasizing the role of crises and the intricacies that impact the real-world effects of reorganization, our theoretical approach builds on existing theories of how legislators allocate

that can be achieved by pursuing a costly, though publicly popular, reorganization. These distinctions explain how differences in presidential and legislative leadership could have resulted in a homeland security policy quite distinct from what was actually achieved. Moreover, in some cases, the actual policy goals served by reorganization may be widely shared among the public. Finally, some politicians may display an unusual willingness to occasionally spend political capital to pursue prescriptively valuable statutory changes reallocating bureaucratic authority. On this score, our point is simply that such circumstances are likely to develop only rarely in an environment encouraging politicians to disregard prescriptive goals. As our analysis below indicates, these conditions did not arise with DHS.

140. See Moe, *supra* note 13, at 299; see also Nina W. Cornell, Roger G. Noll & Barry Weingast, *Safety Regulation*, in *SETTING NATIONAL PRIORITIES: THE NEXT TEN YEARS* 457 (Henry Owen & Charles L. Schultze eds., 1976).

bureaucratic jurisdiction over legal mandates. We posit not only that reorganizations are driven by politics, but that they can be used to further presidential control and policy objectives in specific ways—such as by reshaping the regulatory missions of bureaus, or redistributing authority from career officials and bureau heads to political appointees. Our challenge is not just to the questionable assumption that reorganizations would naturally tend to achieve prescriptively desirable objectives, but also to the theories that primarily emphasize position-taking or the role of politics generally without considering what policy or distributive goals are actually being achieved and through what structural techniques they are being achieved. As the next Part chronicles, each of these tendencies shaped the political bargains that resulted in the creation of DHS.

III. APPLYING THE THEORY: THE ARCHITECTURE OF THE DEPARTMENT OF HOMELAND SECURITY

Our theory of the political-bureaucratic system provides a lens through which to interpret the legislative developments that forged the architecture of DHS. In this Part, we use the theory to better understand the statutory and institutional features that have become characteristic of the Department. In the process, we revisit our two principal questions concerning the Department's formation: Why did the President change his mind to propose reorganization as a means of mega-centralization? And, why did the President create a DHS that contains so many bureaucratic units, many of which are only tangentially related to homeland security? The answers to these questions turn out to be intimately related. They can be understood by reviewing the intersecting effects of legislative influence, presidential choices, political responses to crises, budgets, and bureaucratic structure in this particular context.

A. The Political Influence of Congress

Congressional influence permeated nearly every aspect of the HSA legislation and the bureaucratic machinery it spawned. The Administration's bill was short—fifty brief provisions in comparison with the congressional legislation that included two hundred provisions—many of them in the convoluted legislative lexicon characteristically associated with lawmakers' desire to control the bureaucracy.¹⁴¹ The difference between the President's proposal and the final congressional legislation reflects more than just filling in details and gaps; it reflects the effects of the congressional politics engineering

141. See, e.g., Homeland Security Act of 2002, Pub. L. No. 107-296, § 888, 116 Stat. 2135, 2249-50 (regarding the importance of preserving the Coast Guard's non-homeland security missions).

the new bureaucracy to serve the interests of its members; that is, to conform with the political-bureaucratic system.

Each of the principles discussed in the theoretical Part applies to this case: goal distortion and the distributive tendency; multiple veto points forcing alterations in the legislation; intracongressional committee jurisdictional issues; electoral goals of the majority party against the minority party; uncertainty about the reorganization; and the role of the crisis. As the theory predicts, these principles add up to a set of policies that are not obviously designed to obtain the stated objective of homeland security.

Consider, for example, the impact of goal distortion as it plays out through the distributive tendency. Calculating the optimal allocation of funds is a complex task. As Robert Powell suggests, this calculation must take into account a wide range of characteristics, including: (i) estimations of risk, themselves subject to uncertainty, such as the differential risks associated with targets in high profile cities, in places such as New York and Washington; (ii) factors that reduce risk everywhere, such as increased border security; and (iii) the notion that making one target far more secure makes the next most vulnerable target more attractive to strategic terrorists.¹⁴²

Despite the difficulty with creating an optimal spending plan, nearly everyone agrees that the allocation of funds should be based on the factors noted above, especially assessments of differential risk. Yet, as noted in the theory, spending money according to the optimal factors often implies a high concentration of funds in particular districts, making these programs less popular in Congress. The congressional tendency is therefore to alter the criteria for spending in a way that spreads the money around, even at the expense of efficient pursuit of the legislation's goals. And this seems exactly what has happened.

DHS Secretary Michael Chertoff's statements on January 4, 2006 provide evidence for this story. In response to sharp criticism, Chertoff made the astounding public announcement that thenceforth the Department would base part of its homeland security grant allocation on risk factors (DHS could not allocate all the funds based on objective factors because the legislation required minimum-percentage spending in every state). Chertoff announced new rules about the distribution of such funds based on the risk of terrorist attack to thirty-five urban areas deemed especially vulnerable. Chertoff also stated that homeland security grants are "not party favors to be distributed as widely as possible," thereby suggesting that the previous approach to distributing grants

142. See Robert Powell, *Defending Against Terrorist Attacks with Limited Resources* (Aug. 2005) (unpublished manuscript, on file with authors).

amounted to such “party favors.”¹⁴³ This admission acknowledged that the Department had *not* based its assessments on risk factors prior to this time.¹⁴⁴

Indeed, a wide range of commentators imply that some DHS spending may have degenerated into another source of congressional pork, especially through spending money in rural states with relatively low risks of terrorist attack.¹⁴⁵ While the port of New York and New Jersey is widely regarded as at the highest risk, it received only \$6.6 million in FY 2005, about equal to Memphis and far behind Houston’s \$35.3 million.¹⁴⁶ The attempts to renew the Patriot Act in late 2005 witnessed attempts in the House to place greater emphasis on risk factors and to lower the guaranteed minimum percentage going to each state from the prevailing 0.75 to 0.25 percent. The Senate, with its greater rural bias, beat back this plan so that the original law would prevail.¹⁴⁷ This topic may well be revisited as Congress reconsiders the Act’s renewal. Similarly, an analysis of per capita homeland security grant spending for FY 2003 and FY 2004 indicates that in both years Wyoming—the best-funded state—received \$35.30 and \$37.74 per capita, respectively. New York State, on the other hand, received only \$5.10 and \$5.41 per capita in each respective fiscal year.¹⁴⁸ The small-state bias seems rooted in legislators’ distributive interests, filtered through institutions enhancing the political power of small states, rather than in meticulous analyses of why such funding should be allocated to Wyoming or similar states.

As the theory suggests, legislators’ distribution of federal funds reflects a *common pool problem*: while all are better off from a homeland security program that fulfills its objectives, each is better off if his or her district gains a bigger share of the total. When all members seek greater funds for their districts, however, the consequences can be enormous. Members of Congress have greatly hindered DHS’s ability to address the pressing problems of terrorism in America by prescribing constraints on spending that have little or nothing to do with homeland security and everything to do with their reelection prospects.

Another policy realm where legislators’ parochial concerns seem paramount to security concerns is the creation of the so-called “Homeland Security Centers of Excellence.” Each such “HS-Center” has received a grant of between \$10 million and \$18 million over a three- or five-year period to study topics ranging from network analysis to the economic consequences of

143. Dan Eggen, *D.C. May Benefit as DHS Bases Grants on Risk*, WASH. POST, Jan. 4, 2006, at A1.

144. Editorial, *Better Late than Never*, WASH. POST, Jan. 5, 2006, at A14.

145. Editorial, *The Congress from Nowhere*, N.Y. TIMES, Nov. 18, 2005, at A28; Editorial, *Failing on Homeland Security*, N.Y. TIMES, Dec. 6, 2005, at A26; Editorial, *Risky Funding*, WASH. POST, Nov. 21, 2005, at A14.

146. *Failing on Homeland Security*, *supra* note 145.

147. See Roberts, *supra* note 120, at 443-44.

148. See *id.* at 444-45.

terrorist attacks.¹⁴⁹ Instead of creating a mechanism for choosing center locations on the basis of defensible analytic criteria, the structure set up by the statute essentially dictated the location of the new centers. The Department created six HS-Centers located at the following universities: Johns Hopkins, the University of Southern California, Texas A&M, the University of Minnesota, the University of Maryland, and Michigan State. One would expect that these centers would be created in the districts of legislators facing a risk of losing committee jurisdiction as part of the transfer. As Appendix Table 2 indicates, it is telling that the statute happened to place the centers in jurisdictions where at least one lawmaker was in danger of losing committee jurisdiction, a pattern that suggests the outlines of a potential logroll.¹⁵⁰ Although such a loss of jurisdiction is almost never welcome among legislators, funding for the new homeland security centers may have served as part of the political exchange to increase support for the new legislation among members facing the prospect of diminished jurisdiction.

A third example of political bias in the distribution of funds concerns the new structures for the transfers of funds. After 2001, Congress slightly reduced funding for natural disaster grants and dramatically increased funding for counterterrorism grants.¹⁵¹ One example of an explosion in grant funding can be seen with grant opportunities provided through what was once the Department of Justice's tiny Office of Domestic Preparedness. The office was transferred to DHS, and thereafter its grant-making abilities have grown exponentially. In FY 1998, the Office of Domestic Preparedness awarded \$12 million through a single grant program. As Appendix Table 3 indicates,¹⁵² by FY 2003, the office was in charge of meting out funds in seven separate programs, each ranging in total funding from \$65 million to \$1.5 billion.¹⁵³ Far from reluctant participants in this growth, legislative majorities voted to fund the grants well beyond what the President requested—adding over \$800 million to the President's request in this category for the FY 2004 budget.¹⁵⁴

While the funding of preparedness and research has proven to be an important aspect of the new Department's activity, the legislative process did more than simply inject distributive concerns into the architecture of DHS. It also diluted the extent to which lawmakers considered the prescriptive merits of

149. U.S. Dep't of Homeland Sec., *Homeland Security Centers of Excellence* (July 31, 2006), http://www.dhs.gov/xres/programs/editorial_0498.shtm.

150. *See infra* Appendix Table 2.

151. *See* Roberts, *supra* note 120, at 439-40.

152. *See infra* Appendix Table 3.

153. *See House Appropriators Add \$1 Billion to Homeland Security Request*, DEF. DAILY, June 24, 2003, available at 2003 WLNR 12779928.

154. *See id.* ("Other allocations include \$4.4 billion for the Office of Domestic Preparedness, Firefighters and Emergency Management, an \$888 million increase above the administration's request.").

reorganization, or reorganized the internal distribution of legislative committee jurisdiction to realize those benefits.

The frequently stated rationale for creating the massive Department was coordination. Yet the prescriptive benefits of reorganization are highly uncertain. Centralization creates a far more massive organization, implying that organizational leaders have much greater difficulty mastering the various pieces. Department leaders' difficulties in managing FEMA and its natural disaster mission have made this plain, particularly in the aftermath of the Katrina disaster.¹⁵⁵ Centralization may also contribute to greater monopolization of functions within the government, yielding less competition among bureaus and dissipating the potential benefits of competition. Reorganization creates considerable uncertainty about future career paths for bureaucrats. Those whose futures have been downgraded or who face the most uncertainty are most likely to work less hard or leave the agency. This too has become evident in FEMA, as many of its former employees simply left the Agency.¹⁵⁶ Finally, substantial short-run costs arise from centralization as agencies undergo the transaction costs of integrating personal, information, financial, management, and field systems. These problems raise serious questions—almost entirely neglected in the legislative process—about whether the massive centralization of DHS has had a net increase in the effective provision of homeland security.¹⁵⁷

During most of the Department's history, legislators also neglected the mismatch of congressional jurisdictions and bureaucratic centralization. Although the reorganization made massive changes in bureaucratic organization, Congress declined to engineer parallel changes in congressional oversight. The House Judiciary Committee is particularly illustrative. Among the Judiciary Committee's many amendments, the committee voted to transfer only the law enforcement functions of INS to DHS, keeping the citizenship functions at the Department of Justice (DOJ) and, obviously, under the purview of the committee. Besides retaining their oversight functions, the Judiciary Committee also voted to increase their responsibility by approving an

155. See SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE: FINAL REPORT, H.R. REP. NO. 109-377, at 3 (2006) [hereinafter FAILURE OF INITIATIVE] ("DHS was not prepared to respond to the catastrophic effects of Hurricane Katrina," and "had varying degrees of unfamiliarity with [its] roles and responsibilities under the National Response Plan and National Incident Management System."); see also *infra* Part III.E.

156. Jon Elliston, *Disaster in the Making: As FEMA Weathers a Storm of Bush Administration Policy and Budget Changes, Protection from Natural Hazards May Be Trumped by "Homeland Security,"* BALT. CITY PAPER ONLINE, Sept. 29, 2004, <http://www.citypaper.com/news/story.asp?id=9166>. ("Within FEMA, the shift away from mitigation programs is so pronounced that many longtime specialists in the field have quit. In fact, disaster professionals are leaving many parts of FEMA in droves . . .").

157. See generally LEWIS, *supra* note 7, at 141-45. Regarding the application of this insight to intelligence issues, see generally O'Connell, *supra* note 39.

amendment to transfer the Secret Service and the Federal Law Enforcement Training Center from Treasury to the DOJ.¹⁵⁸ The House leadership did create a special nine-member Select Committee on Homeland Security in July 2002 to screen the changes made by individual committees,¹⁵⁹ but House Speaker Dennis Hastert largely populated this panel with committee chairs who could protect their jurisdiction.¹⁶⁰ Legislators also showed significant resistance at the time the HSA was passed. President Bush reportedly made some early attempts to encourage Congress to solve the jurisdictional issue,¹⁶¹ but legislators essentially ignored him.

The massive bureaucratic reorganization unaccompanied by any congressional reorganization implies that the structure of bureaucratic incentives induced by congressional oversight works against the effects of centralization. This problem raises another variant of the congressional common pool problem: though all members may have wanted to achieve improved homeland security coordination, they also sought to control a piece of the bureaucracy. Doing so, legislators could claim credit for steering policy in a highly salient domain,¹⁶² and for steering funds in directions benefiting constituents. Many members of the relevant subcommittees have specialized in helping existing constituents of the agencies being moved to DHS. To the extent that coordination lowers the level of service legislators could provide to

158. A similar pattern of efforts to protect or enhance committee jurisdiction may be observed in the markups of other committees. For example, the House Science Committee voted to strike the ability of the DHS Secretary to carry out civilian human health research through the Department of Health and Human Services, essentially voting to maintain the Science Committee's jurisdiction over such programs. Finally, the House Transportation Committee, chaired by Representative Don Young (R-Ala.), one of the most outspoken critics of jurisdictional reorganization, voted to halt the transfer of the Coast Guard from the Department of Transportation to DHS and to retain FEMA as an independent agency. Moreover, these concerns were quite well-founded. The transfer of agencies to DHS meant that some bureaucracies were losing huge proportions of their funding and facing a decrease in their security-related missions. These changes affected not only the agencies themselves, but also their allies in Congress. As the Treasury *Budget in Brief* for FY 2004 states:

The transfer of the Federal Law Enforcement Training Center, United States Customs Service, United States Secret Service, a majority of the Bureau of Alcohol, Tobacco and Firearms, Counter-Terrorism Fund and Inter-Agency Crime and Drug Enforcement accounts represents nearly 90% of Treasury's law enforcement mission and almost a third of Treasury's total FY 2003 budget.

OFFICE OF PERFORMANCE BUDGETING, U.S. DEP'T OF TREASURY, *THE BUDGET IN BRIEF: FY 2004*, at VI (2003), available at <http://www.ustreas.gov/offices/management/budget/budgetinbrief/fy2004/fy2004bib.pdf>.

159. Mark Preston & Susan Crabtree, *Hill Confronts Reorganization Turf Battles Erupt Over New Dept.*, ROLL CALL, June 10, 2002; see also *Bag Screening May Be Delayed*, N.J. RECORD, July 20, 2002, at A10.

160. Edward Epstein, *Homeland Security in Hot Seat; Top 4 in Bush's Cabinet Try to Head Off Partisan Turf Wars*, S.F. CHRON., July 12, 2002, at A16.

161. Lydia Adetunji, *Bush Warns of Homeland Security Turf Battles Ahead*, FIN. TIMES, June 8, 2002, at 8.

162. See generally FIORINA, *supra* note 109; DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (2d ed. 1975).

their constituents, these members are likely to use their oversight jurisdiction to impede coordination.¹⁶³

Because the creation of DHS made massive changes to the bureaucracy while leaving the existing structure of congressional jurisdictions in place, congressional incentives cut against the goals of centralization and coordination.¹⁶⁴ The piecemeal set of congressional jurisdictions reflected the old set of priorities; in particular, a set of agencies that did *not* coordinate. Much of the lack of coordination under the old system represents a set of diverse agencies serving diverse constituencies overseen by a diverse set of subcommittees. Leaving the old congressional jurisdictions intact allows representatives of the old, uncoordinated system to pull their agencies away from the coordination-related goals of the new system and to continue to serve their old constituents' interests. In addition, leaving the existing distribution of committee jurisdiction yields another problem interfering with the potential benefits of centralization: DHS's leaders must now report to all of the separate congressional committees, depleting the time they can devote to coordinating. In a less sprawling reorganization, such reporting demands might prove less problematic. Not so with DHS; during the first half of 2004, Department officials were called to testify—on average—almost twenty times a month.¹⁶⁵

Yet most of these prescriptive concerns—whether about the merits of centralization, or about the need to overhaul congressional committee jurisdiction in order to capture the benefits of centralization—were cast aside. Instead, senior legislators from both parties maneuvered to preserve their committees' power. And the parties themselves competed in trying to take credit for an impending reorganization with growing public salience. In the process, Republicans appear to have baited the Democrats on several issues, notably the drug liability and civil service exemptions. In the debate just prior to the 2002 elections, several visible Democrats opposed these provisions. The Republican strategy seemed to work: those Democrats who opposed these provisions were painted as being against homeland security, and several key members, most notably Senator Max Cleland, lost their reelection bids.¹⁶⁶ In

163. For a discussion of a similar strategic problem arising in the context of closing military bases, see *Dalton v. Specter*, 511 U.S. 462 (1994).

164. Fiorina makes this point more generally. See Morris P. Fiorina, *Congressional Control of the Bureaucracy: A Mismatch of Incentives and Capabilities*, in CONGRESS RECONSIDERED 332, 335 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2d ed. 1981).

165. See Susman, *supra* note 108, at 3.

166. Regarding the strategy, see CLARKE, *supra* note 27, at 250 (“Those who opposed the legislation, the Administration’s supporters implied, were unpatriotic . . .”). Regarding its effects, see, for example, Josh Kraushaar, *Veteran Operatives*, CONG. DAILY, Feb. 2, 2006, available at 2006 WLNR 1883447 (“Now-Sen. Saxby Chambliss, R-Ga., scored political points for attacking Cleland’s opposition to the bill creating the Homeland Security Department because it lacked protections for the union rights of employees.”); Bob Kemper, *Loyalty to Bush Helps Georgian Rise*, ATLANTA J.-CONST., Feb. 6, 2005, at B1. Kemper notes that:

the weeks before the November 5, 2002, midterm congressional election, polling results reveal that the public viewed the President and the Republican Party as better at handling national security-related issues. A July 2002 CBS News/New York Times poll of registered voters found that 49% of respondents thought that the Republican party would be “more likely to make the right decisions when it comes to dealing with terrorism,” as compared to only 22% who believed the Democratic party would do so.¹⁶⁷ These results suggest that voters responded to a successful effort by the President and the Republicans to project a favorable image of their handling of homeland security immediately prior to the midterm election. While we recognize that these poll numbers may be explained by a variety of factors, it seems clear that the image of being tough with regard to national security issues is the most likely reason for the shift in public opinion. According to a December 12, 2002, ABC News poll—taken about one month after the 2002 midterm elections—67% of respondents approved of the President’s handling of homeland security.¹⁶⁸ These numbers suggest the President had succeeded in projecting an image of vigorous and favorable activity, encompassing the Administration’s role in creating TSA, the invasion of Afghanistan, and its ultimate decision to spearhead the creation of DHS.

In his 2002 race against Democratic Sen. Max Cleland, Chambliss ran a television ad juxtaposing images of Osama bin Laden, Saddam Hussein and Cleland, who lost both legs and an arm in the Vietnam War.

The ad attacked Cleland’s vote against Bush’s version of a bill to create the Department of Homeland Security. Cleland said he supported forming the department, but wanted workers to have civil service protections. The administration said the department, because of its sensitive nature, should not be encumbered by such labor rules.

Id.

167. Survey by CBS News/N.Y. Times (July 13-16, 2002) (available at iPOLL Databank, Roper Center for Public Opinion Research, University of Connecticut, <http://www.ropercenter.uconn.edu/ipoll.html>). The same organizations found that in October 2002, 52% of respondents thought that the Republican party would be “more likely to make the right decisions when it comes to dealing with terrorism,” as compared to only 20% who believed the Democratic party would do so. Survey by CBS News/N.Y. Times (Oct. 27-31, 2002) (available at iPOLL Databank, Roper Center for Public Opinion Research, University of Connecticut, <http://www.ropercenter.uconn.edu/ipoll.html>). Other polling organizations revealed similar patterns. In an October 2002 poll, 49% of respondents thought that the Republican party would do a better job dealing with the war on terrorism, while only 13% thought the Democrats would and 27% thought that both would do about the same. Survey by NBC News/Wall St. J./Hart & Teeter Research Cos. (Oct. 18-21, 2002) (available at iPOLL Databank, Roper Center for Public Opinion Research, University of Connecticut, <http://www.ropercenter.uconn.edu/ipoll.html>).

168. Survey by ABC News/Wash. Post (Dec. 12-15, 2002) (available at iPOLL Databank, Roper Center for Public Opinion Research, University of Connecticut, <http://www.ropercenter.uconn.edu/ipoll.html>).

B. *The Political Influence of the White House*

Along with Congress, the President and his White House advisers exerted considerable influence over the creation of DHS, with the massive scope of the Administration's reorganization plan a case in point. But given the extent of the legislature's influence, the White House's role in the reorganization raises the question of whether the President was merely responding to external pressure.

Consistent with such a conjecture, some observers place considerable explanatory weight on the existence of what might be termed a "bandwagon" effect, where the President's hand was forced by growing legislative interest in creating the new Department. To the extent that some form of reorganization was likely to pass, the argument presumes, the President's public image was best served by being in favor of DHS rather than by opposing it and losing.¹⁶⁹ Moreover, perhaps the President also had an incentive to differentiate his plan from others so as to be able to claim credit for the reorganization.¹⁷⁰

Although the bandwagon effect undoubtedly came into play—and may even explain the President's initial willingness to revisit the creation of the Department—it cannot explain the details of the White House proposal, such as why the President's alternative plan was so massive. The President could have joined the bandwagon with a reorganization only modestly different from those already before Congress. He would have almost certainly heightened the possibility of its adoption by proposing a smaller reorganization devoid of features such as assistant secretary positions not subject to Senate confirmation that were designed to heighten presidential influence.¹⁷¹ Viewed from this perspective, a reorganization of comparatively larger scope and size may have posed a heightened risk to the President's image as an effective leader. These factors raise the question of whether White House partisan and policy goals made the Administration become such a fertile ground for arguments in favor

169. For a cogent review of the somewhat contradictory evidence providing limited support for modest bandwagon effects, see Richard Nadeau et al., *New Evidence About the Existence of a Bandwagon Effect in the Opinion Formation Process*, 14 INT'L POL. SCI. REV. 203 (1993). For analyses of the evolution of homeland security policy claiming the impact of a bandwagon effect, see CLARKE, *supra* note 27, at 250-51; Kettl, *supra* note 8, at 13, 23.

170. Elliott, Ackerman, and Millian detail a similar political competition between Senator Edmund Muskie (D-Me.) and President Richard Nixon in the formation of the first major environmental protection legislation. See E. Donald Elliot et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 326-29 (1985).

171. A related contention focuses on the President's need to reinforce the public's perceptions of his leadership abilities, a goal that could be furthered if he was perceived as guiding the nation's new legislative effort. See Kettl, *supra* note 8. This factor may have also affected the President's actions, but it too fails to explain the massive size of the reorganization. Demonstrating presidential leadership qualities depends on achieving legislative victory; in contrast, Presidents with grand proposals resulting in conspicuous legislative failure hardly convey the dynamic leadership qualities that they presumably seek to project.

of crafting the Department in a particular way, even if the prescriptive costs were high.

To address this issue, we begin by raising another piece of the puzzle. Why did Bush, so fiscally profligate in general, insist that the DHS be “revenue neutral?” The stated rationale for the large DHS umbrella was that centralization and coordination would improve homeland security. Yet this rationale alone cannot explain why centralization went so far to include so many agencies (and parts of agencies) whose missions are so tangential to homeland security. As we have seen, the uncertainty about the effects of reorganization combined with the lack of congressional jurisdictional reorganization serve to question whether centralization would yield net benefits for homeland security. Reflecting the Bush Administration’s initial misgivings about reorganization, the Administration understood these problems in advance, and these weighed against centralization.

Our thesis is that a major reason why DHS encompassed a massive reorganization is that it may have furthered Bush’s *domestic* policy interests that are largely independent of homeland security. Indeed, a major consequence of the new DHS structure—perhaps the most important consequence—concerns domestic policy, not homeland security. Legislators understood that the creation of a new department would inevitably have consequences for domestic policy. First, legislators were clearly concerned about what the Department would mean for the important non-security duties for which the agencies in question were charged. Much of the early debate in Congress about the President’s proposal focused on whether, for example, it was wise to transfer FEMA and the Coast Guard to DHS given their domestic policy mandates. As noted above, the legislation addressed this directly.¹⁷²

The HSA demonstrates the extent to which political actors recognized the domestic regulatory policy stakes of the creation of the Department.¹⁷³ The committee report accompanying the legislation concludes:

[M]any agencies within the Department . . . perform important non-homeland security missions that Americans rely on every day. The Animal and Plant Health Inspection Service protects ecosystems from invasive species. The Federal Emergency Management Agency assists local communities to prepare for and respond to natural disasters. The U.S. Coast Guard performs essential maritime search and rescue, fisheries enforcement, marine safety, marine

172. The HSA ultimately included a provision in Title I of the Act which explicitly requires DHS to respect the nonterrorism-related functions of the so-called legacy missions of the transferred agencies. Homeland Security Act of 2002, Pub. L. No. 107-296, § 101(b)(1)(E), 116 Stat. 2135, 2142. Perhaps more strikingly, the HSA provisions governing the Coast Guard reiterate the importance of respecting the non-homeland-security-oriented Coast Guard missions and impose monitoring requirements on its work, but still allowing the Secretary to make some reductions on non-homeland security work. *See id.* § 888.

173. *See supra* note 141 (referring to HSA provisions imposing monitoring requirements on the Coast Guard).

environmental protection, navigation assistance, and migrant interdiction functions. The Department of Homeland Security's Bureau of Citizenship and Immigration Services provides asylum for refugees and assists immigrants in becoming American citizens. The Customs Service protects and monitors foreign trade that is essential for a healthy American economy. The Secret Service monitors and protects against identity theft, counterfeiting, and other financial crimes.¹⁷⁴

Nonetheless, the provisions in the bill also demonstrate how, despite these concerns, the explicit terms of legislative compromise creating DHS allow for a diminution in domestic regulatory activities. Put simply, the DHS provides a statutory and organizational framework that allows Bush officials to divert a wide range of resources from agency legacy mandates to homeland security activities. Regardless of whether these activities have any impact on security, the Administration has reason to value the diversion of resources out of the legacy mandates it finds worthy of disapproval.

The potential to reshape legal implementation through reorganization can be further grasped by contrasting reorganization with strategies deployed by the Reagan Administration. A major policy goal of President Ronald Reagan was to reduce what many Republicans believed was a bloated federal government, which included a wide range of governmental programs that the Reagan Administration did not value or believed outright harmful to the economy. Reagan was ideologically against an elaborate regulatory state that he disparagingly termed "big government." When Reagan took office, he appointed a range of administrative heads who shared his views. Many sought to sabotage their agency's efforts, in part by simply stopping the agency's efforts to enforce the law.¹⁷⁵

This strategy failed. Constituencies benefiting from the regulations took the agencies to court in an attempt to get them to enforce the existing set of laws. The courts agreed and, absent agency proceedings that decided on a different enforcement strategy, forced them to continue administering the law as they

174. S. REP. NO. 108-115, at 1-2 (2003). A bipartisan group of legislators successfully incorporated into the HSA a bill entitled the Non-Homeland Security Mission Performance Act of 2003, S. 910, 108th Cong., creating multiple layers of reporting requirements that could assist legislators in monitoring the performance of DHS in the non-homeland security areas. Nonetheless, the new law formally changed all the component agencies' missions to emphasize the homeland security function, and the Secretary and his subordinates retained considerable de jure and de facto discretion to change agency priorities.

175. See, e.g., Robert F. Durant, *Hazardous Waste, Regulatory Reform, and the Reagan Revolution: The Ironies of an Activist Approach to Deactivating Bureaucracy*, 53 PUB. ADMIN. REV. 550 (1993) (analyzing how legislative responses diluted the impact of White House intervention seeking to limit the regulatory reach of environmental protection policies); Marissa Martino Golden, *Exit, Voice, Loyalty, and Neglect: Bureaucratic Responses to Presidential Control During the Reagan Administration*, 2 J. PUB. ADMIN. RES. & THEORY 29 (1992) (discussing techniques of bureaucratic resistance to presidential deregulatory efforts during the Reagan Administration used by career civil servants at the Civil Rights Division of the Department of Justice and the National Highway Traffic Safety Administration).

had. Anne Gorsuch's leadership of the EPA illustrates this failure. Her attempts to slash the Agency's budget and failure to uphold environmental laws led to her resignation.¹⁷⁶

George W. Bush's goals were not the same as Reagan's, and he did not appear to share the full extent of Reagan's ideological commitment to the market.¹⁷⁷ Like Reagan, however, Bush believed a wide range of domestic programs should be outside the purview of the national government. The Reagan Administration's experience nonetheless demonstrated that the strategy of direct sabotage, shirking, and neglect of the law was unlikely to work.

But, as we have seen, crises have a capacity to change the political equation. One such change—which may have initially seemed unrelated to the Administration's regulatory and administrative agenda—involved the President's homeland security agenda. Even after the September 11 attacks, the President was reluctant to create a new homeland security cabinet agency. Despite the uncertain long-term benefits of centralizing homeland security and the high transition costs, Congress nonetheless accepted the reorganization because of their conventional common pool problems. In the President's case, his revealed preference of no reorganization eventually dissipated in the face of gathering congressional and public support for reorganization, and continuing protests from some aides seeking limited changes in the structure of land-border enforcement.

Once the White House recognized that avoiding reorganization altogether was not an option, the Administration's strategy became decidedly more ambitious. Perhaps the September 11 attacks would provide the Bush Administration with a unique opportunity to lead a policy that would achieve a range of domestic goals of which both key officials in the Administration and many Republicans in the legislature approved. The President came into office determined to loosen federal regulatory controls.¹⁷⁸ The Coast Guard's extensive regulatory functions—including the protection of marine ecosystems, the regulation of marine safety, and setting requirements for the use of port facilities—were long unpopular with a number of business constituencies that have often been supportive of Republicans in recent years, including cargo vessel operators,¹⁷⁹ the fishing industry,¹⁸⁰ tanker and oil companies,¹⁸¹ and

176. See Evan J. Ringquist, *Political Control and Policy Impact in EPA's Office of Water Quality*, 39 AM. J. POL. SCI. 336 (1995) (discussing EPA Administrator Anne Gorsuch's persistent efforts to limit regulatory enforcement and the limited but material effect of those efforts on the EPA's Office of Water Quality).

177. Indeed, Bush's commitment to social policy goals implied that he believed the government should pursue a wide range of other goals.

178. See Laurie McGinley, *Gore, Bush Would Lead Regulatory Army in Different Directions*, WALL ST. J., Oct. 31, 2000, at A28.

179. See, e.g., *Congress Signs Off on Record Tax Bill*, NEW ORLEANS TIMES-PICAYUNE, Oct. 28, 1990, at A1 ("Owners of commercial vessels, except fishing boats, would for the first time be charged fees by the Coast Guard for inspections, licenses for pilots and other seamen, and other services. *The fees will be determined by the Coast*

cruise lines.¹⁸² Republicans also questioned certain FEMA functions that could be framed as essentially social welfare policies, including FEMA's role in food and shelter assistance, noncompetitive mitigation grants, and subsidized flood insurance.¹⁸³ As historian Douglas Brinkley has written, even just a few years after FEMA's creation, "the incoming Reagan administration saw the outfit as a

Guard.") (emphasis added); Frank N. Wilner, *User Charges Proposed*, TRAFFIC WORLD, Feb. 8, 1999, at 13, available at 1999 WLNR 5024660 (describing congressional Republicans' resistance to Clinton Administration efforts to use Coast Guard regulatory and revenue authority for harbor deepening and environmental enforcement). The article describes congressional Republican concern with proposed Coast Guard activities thus:

Already, House Coast Guard and Marine Transportation Subcommittee Chairman Wayne Gilchrest, R. Md., has said the administration's intent to tax cargo-vessel operators almost \$1 billion to fund coastal, Great Lakes and St. Lawrence Seaway harbor deepening and maintenance dredging, is "dead-on-arrival." Also under attack is a proposed vessel fee to fund Coast Guard navigation and other safety assistance activities.

Id.

180. See Rebecca Boren, *Coast Guard Report Is Making Waves for Miller*, SEATTLE POST-INTELLIGENCER, Apr. 12, 1991, at A10. Describing the consequences of a Washington State Republican Congressman's efforts to delay enforcement of Coast Guard safety rules on a fisheries corporation, the article notes that:

The sinking of a fish-processing trawler in calm waters off Alaska a year ago is creating a stormy sea for Congressman John Miller's pursuit of a U.S. Senate seat in 1992.

The families of some of the nine crewmen who died last March when the Aleutian Enterprise sank recently have accused the Seattle Republican of causing those deaths by interfering in the Coast Guard's efforts to enforce marine safety rules on factory trawlers.

Id.

181. See Les Blumenthal, *Oil Tanker Restrictions in Sound Will Remain*, MORNING NEWS TRIB. (Tacoma, Wash.), Oct. 7, 2005, at B1 ("A provision that would have lifted the 28-year-old [Coast Guard] restrictions on oil tanker traffic in Puget Sound will be dropped from a new energy bill, Washington state lawmakers said Thursday. The decision by *Republican sponsors of the bill* came after a lobbying effort by three of the state's House members . . .") (emphasis added).

182. See *Cruise Ships Sail into Political Arena; The Industry Donated \$262,925 to Candidates and Parties this Year, A Florida Paper Reports*, BRADENTON HERALD (Bradenton, Fla.), Nov. 6, 2000, at 5. The report noted that cruise line companies have been "targeted as potential sources of tax dollars and criticized for dumping waste. To keep their tropical-dream business afloat, the luxury liners have gotten into the political game," and that "the chief responsibility for regulating the industries' environmental practices rests with the U.S. Coast Guard." *Id.* It also indicated that the industry appeared to generate \$605 million in wages in Florida alone, and that the Republican Party took "the largest amount" of contributions from cruise lines. *Id.* In the story Florida Republican House member Tom Feeney also stated that "[t]he cruise industry probably learned that when they weren't super active in the political process . . . someone almost took their head off. I think they've decided they have to be active." *Id.*

183. See, e.g., Julie Mason & Karen Masterson, *Houston Delegates at Odds: FEMA Fight Latest Flare-Up in House*, HOUSTON CHRON., Aug. 5, 2001, at A1 ("Bentsen went around [House Majority Whip Tom] DeLay and took a tough public stance against a GOP plan to slash FEMA's disaster assistance."); Bill Walsh, *House Panel Strips Millions from FEMA Budget; Vitter Supports Cuts to Disaster Relief*, NEW ORLEANS TIMES-PICAYUNE, June 20, 2001, at 5 ("Despite warnings that it could slow emergency response to future flood and hurricane victims, House Republicans have stripped \$389 million in disaster relief money from the budget as part of an effort to keep federal spending in check.").

feel-good liberal money drain, a cousin to HUD [Department of Housing and Urban Development] and HEW.”¹⁸⁴

The new strategy sought to bring a wide range of agencies with domestic programs within the umbrella of the DHS. Three separate components of the DHS umbrella furthered Bush’s domestic policy goals: one legislative, one organizational, and one budgetary. The legislative component gave all the agencies moved to DHS new statutory responsibility that differed from their legacy mandates. Specifically, agencies brought within the umbrella had a new law requiring them to act. In contrast to the agencies in the Reagan era, the agencies moved to DHS now faced a set of statutes with conflicting goals—their legacy mandates versus the new homeland security mandate. Indeed, even before the creation of DHS formalized the importance of the Coast Guard’s new security priorities, the media began reporting how the Agency had been forced to reorient its resources: “While only 1 percent of [the Coast Guard’s] resources were dedicated to port security before Sept. 11, more than 50 percent of all coast guardsmen are now [in mid-2002] focused on homeland security”¹⁸⁵ As one longtime Coast Guard observer noted at the time, “there wasn’t a whole lot of capacity for [the Coast Guard] essentially to pick up this new mission without it impacting significantly on its traditional missions.”¹⁸⁶

Second, Bush’s insistence that DHS be budget neutral implied that all resources devoted by these agencies to homeland security diverted resources from the agencies’ legacy mandates. Budget neutrality forced these agencies to devote fewer resources to their legacy mandates. The more these agencies spent on homeland security, the less they spent on their legacy mandates.

Third, placing these agencies within the DHS organizational framework served to further this diversion of resources. If an agency were left independent or in its former department, the agency (possibly in collaboration with its former department) would make the determination of the tradeoff of how much resources to transfer from its legacy mandate to homeland security concerns. It could, for example, decide that 3% of its resources would be appropriate. Placing these agencies within DHS, however, empowered Bush Administration officials to help make that tradeoff. In particular, placing these agencies within DHS allowed departmental leaders leverage with which to force agencies to make a greater tradeoff than they would otherwise; that is, to devote greater resources to homeland security than the agency would do on its own.

It is worth noting the paucity of defensible prescriptive arguments for creating such a vast department at the time, and for insisting that it be revenue neutral. Recall that early on Bush advisers flatly opposed the creation of a new

184. BRINKLEY, *supra* note 10, at 247.

185. George James, *A Line in the Water: In the War on Terrorism, the Coast Guard Finds Itself Stretched Thin*, N.Y. TIMES, May 26, 2002, at § 14, at 1.

186. *See id.*

department,¹⁸⁷ and the President himself repeatedly claimed to be a critic of large bureaucracies.¹⁸⁸ Those within the White House seeking bureaucratic changes initially sought to merge Customs and INS within the Justice Department, and Homeland Security Adviser Ridge reportedly decided it was best to “leave the Coast Guard out of it.”¹⁸⁹ A larger proposal would likely exacerbate the legislative bargaining, transition, and internal management challenges associated with turning the legislative proposal into a new bureaucratic reality. And the Administration’s insistence on revenue neutrality proved a potential political liability—as both legislators and government auditors emphasized how the merger would not proceed effectively under revenue neutrality.¹⁹⁰ “More important than a precise cost of the transition,” noted one GAO report directly contradicting White House claims, “is the recognition that there will be short-term transition costs”¹⁹¹ Nonetheless, the creation of DHS, coupled with an insistence on revenue neutrality, appears to have allowed Bush to transfer resources out of agency legacy mandates into new homeland security concerns. Because it appears the Administration did not value these legacy mandates, this combined statutory and bureaucratic approach made him better off even if the resources diverted from legacy mandates to homeland security activities produce *no* tangible homeland security benefits.

Legislators, too, recognized early on that DHS was, to some extent, a presidential power-grab. As such, lawmakers made efforts to rein in what they saw as an overextension of executive power. These attempts can be clearly demonstrated through a comparison of the President’s initial bill proposal and the resulting HSA. Examples of how legislators refused to give the President the full authority he desired are repeatedly apparent. The final bill, for instance, did not give the White House the authority to appoint assistant secretaries without Senate confirmation, as was requested in the original proposal. Nor, as previously mentioned, was the President granted the right to control when agencies were transferred (section 802 in the proposal) or control the allocation of funds from the transferred agencies to the Secretary of DHS (section 803(c) in the proposal). Finally, Congress voted to include the establishment of the National Homeland Security Council within the Executive Office—an Agency that was not proposed in the President’s plan.

187. *See infra* Part I.

188. *See generally* GEORGE W. BUSH, RENEWING AMERICA’S PURPOSE: POLICY ADDRESSES OF GEORGE W. BUSH, JULY 1999-JULY 2000 (2000) (describing his goal of eviscerating the layers of bureaucracy between citizen and decision-maker).

189. BRILL, *supra* note 36, at 397.

190. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, GAO-03-260, HOMELAND SECURITY: MANAGEMENT CHALLENGES FACING FEDERAL LEADERSHIP 44-45 (Dec. 2002), *available at* <http://www.gao.gov/new.items/d03260.pdf>; Press Release, Office of Senator Joseph Lieberman, Lieberman Warns Against Short-Changing Homeland Security (Dec. 20, 2002), *available at* <http://lieberman.senate.gov/newsroom/release.cfm?id=208169>.

191. U.S. GEN. ACCOUNTING OFFICE, *supra* note 190, at 45.

In addition to the legislation's language, floor statements reveal legislators' weariness of conferring more power on the President. Senator Robert Byrd (D-W. Va.) said of the HSA in a floor statement to the Senate: "The President is clearly attempting to remove the limits on his power. I don't question his good intention. Maybe he doesn't understand what he is doing. But this is clearly an attempt to remove limits on the Executive's power"¹⁹² This comment is representative of the deep distrust that some in Congress felt over what they perceived as a presidential grab for increased authority.

Legislators' efforts to limit increases in presidential power over the Department indicate the extent to which the fight over DHS was not only about the appropriate degree of centralization that should govern homeland security policy, but also concerned the extent of direct presidential control over the regulatory, bureaucratic, and legal functions that would be vested in DHS. Although legislative responses limited how much power the President achieved through the HSA, its creation significantly enhanced the power of the Executive. The new law allowed the President to select a cadre of political appointees to oversee twenty-two agencies lodged in a new bureaucracy with the daunting mission of protecting the homeland while continuing to carry out non-homeland security missions. After a tense fight in Congress, the DHS civil service employees were also subject to more flexible personnel rules, thereby allowing political appointees to control them more readily.

The umbrella structure had another organizational effect that also served the purpose of increasing executive power. When a bureau was placed within DHS, the Department's hierarchy could make it clear that legacy mandates were no longer the agency's priority and that therefore bureaucrats specializing in those legacy mandates were less likely to be promoted into senior management. All this meant that these bureaucrats would be treated less well, and would be more likely to leave.¹⁹³ At the very least, the DHS umbrella gave Administration officials opposed to an agency's legacy mandate additional tools with which to sabotage the ability to perform that mandate.¹⁹⁴

192. 148 CONG. REC. S8046 (2002).

193. See, e.g., Chris Cillizza, *Bills Scold Executive Branch*, ROLL CALL, May 25, 2005, available at 2005 WLNR 8280726 ("Homeland Security has had two secretaries and three deputy secretaries in its brief existence. More than 40 percent of high-level staff positions are currently vacant."); R.G. Edmonson, *DHS Moving Ahead After Port Worker ID Delays*, J. COMMERCE, May 17, 2006, available at 2006 WLNR 8536041 ("[E]mployee turnover at all levels in Homeland Security was a factor in delaying the program."); Angela Greiling Keane, *Brain Drain Pains DHS*, TRAFFIC WORLD, Apr. 3, 2006, at 13, available at 2006 WLNR 5395365 ("More turnover rattled the Department of Homeland Security"); *Homeland Security Struggles with 'Extraordinary' Turnover*, EXTREME TECH.COM, June 10, 2005, available at 2005 WLNR 9519206; Spencer S. Hsu, *Weaknesses in Nation's Emergency Preparedness Exposed Yet Again by Katrina*, WASH. POST, Oct. 15, 2005, at A14 ("Personnel turnover, constantly changing priorities and split responsibilities among federal agencies . . . sap the nation's ability").

194. Our analysis of the potential policy payoffs to the White House from expansive reorganization raises two additional questions. First, if the Administration's inclusion of

As a result, the creation of DHS appears to represent a clever domestic political innovation, allowing Bush to attain goals in ways that President Reagan failed. Reagan's direct attempt to circumvent or ignore domestic regulatory laws largely ended in disaster.¹⁹⁵ By giving the Bush Administration new statutory and organizational tools, the DHS umbrella provided the legal means to divert considerable resources away from domestic legacy mandates.

C. The Role of the Post-September 11 Crisis

The crisis following the September 11 terrorist attacks had several predictable effects on the policymaking process concerning homeland security. First, it gave the President an issue from which he could launch a new phase of his theretofore lackluster presidency and shore up his rapidly declining public approval rating. The weekend before the September 11 attacks, President Bush received a job approval rating of 51%; by September 21, 2001, his job approval rating had skyrocketed to a record-breaking 90%, representing the largest public opinion rally ever experienced by a U.S. President.¹⁹⁶ But this popularity was relatively short-lived as Bush's approval rating steadily dropped over the next eight months to a post-September 11 low of 70% immediately

regulatory agencies within DHS was partly motivated by a desire to control and curtail administrative and regulatory activity, why did some Democratic proposals also include large regulatory agencies such as the Coast Guard? Although Lieberman's proposal was nearly as large in scope as Bush's, the context and substance of their proposals differed in important ways. Lieberman was likely motivated by the prospect of grabbing power for the Senate Governmental Affairs Committee, in which he played a leading role. Moreover, as Part I notes, Bush's proposal was not only larger in the end, but its development nearly resulted in the inclusion of even more regulatory agencies that were not included in Democratic proposals—such as the Nuclear Regulatory Commission and the Federal Aviation Administration. In addition, Bush's proposal included elements expanding presidential power by weakening the civil service and allowing the appointment of Assistant Secretaries without Senate confirmation. Finally, as we note below, Bush's proposal was coupled with moves to impose budgetary restrictions on agencies so as to force agencies to substitute homeland security efforts for their legacy mandates. The second question is why the Department was not even larger. As with past reorganization efforts, the White House was likely to best achieve its goals by balancing the costs and benefits of marginal increases in the scope and size of the Department: (1) legislative resistance from affected committees would be greater as more functions were placed in the Department (the judiciary committees, in particular, may have objected far more strenuously if the primary department under their jurisdiction, the Justice Department, had lost the FBI or not received ATF); (2) the hidden domestic policy implications of the reorganization might become starkly apparent to the public; (3) resistance to transfer from bureaus with greater autonomy, such as the FBI, would have generated additional friction; and (4) there might be a genuine risk that even more massive reorganizations would adversely impact critical functions such as air traffic control (which was considered and ultimately rejected as a candidate for inclusion).

195. See *supra* notes 175-76 and accompanying text (discussing the limits of President Reagan's capacity to dilute regulatory enforcement).

196. Frank Newport, *The American Public Reacts*, GALLUP POLL NEWS SERV., Sept. 24, 2001, available at <http://www.galluppoll.com/content/Default.aspx?ci=4900>.

before the DHS announcement. Because of the sharp decline in presidential popularity, the White House must have felt pressure to produce additional terrorism-related policy; the Patriot Act, the creation of the TSA, the invasion of Afghanistan, and a spate of other executive actions were not enough.

Bush therefore sought to take visible command of the policymaking and shepherded the various pieces of legislation through the process—legislation that had clearly become his and not that of the Congress. To do so, he had to provide a plan that differentiated his Administration's proposal from those under discussion in Congress.

Perhaps the most important aspect of a crisis is that the attentive public demands quick action. Especially in a national security crisis where the public feels vulnerable, fast and decisive action is needed to assure citizens that risks have been significantly lowered. Perhaps most significantly, the public cares deeply about terrorism and homeland security issues. Even before September 11, Gallup reported that a significant proportion of Americans were concerned about being victims of a terrorist attack. In an April 2000 poll, Gallup found that 24% of respondents were either very or somewhat worried that they or someone in their family would be a victim of an Oklahoma City-style bombing.¹⁹⁷ In January of 2001, Gallup found that 47% of respondents reported that it was somewhat or very likely that terrorists or another country using nuclear weapons within the next ten years would attack the United States.¹⁹⁸

The public's concern with national security increased over time¹⁹⁹ and coincided with growing support for reorganization. Although only limited public opinion polls are available regarding the creation of DHS, available data suggest that Americans generally supported the idea of a cabinet-level Department of Homeland Security even before the President's announcement.²⁰⁰ Additionally, a January 31, 2002 poll found that 84% of respondents approved of Bush's request to spend \$38 billion on homeland security.²⁰¹ After President Bush made the June 7, 2002 announcement in

197. *Terrorist Attacks: Public Opinion from April 1995-January 2001*, GALLUP POLL NEWS SERV., Sept. 11, 2001, available at <http://www.galluppoll.com/content/default.aspx?ci=4876>.

198. *Id.*

199. In the weeks following the attacks, as might be expected, the number of respondents concerned about terrorism increased, with 58% of respondents reporting that they were somewhat or very worried that they or someone in their family would be a victim of a terrorist attack. Lydia Saad, *Personal Impact on Americans' Lives*, GALLUP POLL NEWS SERV., Sept. 24, 2001, available at <http://www.galluppoll.com/content/?ci=4900>.

200. In a Time/CNN/Harris poll in late September 2001, 56% of respondents believed that the Office of Homeland Security would make the country safer. Survey by Time/Cable News Network/Harris Interactive (Sept. 27, 2001) (available at iPOLL Databank, Roper Center for Public Opinion Research, University of Connecticut, <http://www.ropercenter.uconn.edu/ipoll.html>).

201. Survey by L.A. Times (Jan. 31-Feb. 3, 2002) (available at iPOLL Databank, Roper Center for Public Opinion Research, University of Connecticut,

which he endorsed the creation of DHS, public opinion reflected a belief that DHS was a fundamentally good idea. In a typical poll, Gallup found that 72% of respondents approved of the creation of DHS.²⁰² The widespread popularity of reorganization suggests the potential position-taking benefit that politicians could achieve by supporting the creation of DHS.

As legislators and the President pursued the creation of the massive Department, the public's inability to assess the intricacies of the plan had three separate effects on crisis policymaking. First, popular demand for action induced political officials to prefer quick action that was less well-considered and well-designed to slower action that was better considered and better designed. Second, the need to pass something quickly also allowed political officials to hide other initiatives with very different aims within the plans to address the crisis. Third, the demanding public, unable to analyze the implications of transition costs or organizational details, put legislators seeking better plans (or opposing the plans) at a political disadvantage. Opposition delays action, and if the public cannot appreciate the policy-specificity of the argument, those seeking to improve the process appear simply as opponents. Again, this clearly occurred in the case of Max Cleland.²⁰³ All three effects appear to have influenced homeland security policymaking.

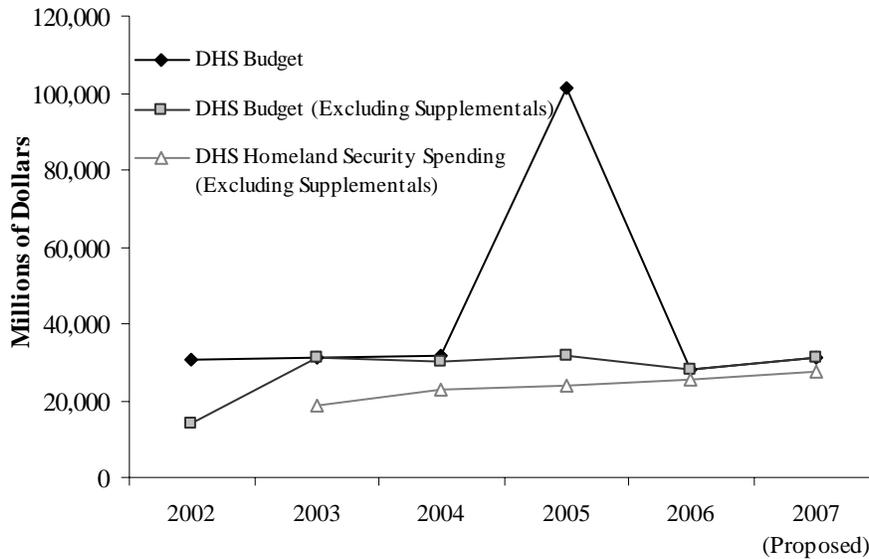
D. Budget Politics and Legacy Mandates

Budget-related evidence is consistent with the hypothesis that reorganization furthered domestic legal and policy goals cutting against legacy

<http://www.ropercenter.uconn.edu/ipoll.html>).

202. Frank Newport, *Americans Approve of Proposed Department of Homeland Security*, GALLUP POLL NEWS SERVICE, June 10, 2002, available at <http://www.galluppoll.com/content/Default.aspx?ci=6163>.

203. See *supra* note 166. This aspect of the DHS suggests the impact of voters' knowledge and sophistication, and not just the salience of the underlying issue, on the allocation of legal responsibilities across bureaucracies. Cf. Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 AM. J. POL. SCI. 951 (2001) (noting that the use of cognitive short-cuts or heuristics *increases* the probability of a correct vote by political experts but *decreases* the probability of a correct vote by novices). But see Arthur Lupia & Mathew D. McCubbins, *The Institutional Foundations of Political Competence: How Citizens Learn What They Need to Know*, in ELEMENTS OF REASON: COGNITION, CHOICE, AND THE BOUNDS OF RATIONALITY 47 (Arthur Lupia et al. eds., 2000) (arguing that low-information rationality and political competence are possible through heuristics and institutions allowing citizens to interpret complex information). There is little doubt that voters with limited knowledge can often make reasonable choices by analyzing the behavior of organized interests (and by drawing on perceptions about the relationship of their own views to those of the relevant organized interests). But voters' relative ignorance about the intricacies of legislative proposals may be especially likely to affect political circumstances during crises, where policy changes may happen more rapidly, and in circumstances where prominent organized interests (such as the NRA or the ACLU) do not take an explicit position. Both of those conditions were present when the HSA was under consideration.

Figure 1. DHS Budget Authority in Perspective

Source: Calculations based on data from the Office of Management and Budget, *Budget of the United States Government* (fiscal years 2004-2007).

mandates. Recall that in his initial proposal to create the Department, Bush repeatedly promised that DHS would be “revenue-neutral,” meaning that the new Department would not cost any more than the combined budgets of its component parts.²⁰⁴ The Bush Administration’s projected budgets for the Department of Homeland Security in FY 2003 and 2004 held resources constant compared to the 2002 figures (including both actual and supplemental expenditures).²⁰⁵ We argue that this push for budget neutrality suggests the Administration was contemplating cutbacks in legacy mandates during the creation of DHS; by giving new homeland security mandates to the agencies transferred to DHS and by not giving those agencies any new funding to perform these mandates, the President forced resources out of legacy regulatory functions.

204. See Editorial, *Looking for Fiscal Patriots*, MILWAUKEE J. SENTINEL, June 17, 2002, at A10 (“Bush’s proposed Department of Homeland Security would be revenue neutral, the president’s aides insist”); Editorial, *Take Time on Homeland Plan*, HARTFORD COURANT, June 20, 2002, at A8 (“Mr. Bush says his proposal will be revenue-neutral”); .

205. The DHS’s Discretionary Budget Authority, including actual and supplemental expenditures, was \$31,051 million in FY 2002. U.S. DEP’T OF HOMELAND SEC., *THE BUDGET FOR FISCAL YEAR 2004*, at 445 (2003). The Bush Administration’s projections for FY 2003 and FY 2004 were \$27,884 million and \$29,185 million, respectively. *Id.*

In succeeding years, departmental spending exceeded the Bush Administration's initial projections.²⁰⁶ But once we remove supplemental appropriations such as those funding the aftermath of disasters such as Katrina, a different picture emerges. As Figure 1 indicates, overall discretionary funding for DHS remained relatively constant between 2003 and 2006, and the President's request for 2007 continues the pattern.²⁰⁷ The key comparison in the figure is between total DHS funding (excluding supplementals) and DHS homeland security spending. Because the latter rises faster than the former, these numbers indicate that DHS spending on legacy mandates decreased.

Although the budget for DHS and its components appears to have increased substantially, much of the increase occurred through a supplemental appropriation before the new Department had been created and reflected, in large measure, disaster-related expenditures associated with the September 11 attacks, new grant programs, and the creation of the TSA.²⁰⁸

An even more telling picture emerges from the breakdown of appropriations flowing to DHS on the basis of whether or not the Office of Management and Budget considers an appropriation to be primarily homeland security related.²⁰⁹ Total DHS discretionary funds flowing to DHS have remained essentially flat, but the dedicated homeland security resources within the Department have consistently risen. As Figure 2 shows, the proportion of resources flowing to functions most directly related to homeland security has increased from about 60% to roughly 90% during the life of the Department. Admittedly, the appropriations designated as primarily homeland security-related almost certainly have the potential to provide a measure of nonsecurity benefits.²¹⁰ It is revealing, however, that the White House directly identifies an increasingly dominant share of the Department's resources with security-related missions.²¹¹

206. See OFFICE OF MGMT. & BUDGET, HISTORICAL TABLES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2007, at 113 (2006) (showing that the homeland security discretionary budget in 2003 equaled \$30,759 million and in 2004 equaled \$30,344 million).

207. See *id.*

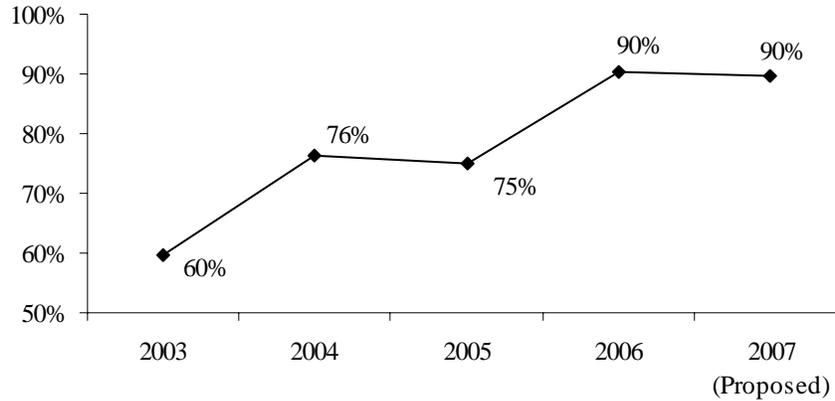
208. See OFFICE OF MGMT. & BUDGET, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2004, at 610 (2003) (showing supplemental appropriations as proportion of total resources provided for DHS bureaus in 2002).

209. OFFICE OF MGMT. & BUDGET, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2007, at 19-34 (2006); OFFICE OF MGMT. & BUDGET, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2006, at 37-52 (2005); OFFICE OF MGMT. & BUDGET, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2005, at 25-39 (2004).

210. As best we can tell, OMB's definition of "homeland security" seems to focus on the protection of the American national territory, and its population and infrastructure, from man-made threats. See *supra* Part I for examples of other sources that have defined the term in a similar fashion.

211. Even if the resources of departments and bureaus were growing overall, changes in the proportion of resources dedicated to a particular mission alter internal and external perceptions of a bureau's mission, the allocation of time and attention of its leadership, and

Figure 2. Security-Focused Activity as Percentage of DHS Budget (Excluding Disaster Supplementals)



Source: Calculations based on data from the Office of Management and Budget, *Budget of the United States Government* (fiscal years 2004-2007).

We can learn still more about budgetary developments by going beyond broad funding categories and examining patterns involving individual bureaus. Some agencies that clearly encompass both traditional homeland security functions as well as domestic regulatory activities *did* experience budget increases.²¹²

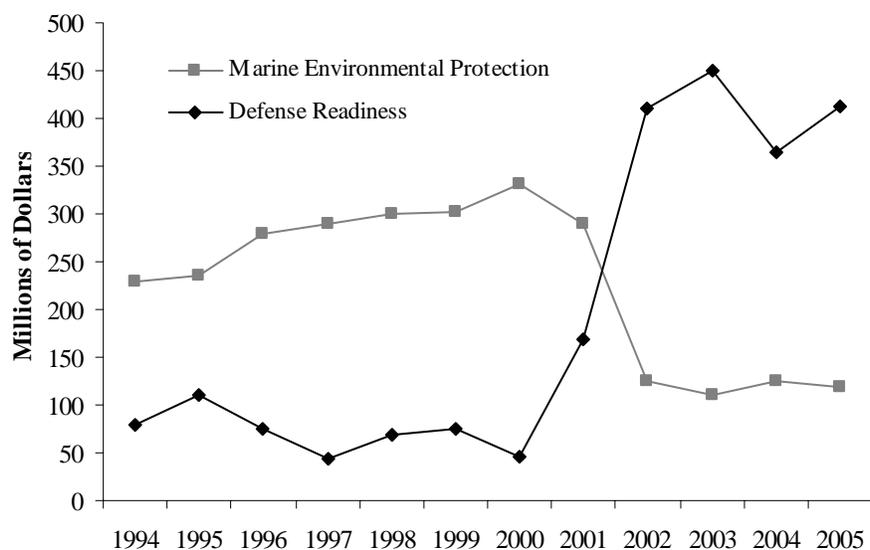
But here too, a different picture emerges from the details. Consider first the Coast Guard. Some of the budget increases for the Coast Guard cover a portion of long-anticipated infrastructure needs.²¹³ Despite the flow of some additional resources to the bureau, some legislators maintain that the Agency has not received adequate resources to carry out its new mandates. In a debate during the Coast Guard reauthorization process, Representative Howard Coble thought “that the Coast Guard leaders ‘must have a magic wand’ because he said they have seamlessly assumed a range of new responsibilities without corresponding increases in funding.”²¹⁴ Moreover, individual appropriations accounts for the Coast Guard tell a story of shifting priorities. Just before and during the

its relationships to external constituencies. Cf. LAWRENCE S. ROTHENBERG, *REGULATION, ORGANIZATIONS, AND POLITICS: MOTOR FREIGHT POLICY AT THE INTERSTATE COMMERCE COMMISSION* (1994) (describing how the ICC’s priorities, internal culture, and relationships with external interests shifted as the proportion of economic activity it regulated increasingly involved trucking instead of rail transportation).

212. See *infra* Appendix Table 4.

213. See MICHAEL E. O’HANLON ET AL., *PROTECTING THE AMERICAN HOMELAND: ONE YEAR ON XIX* (2003) (noting that new Coast Guard funds “are doing little more than addressing previous shortfalls” and amount to “hardly a change commensurate with the new responsibilities of this agency”).

214. Kathleen Hunter, *House Adopts Revision to Coast Guard Reauthorization*, CQ TODAY, June 26, 2006, available at 2006 WLNR 11408068.

Figure 3. Coast Guard Actual Outlays, 1994-2005

Source: Data compiled from the Office of Management and Budget, *Appendix, Budget of the United States Government* (fiscal years 1996-2007).

creation of DHS, several major Coast Guard programs experienced a sharp decline, most notably Marine Environmental Protection and Search and Rescue, both of which had been on a fairly strong upward budgetary trajectory since 1996.²¹⁵ On the other hand, as Figure 3 indicates, programs focused on security-related issues, such as Defense Readiness and Marine Safety and Security, experienced a dramatic increase in the same period, leaving a shrinking proportion of total Coast Guard outlays for domestic administrative and regulatory functions.

These budgetary changes have taken their toll on the Coast Guard's administrative and regulatory functions. Studies from the GAO confirm that Coast Guard programs have suffered as a result of the new homeland security missions imposed on the Agency by the transfer.²¹⁶ One report tracks the

215. See Office of Mgmt. & Budget, Public Budget Database, Budget Authority, <http://www.whitehouse.gov/omb/budget/fy2007/db.html> (providing account level detail for budget authority from 1976 through 2007). Indeed, the fact that some limited declines in environmental enforcement outlays began during the Bush Administration but before the creation of DHS was considered by Congress only underscores the extent to which the Bush Administration assigned lower priorities to regulatory enforcement within the bureau compared to the previous Administration.

216. See, e.g., *Coast Guard's Move to the Department of Homeland Security: Hearing Before the Subcomm. on Coast Guard and Maritime Transp., of the H. Comm. on Transp. and Infrastructure*, 108th Cong. (2003) (statement of JayEtta Z. Hecker, Director Physical Infrastructure, U.S. Gen. Accounting Office), available at <http://www.gao.gov/new.items/d03594t.pdf>.

number of resource hours expended on each of the Coast Guard's program over time, using the first quarter of 1998 as a baseline.²¹⁷ The general trend shows increasing reprioritization away from administrative and regulatory missions since the September 11 attacks, and particularly since passage of the HSA. For example, coastal security, which is the program that experienced the highest increase in resource hours, went from 2400 resource hours in the first quarter of 1999 to 37,000 resource hours in the first quarter of 2003, a more than fifteen-fold increase.²¹⁸ Even where such changes began before the Coast Guard's transfer, folding the bureau into the vast, terrorism-focused DHS bureaucracy almost certainly makes it easier for these shifts in resources to be cemented into longer-term priorities. Placement of the entire bureau in DHS underscored the importance of the Coast Guard's counterterrorism functions, provided a new structure of national security-focused appointees to monitor the bureau's spending priorities, and weakened the prospect that congressional and departmental overseers more concerned about the bureau's domestic regulatory activities could have reversed the trend. Indeed, "for the foreseeable future," GAO investigators explicitly concluded that "the Coast Guard must absorb the cost of implementing a variety of newly mandated homeland security tasks by taking resources from ongoing activities."²¹⁹

And the Coast Guard confronted these developments at a time when some important new regulatory initiatives, such as those implementing the International Convention for the Prevention of Pollution from Ships, which imposed new requirements for pollution prevention equipment,²²⁰ were likely to demand additional enforcement resources. In other cases, the Coast Guard postponed regulatory initiatives that had been in the works for years in the aftermath of its transfer to DHS.²²¹

Similar developments affected the administrative functions of FEMA. FEMA's budget has two distinct components: responding to specific disasters, such as Katrina; and ("base") funding for FEMA's administrative capacity, mitigation grants, and discretionary disaster relief programs. The increase in FEMA's budget shown in Appendix Table 4 reflects both the core program budget as well as special appropriations for specific disasters such as the September 11 terrorist attacks that Congress and the President would find politically costly to ignore. In contrast, FEMA's ongoing administrative and discretionary functions, including activities such as oversight of disaster relief spending, flood insurance, and mitigation grants, may attract less public

217. *Id.*

218. *Id.*

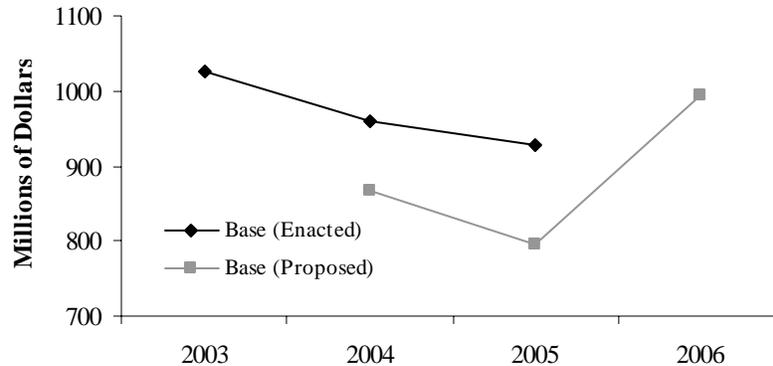
219. *Id.* at 3, 14.

220. *See* Pollution Prevention Equipment, 70 Fed. Reg. 67,066 (proposed Nov. 3, 2005) (to be codified at 46 C.F.R. pt. 162).

221. *See, e.g.,* Draft Programmatic Environmental Impact Statement for Vessel and Facility Response Plans for Oil: 2003 Removal Equipment Requirements and Alternative Technology Revisions; Reopening Comment Period, 70 Fed. Reg. 45,409 (Aug. 5, 2005).

attention while inviting political controversy. As Figure 4 indicates, if we focus on FEMA's base budget, it becomes clear that FEMA's funding has remained essentially flat (or slightly declined) since the creation of DHS. By adding responsibilities and restricting FEMA's core resources, budgetary developments since the merger further strained FEMA's administrative capacities and its available resources for discretionary mitigation programs.²²²

Figure 4. FEMA Base Funding Authorization



Source: DEMOCRATIC STAFF OF H. APPROPRIATIONS COMM., 109TH CONG., A STORY OF NEGLECT: A REVIEW OF FEMA AND THE ARMY CORPS OF ENGINEERS IN THE AFTERMATH OF HURRICANE KATRINA (2005).

E. The Consequences of Reorganization

Our theoretical framework provides answers to the puzzles framed at the outset. Why is DHS so big, and why does it include so many agencies whose missions are tangentially related to homeland security? Part of the answer is that Bush sought to take the lead in providing homeland security. But he, and his Administration, may also have used the DHS umbrella as a means for

222. See DEMOCRATIC STAFF OF H. APPROPRIATIONS COMM., 109TH CONG., A STORY OF NEGLECT: A REVIEW OF FEMA AND THE ARMY CORPS OF ENGINEERS IN THE AFTERMATH OF HURRICANE KATRINA (2005), available at http://www.house.gov/appropriations_democrats/pdf/A-Story-of-Neglect.pdf. Although these figures were evidently compiled by Democratic committee staff, former FEMA Director Michael Brown and the DHS Inspector General identified the same trend. See FAILURE OF INITIATIVE, *supra* note 155, at 155-56. The report indicates:

[Michael] Brown claimed that FEMA's operational budget baseline (for non-Stafford Act disaster funding) had been permanently reduced by 14.8 percent since joining DHS in 2003. In addition to the permanent baseline reduction, he claimed FEMA lost \$80 million and \$90 million in fiscal years 2003 and 2004 respectively from its operating budget. Brown argued these budget reductions were preventing FEMA officials from maintaining adequate levels of trained and ready staff.

Id.; see also OFFICE OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., A PERFORMANCE REVIEW OF FEMA'S DISASTER MANAGEMENT ACTIVITIES IN RESPONSE TO HURRICANE KATRINA 111-12 (2006).

disguising a wide-ranging transformation of domestic policies. As we argued in the Introduction, it remains unclear the extent to which the creation of DHS was part of a deliberate plan to dilute and reassign domestic regulatory functions. However, the fact remains that the Bush Administration advocated the largest possible new department, despite warnings from within its own camps about the risks to security-related outcomes. Furthermore, given the wide-ranging bureaucracies the Administration considered for transfer, it is difficult to believe that one of the goals was *not* to affect legacy missions of the transferred agencies.

Forcing the transferred agencies under the homeland security umbrella had two separate, reinforcing effects. First, the reorganization—especially with the stated goal of revenue neutrality—forced agencies to transfer resources formerly devoted to their legacy mandates to homeland security concerns. Second, the new organizational control allowed the Administration to downplay the portions of the organization that remained focused on the legacy mandates, further disrupting the agency’s ability to serve this mandate. The Bush Administration seemed to value this transformation, not necessarily because this improved homeland security, but because it altered a variety of domestic programs. Consider the final, related puzzle: why did Bush insist that this policy be budget neutral despite the fact that he has been so profligate in other areas? The answer is that budget neutrality is a central tool in forcing agencies to transform their operations so that they transfer resources out of their legacy mandates.

Another way to understand the dynamic of domestic regulatory impacts associated with the creation of DHS is to contrast it with an alternative approach for curbing administrative discretion. Suppose that instead of creating a massive new department, Congress had mandated that agencies undertake a “Homeland Security Impact Statement” (HSIS) in parallel with the Environmental Impact Statements created in 1969. The HSIS would require agencies to study the impact of their proposed policies—and possibly also existing ones—on homeland security. As with an EIS, an HSIS would likely have had mixed implications. To be done seriously, it would take considerable effort. And, as with an EIS, the procedural nature of the exercise does not compel any policy changes. Moreover, this approach would not achieve Bush’s domestic policy goals of forcing agencies to divert a considerable portion of resources and personnel from their legacy mandates.

Ironically, even shifting the focus away from legacy mandates does not guarantee the effectiveness of security policies. The distributive tendency has distorted DHS’s spending priorities away from high-risk targets to areas of significantly lower priority.²²³ The legislature’s failure to reorganize

223. Although DHS has taken some steps to preserve and expand the role of technical risk analysis in the allocation of homeland-security-related grant funds, such efforts have played out against a backdrop of pressures forcing DHS to allocate funds in accordance with

congressional oversight jurisdictions works to preserve the noncoordination status quo, directly hindering the goal of centralization and coordination. And partisan goals lead to some extreme measures relatively independent of the goal of homeland security.

Regardless of the precise mix of political goals shaping the HSA, some of the problems afflicting its bureaus since the merger have become all too familiar. Indeed, the disastrous performance of DHS and FEMA in the aftermath of Hurricane Katrina in August 2005 is a natural consequence of a political process that played down transition costs and structural problems associated with the creation of DHS. Recall that the DHS merger accelerated a process through which FEMA's natural disaster and mitigation missions were eviscerated.²²⁴ As the legacy missions were downgraded, many experienced workers left the Agency.²²⁵ Both a congressional committee and the White House issued reports detailing the mistakes made during the recovery efforts following the hurricane. The reports show how FEMA and DHS were

external political dynamics. Two of the three major grant programs—the Law Enforcement Terrorism Prevention Program and the State Homeland Security Grant Program—have statutory baseline formulas that flatly require nearly half the money to be allocated *equally* on a state-by-state basis, with 0.75% of total funds going to each state and 0.25% of total funds allocated to a list of territories. *See* SHAWN REESE, CONG. RES. SERV., HOMELAND SECURITY GRANTS: EVOLUTION OF PROGRAM GUIDANCE AND GRANT ALLOCATION METHODS 1 (2006). In addition, the extent to which the Department has described recent changes as gradual moves to implement a more risk-based methodology suggests that the original allocation formulas more thoroughly reflected the influence of political pressures on DHS. *See* Robert O'Harrow, Jr. & Scott Higham, *Politics Cast Shadow on 9-11 Funds*, CINCINNATI POST, Dec. 26, 2005, at K1.

224. *See* Elliston, *supra* note 156; *see also* Shruti Basavaraj, *House Approves Funding for Natural Disaster Preparedness*, NATION'S CITIES WKLY., July 7, 2003, at 3 (“Since the consolidation of numerous federal agencies under the umbrella of DHS, many stakeholders have been concerned about the dilution of the FEMA mission of response, recovery and mitigation of all hazards—including natural disasters.”). For a cogent argument explaining why it is problematic to assume that capacity to respond to natural disasters and to terrorist attacks are fungible, *see* Patrick S. Roberts, *Reputation and Federal Emergency Preparedness Agencies, 1948-2003* (Sept. 2, 2004) (unpublished manuscript), *available at* <http://www.training.fema.gov/EMIWeb/downloads/RobertsPfema82004apsa.pdf>.

There are reasons to believe that terrorism is incompatible with the definition of all hazards that existed before September 11. Terrorism lacks predictability and clear definitions: the enemy is elusive and it is unclear who or what should be involved in prevention and response. Weapons could be biological, radiological, chemical, or traditional arms, and the medical and damage control elements of response overlap with law enforcement and investigative elements.

Id. at 29.

225. *See* Bruce Alpert, *Senators Get an Earful on FEMA, SBA: Horror Tales Feature Ineptitude, Delays*, NEW ORLEANS TIMES-PICAYUNE 2, May 20, 2006, at 2, *available at* 2006 WLNR 8696865 (“[C]onstant turnover of personnel at FEMA forced them to start over multiple times in [citizens’] efforts for reimbursement or help.”); Frank Davies, *Doubts Persist About FEMA’s Ability to Respond*, NEWARK STAR-LEDGER, May 7, 2006, at 42 (“FEMA lost many top professionals in the past few years, and the turnover continued after Katrina. In March [2006], a House committee reported that only 73 percent of FEMA staff positions were filled . . .”).

unprepared for an emergency on the scale of Katrina. Both DHS and FEMA were indicted for “lack[ing] adequate trained and experienced staff.”²²⁶ The White House report suggests transferring certain disaster recovery responsibilities out of DHS, possibly by having DOJ oversee law enforcement and HHS take over distributing aid to victims.²²⁷ The congressional report goes beyond the conclusion that DHS and FEMA were unprepared. Its analysis highlights the problems resulting from a structure where layers of organization separated the White House from the operational command and technical advice most directly associated with the disaster response.²²⁸ The report concludes that, had the structure worked better, the response to Katrina would have commenced several days earlier than it did.²²⁹ An internal DHS Inspector General report also said as much.²³⁰

226. FAILURE OF INITIATIVE, *supra* note 155, at 3.

227. Amanda Ripley, *Speed Read: The White House Katrina Report*, TIME.COM, Feb. 23, 2006, <http://www.time.com/time/nation/article/0,8599,1167076,00.html>.

228. See FAILURE OF INITIATIVE, *supra* note 155, at 131. The report notes that:

With the creation of the Department of Homeland Security . . . and the development of the National Response Plan . . . , an additional layer of management and response authority was placed between the President and FEMA, and additional response coordinating structures were established. The Secretary of Homeland Security became the President’s principal disaster advisor As part of these changes, critical response decision points were assigned to the Secretary of Homeland Security [who] . . . executed these responsibilities late, ineffectively, or not at all.

Id.

229. See *id.* at 132. “[A]bsent a catastrophic disaster designation from [Homeland Security Secretary] Chertoff, federal response officials in the field eventually made the difficult decisions to bypass established procedures and provide assistance without waiting for . . . clear direction from Washington.” *Id.* Moreover, “[t]he federal government stumbled into a proactive response during the first several days after Hurricane Katrina made landfall, as opposed to the Secretary making a clear and decisive choice to respond proactively” *Id.* These events, according to the congressional report, did not merely reflect personal failures on the part of the Secretary, but were largely grounded in structural problems: “The White House Homeland Security Council . . . , situated at the apex of the policy coordination framework for DHS issues, itself failed to proactively de-conflict varying damage assessments.” *Id.* In the weeks immediately before Katrina arrived, Secretary Chertoff had already begun planning extensive efforts to redefine the relationship among the White House, the DHS secretariat, and FEMA. These efforts also suggest the presence of pervasive structural problems in the flow of information, decisions, responses, and coordination efforts governing disaster response. For a description of those efforts, see Press Release, Dep’t of Homeland Sec., Homeland Security Secretary Michael Chertoff Announces Six-Point Agenda for Department of Homeland Security (July 13, 2005), *available at* http://www.dhs.gov/xnews/releases/press_release_0703.shtm.

230. See OFFICE OF INSPECTOR GEN., *supra* note 222, at 23 (featuring a subsection entitled, “FEMA and DHS Were Adjusting to the National Response Plan”). The report emphasizes the transition costs associated with changes in the national response plan governing federal efforts after a disaster. For a discussion of how post-Katrina oversight of allegedly emergency expenditures at DHS continued to break down even after Katrina, see Mimi Hall, *GAO: TV, iPods Part of Post-Katrina Waste*, USA TODAY, July 19, 2006, at 3A (“Homeland Security Department employees, including Secret Service agents and FEMA workers, wasted hundreds of thousands of dollars on iPods, beer-making equipment, a flat-screen TV, dog booties and clothing after Hurricane Katrina hit the Gulf Coast last fall,

The storm and floods would have produced a crisis of major proportions under almost any circumstances. But the available evidence suggests that the structural problems associated with DHS—particularly early in the cycle of its existence—made things worse.²³¹ Even if one makes unrealistic assumptions about the potential coordination payoffs over time, the shortcomings in FEMA's and DHS's responses to Katrina are consistent with the existence of steep transition costs.

Nor was FEMA the only bureau to suffer in the reorganization. Problems also arose in other units, such as TSA. The completion of its headquarters facility was delayed by the transfer to DHS.²³² Its internal structure was reorganized to remove federal air marshals from its jurisdiction.²³³ The TSA's experience, like that of FEMA and other bureaus, demonstrated how the reorganization could trigger a variety of costs affecting the effective performance of legal mandates, including the need to adopt new technologies and internal bureaucratic procedures associated with a new department,²³⁴ internal competition for control between bureau leaders and higher-level appointees,²³⁵ and the burdens of adjusting to new management arrangements that altered the relationship among bureaus, other agencies, and the White House.²³⁶ Even if one views these management problems as temporary

according to government investigators.”). The referenced GAO report suggests that the degree of inappropriate expenditures considerably exceeded what would have been ordinarily expected in the aftermath of a natural disaster.

231. See BRINKLEY, *supra* note 10, at 268 (“In point of fact, the ultimate responsibility for the lackluster federal response to Katrina lay entirely with Chertoff, the Secretary of Homeland Security. Under rules instituted in January 2005, Homeland Security was in charge of *all* major disasters, whether from international terrorism, Mother Nature, or infrastructure collapse.”). The attention focused on FEMA after the Katrina debacle forced Congressional leaders to allow substantial structural reforms of the agency. See Post Katrina Emergency Management Reform Act of 2006, S. 3721, 109th Cong.

232. See *Transportation Security Administration Arlington, Va.*, MID-ATLANTIC CONSTRUCTION, Dec. 1, 2005, at 37, 37 (“Complicating the short time frame and difficult logistics [associated with the preparation of TSA headquarters], the contractor also had to work with a newly formed government arm—TSA's Homeland Security department. Because the new department was still determining what its needs and requirements were, the construction team was constantly waiting for direction and reworking construction that had already been completed according to the original plan.”).

233. See Eleanor Stables & Toni Johnson, *HR2360—Fiscal 2006 Homeland Security Appropriations*, CQ BILLANALYSIS, Apr. 3, 2006, available at 2006 WLNR 5945020 (“The Federal Air Marshals become part of TSA. Although part of TSA when the department was created, the marshals were switched to Immigration and Customs Enforcement in November, 2003. As part of the departmental reorganization, the administration proposed moving them back to TSA.”). This underscores the extent to which the Department Secretary's authority to recommend and promote internal changes within its bureaus (some of which require congressional authorization) may impose transition costs on the operation of the bureaus.

234. See *Transportation Security Administration Arlington, Va.*, *supra* note 232.

235. See John Mintz, *Infighting Cited at Homeland Security: Squabbles Blamed for Reducing Effectiveness*, WASH. POST, Feb. 2, 2005, at A1.

236. See Stables & Johnson, *supra* note 233.

transition costs, they raise the question of whether the potential efficiency from the creation of DHS made up for these costs. We will return to this question in our conclusion.

IV. IMPLICATIONS

Though our primary focus has been on explaining the intricacies of DHS and its legal responsibilities, the following Part discusses two extensions of the argument. First, we make some cautious observations relevant to the ongoing debates about judicial deference to agency legal interpretations, emphasizing particularly the fact that agencies are sometimes structured to obscure policy decisions for which Presidents are supposed to be accountable. Second, we describe how reorganizations appear to constitute an underappreciated technique through which politicians achieve policy goals and enhance control of domestic and national security functions.

A. *Structural Politics and Agency Legal Interpretations*

The familiar *Chevron* doctrine holds that courts should defer to “reasonable” agency interpretations of law where a statute does not explicitly resolve the matter before a court.²³⁷ A vast literature debates the merits of *Chevron* deference and its associated caselaw.²³⁸ Though engaging, that literature is not our primary concern; our analysis sheds light on certain facets of the debate. In particular, our modest contribution to this ongoing dialogue further emphasizes the problems with making blanket assumptions about expertise or accountability, the two concepts most frequently deployed to support judicial deference.

The expertise justifications for deference antedate *Chevron*.²³⁹ Our case study of DHS, rooted in a large literature on the political control of agencies, raises familiar questions about that rationale by emphasizing the extent to which politics can be expected to interfere with efforts to build agencies possessing subtle technical expertise. In particular, large umbrella organizations differ considerably from agencies with specific, narrow missions. When an agency is saddled with such a massive panoply of bureaucratic units and missions, the nature of its expertise becomes far less obvious. At the very least,

237. See *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984). For some cogent examples of the prescriptive scholarship on the scope of the *Chevron* doctrine, see Merrill & Hickman, *supra* note 1; Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

238. See sources cited *supra* note 1 for some of the more interesting arguments made in the course of this debate. See also CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985).

239. See, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

it seems that the case for deferring to expertise is stronger when the interpretation itself is coming from officials directly involved in policymaking (such as Coast Guard officials) rather than higher-level political appointees (such as the Secretary or General Counsel of DHS). In contrast, at least one prominent scholarly account argues for the opposite approach—affording *greater* deference to agency interpretations originating with an agency head.²⁴⁰

Even leaving aside the question of the precise official whose interpretations merit deference, the shortcomings associated with DHS furnish reasons for skepticism about across-the-board expertise justifications for deference. Perhaps political or distributional considerations are just one aspect of the process driving the design of agencies. By demonstrating how agencies may be poorly equipped to achieve their stated goals, however, our case study of DHS emphasizes the importance of qualifying any expertise argument by acknowledging (as a starting point) the extent to which agencies may be designed to serve political rather than principled purposes.

Similar caveats apply to the accountability arguments for agency deference voiced by scholars and recited in court opinions.²⁴¹ Accountability justifications are grounded, presumably, in the idea that the elected branches are more responsive to public pressures than the judiciary.²⁴² Ironically, the evidence suggests that the public supported the creation of DHS because it sought a more effective way of organizing the bureaucratic units with security-related functions. Our analysis questions whether such gains were realized in practice. It also shows that this rationale alone fails to explain the size and scope of DHS. Instead, obscure changes occurred through the creation of DHS in areas from environmental enforcement to natural disaster preparedness, for which the Administration refused to take public responsibility. Insisting on revenue neutrality, Administration officials emphatically refused to acknowledge that the merger could generate substantial short-term financial costs, or that maintaining performance of the bureaus' legacy mandates in a more terrorism-focused cabinet agency would entail the need for new

240. See David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 215. Barron and Kagan emphasize the potential accountability benefits associated with deferring to interpretations made by high-level political appointees rather than lower-level bureau chiefs. *Id.* at 201-02. Our analysis suggests that this may be precisely backwards because expertise justifications are not as applicable with cabinet-level officials and accountability rationales do not fully account for how structure can be used to render opaque the policy trade-offs that presidential administrations may choose to make.

241. See *Chevron*, 467 U.S. at 865; see also *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43-44 (1983).

242. See generally Sunstein, *supra* note 1, at 2587 (“[I]nterpretation of statutes often calls for political accountability, and the executive has conspicuous advantages on that count as well.”). One of the difficulties in evaluating this position involves fixing who or what precisely the executive is. The comparatively greater salience of electoral developments for the executive branch may often provide the beginnings of a rationale for judicial deference. Nonetheless, our concern is that general references to accountability may tend to blur intricate questions about what sort of responsiveness is desired, and why.

funding.²⁴³ Any plausible version of the accountability argument seems to depend on a political dynamic where the Administration receives deference in interpreting the law because it is taking responsibility for regulatory policy choices.²⁴⁴ The opposite seems to have occurred in the case of DHS, suggesting that accountability arguments for deference, like those relying on expertise, are at best context dependent.

In short, accountability arguments for deference appear strained in light of how Presidents can use the politics of bureaucratic structure to make regulatory choices more opaque to voters who are presumed (in most such arguments) to make decisions at least partly on the basis of regulatory policy. Indeed, even defining accountability in a nontautological fashion becomes exceedingly difficult in a world where multiple branches of government with conflicting agendas are responsive to the political process, and where crises can increase public demands for structural changes that are prescriptively troubling.

Our claim here is a limited one. Our criticisms are not of deference, but of the most commonly asserted arguments in favor of deference. Although prescriptive questions about the degree of deference are complex,²⁴⁵ our analysis suggests that across-the-board approaches to deference are likely to be difficult to defend.²⁴⁶ If agencies forged in crisis can be poorly equipped for success and have complicated indirect impacts on regulatory activity beyond their primary areas of focus, then it is not obvious that courts are naturally worse interpreters (in terms of some defensible consequentialist metric) across the board. Evaluating the relative merits of courts and agencies as interpreters in such a world is complicated. A defensible evaluation depends on defining concepts such as “accountability” in a non-circular manner, on empirical guesses about how courts interpret the law compared to agencies, and on the potential legislative responses to different regimes. Given the highly abstract nature of many discussions regarding the merits of judicial deference to agency legal interpretations,²⁴⁷ we suspect that it will be fruitful to refocus the deference inquiry on the context-specific political realities that determine how agencies are actually designed, how they are likely to function in the real world, and whether the full extent of policy changes brought about by agencies’ creation are salient to the public.²⁴⁸

243. See *Take Time on Homeland Plan*, *supra* note 204.

244. Cf. *State Farm*, 463 U.S. at 59 (Rehnquist, J., dissenting).

245. Cf. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003) (arguing that statutory interpretation should take into account institutional capacities and dynamic effects).

246. This is, to some extent, the logic underlying the *Mead* doctrine. See *United States v. Mead Corp.*, 533 U.S. 218 (2001). But perhaps even *Mead* did not sufficiently consider the extent to which the validity of assumptions about agency accountability or expertise depends on the political context in which an agency was developed and operates.

247. See, e.g., Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. (forthcoming Jan. 2007).

248. We acknowledge some of the costs associated with broad standards instead of

B. *Parallels with Previous Reorganizations*

Although the evolution of agency structure is indeed likely to depend on an agency's unique context, three crucial aspects of the post-September 11 homeland security story seem to echo broader trends in the political design of legal mandates: (i) the mixing of security and nonsecurity functions within the same bureaucracy to achieve strategic goals, (ii) the prominent role that both legislators and the White House played in reorganizing the bureaucracy, and (iii) the extent to which the reorganizations provided an opportunity for politicians to bolster presidential influence over agencies.²⁴⁹ Without suggesting that the process plays out in precisely the same way whenever bureaucratic authority over major federal legal responsibilities is reallocated, two other cases help place the DHS case in larger context. In particular, similar dynamics appear to have shaped the stories of two previous, and significant, reorganizations—the creation of the Federal Security Agency in the late 1930s (which eventually spawned today's Departments of Health and Human Services and Education) and the creation of the Department of Energy under Carter.

In 1939, President Roosevelt finally secured from Congress some of the limited reorganization authority he so aggressively sought. Almost immediately, he merged the functions of more than a half-dozen independent or subordinate social welfare and regulatory agencies closely associated with his Administration's policy priorities to create the Federal Security Agency (FSA) in 1939. The reorganization that created the FSA appears to have served multiple political goals. First, it gave some of the Administration's most prized social welfare and regulatory agencies a politically useful association with the concept of national security at a time when opposition to Roosevelt was growing in Congress.²⁵⁰ Lawmakers supportive of defense efforts but skeptical

rules. See Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807 (2002). Nonetheless, in light of the political and bureaucratic realities associated with structural choices, the rationales that have most often animated the long-running debates supporting arguments for judicial deference to agency legal interpretations seem to us particularly unlikely to support arguments for a trans-substantive presumption of deference.

249. Note that some legislative coalitions may share with the White House the goal of enhancing presidential influence over the bureaucracy. Legislative coalitions expecting their power to erode may seek to bolster presidential influence if they expect the White House is more likely to remain sympathetic to the coalition's goals, or they may seek to diminish bureaucratic autonomy by enhancing presidential leverage.

250. The Roosevelt Administration's determination to emphasize national security aspects of the FSA were plain even before the beginning of American participation in World War II in documents such as Roosevelt's message to Congress describing his justifications for reorganization. See generally Mariano-Florentino Cuéllar, "*Securing*" the Bureaucracy: *The Federal Security Agency and the Political Design of Legal Mandates, 1939-1953* (Stanford Law Sch. Pub. Law Working Paper No. 943,084, 2006), available at <http://ssrn.com/abstract=942447>. Roosevelt's reorganization message emphasized the centrality of strengthening the nation's defense-related capacity. See Reorganization Plan

of social welfare programs were given a new reason to vote for FSA-related programs. The Agency also served to publicly market (with Roosevelt's help) regulatory and social welfare programs as critical elements of an expansive conception of security that included domestic civil defense; programs to promote the economic health and well-being of Americans who could be called upon to participate directly or indirectly in a war-related effort; federal involvement in education policy to promote the dissemination of skills allegedly useful to national defense; and public health efforts designed to limit the extent to which disease affected national capacity.²⁵¹ Second, although Congress had previously thwarted Roosevelt's efforts to create a new cabinet-level Department of Public Welfare, the creation of the initially smaller FSA still provided a new, centralized supervisory staff to function as an additional layer of political appointees supplementing the meager White House staff.²⁵² Third, the new Department gave the White House a vehicle that could be used to provide political cover for particularly sensitive national security projects, such as defensive and offensive biological weapons research.²⁵³ By the start of the Eisenhower Administration, the FSA had become such a fixture of federal power that it received cabinet-level status and was rechristened the Department of Health, Education, and Welfare.²⁵⁴

As it moved along the path to becoming a cabinet agency, the FSA's fate indicates some of the political rationales for enhancing presidential control over disparate bureaus. Greater presidential control, sought through agency reorganization and perhaps supported by an eroding New Deal legislative coalition dependent on presidential leadership to safeguard its achievements, could be used to shape public perceptions of the core goals of the affected agencies. Distinguishing FSA from the current example, Roosevelt appeared to

No. 1 of 1939, 4 Fed. Reg. 2727 (1939), reprinted in 53 Stat. 1423 (1939).

251. See Cuéllar, *supra* note 250. Indeed, the Roosevelt Administration's effort to emphasize the new agency's potential national security contributions was more than rhetoric. Even beyond the more explicit and publicly appreciated connections to national security (particularly through the education and training programs run by the Office of Education), the Agency was given responsibility for leading biological weapons research and for assisting in the relocation of Japanese Americans living on the Pacific coast. *See id.*

252. *See id.*; see also L.F. Schmeckebier, *Organization of the Executive Branch of the National Government of the United States: Changes Between July 16, 1938, and April 25, 1939*, 33 AM. POL. SCI. REV. 450 (1939). Even after Roosevelt used his authority under the Reorganization Act of 1939 to dramatically expand the Executive Office of the President, the resulting White House organization still amounted to only a small fraction of the staff and organizational resources available to modern Presidents. *See* MATTHEW J. DICKINSON, BITTER HARVEST 112-13 (1997).

253. The placement of the War Research Service within the FSA rather than the War Department shows not only how social welfare and public health programs might gain prestige and supporters by being associated with national security missions, but also how secret weapons research programs could be hidden through placement in an agency that did not appear (on the surface) to be engaged in offensive weapons development. *See* Cuéllar, *supra* note 250.

254. *See id.* at 4.

believe that the benefits in terms of repackaging the agencies outweighed any danger that their flexibility would actually be diluted because of the new national security mission.²⁵⁵

Several decades later, President Carter confronted a deepening energy crisis and sought to create a new cabinet-level Department of Energy. Although his decision to seek the creation of the Energy Department was fueled in part by a desire to impress the mass public with his leadership in a salient issue area, this rationale does not fully explain the scope of the Department or the legal powers the Administration sought to confer on it. In fact, Carter sought to enhance presidential power through the creation of the new Department in two ways. First, he sought to give the Secretary—a political appointee—power to regulate energy prices which had previously been vested in independent agencies.²⁵⁶ This provoked opposition in Congress, resulting in a compromise that denied the President some of what he sought but nonetheless enhanced his legal control over energy policy activities encompassing both domestic functions (such as heating oil subsidies) and national security mandates (such as the design and manufacture of nuclear weapons).²⁵⁷ Second, Carter incorporated a broad range of agencies with national security responsibilities—most notably the National Laboratories, involved in nuclear weapons design and production, which was then housed in the Energy Research and Development Administration—in addition to agencies focused on the matters more directly associated with domestic energy concerns.²⁵⁸ By moving the National Laboratories and strategic petroleum reserves into an executive department with a new mission and a layer of political appointees, the President gained influence over these functions and over how the public understood their purpose.²⁵⁹

255. *See id.*

256. *See* Adam Clymer, *President Thwarted on Authority to Set Natural Gas Prices*, N.Y. TIMES, July 23, 1977, at A1, A9 (“The goal of the legislation was to centralize the setting of energy policy, with the Secretary of Energy getting the right to establish general policies”); *see also* *Carter Proposal for New Energy Agency Seen Subject of Long Debate in Congress*, WALL ST. J., Mar. 2, 1977, at 3 (“The greatest controversy is expected to result from the plan to include the FPC, an independent regulatory agency, in the new department.”).

257. *See* Clymer, *supra* note 256; *Senate Draft on Energy Agency Limits Proposed Powers of the New Secretary*, WALL ST. J., Apr. 27, 1977, at 2.

258. *See* *Carter Sends Congress Bill For an Energy Department*, N.Y. TIMES, Mar. 2, 1977, at D1 (reporting that President Carter’s proposed bill would transfer the Energy Research and Development Administration—housing the National Laboratories—and give it “jurisdiction over petroleum reserves in California and Wyoming and oil share reserves in Colorado and Utah, now under the authority of the Defense Department”).

259. *See* Charles O. Jones & Randall Strahan, *The Effect of Energy Politics on Congressional and Executive Organization in the 1970s*, 10 LEGIS. STUD. Q. 151, 158-59 (1985); *cf.* LEWIS, *supra* note 7, at 119-21 (discussing the creation of the National Nuclear Security Agency and emphasizing how the insulation of some security-related functions was perceived by both legislators and the President as undoing some of the control the President would have otherwise achieved over key national security components of the Agency).

These two additional examples suggest how critical strands in the DHS story have previously appeared at key episodes forging the geometry of federal power and exist in some tension with certain assumptions occasionally made by legal scholars and political scientists who study bureaucracy. The mixing of national security and domestic policy functions raises questions about contentions that national security issues—and the bureaucracies that handle them—are fundamentally different from their domestic counterparts.²⁶⁰ In contrast to scholars who emphasize ultimate presidential power in shaping bureaucracy,²⁶¹ we find lawmakers sharing a substantial role in striking bargains that achieve political goals—some of which are hidden from public view—through legal changes in bureaucratic structure. Finally, the extent to which, historically, those changes often involve some enhancement in overt executive control over the bureaucracy (whether as a result of a presidential victory over legislators' interests, or because legislative coalitions benefit from an enhanced presidential role) raises questions about claims that "presidential administration" of the bureaucracy is a recent phenomenon.²⁶²

CONCLUSION

This Article used the evolution of homeland security policy after September 11 as a case study to analyze the allocation of legal authority within the bureaucracy, and the impact of bureaucratic structure on the implementation of legal mandates. Despite a large body of previous scholarship on bureaucracy and the implementation of legal mandates, such work has not yielded comprehensive theories linking the politics of bureaucratic structure to the behavior of the mass public in a crisis, inter- and intra-branch bargaining involving the legislature, and specific legal interpretations and policy outcomes straddling national security and more conventional domestic policy issues. In part because of these gaps, existing explanations for the creation of the new Department of Homeland Security fail to provide adequate answers to crucial questions, such as why the President switched from opposition to support of the

260. See ZEGART, *supra* note 6, at 6 ("[N]ational security agencies arise and evolve in fundamentally different ways than their domestic policy counterparts . . .").

261. See William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095, 1113 (2002) ("By strategically employing . . . unilateral powers, presidents have managed to create a broad array of administrative agencies that perform functions that congressional majorities oppose."). The distinction between their contention and our position may be a subtle one, particularly when it comes to interpreting some of their empirical results. But we think it particularly important to consider the subtle ways in which pivotal legislative coalitions (with sufficient power to either confer power on the President or block efforts to rescind such power) may benefit from actions that otherwise seem to benefit mostly the President.

262. For an example of such a claim, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (arguing that "Presidential Administration" began in earnest in the Clinton Administration and that its major elements involve credit-claiming and direct control).

bureaucratic reorganization and why, after that initial resistance, the scope of his proposal was greater than that of past and existing proposals.

To address these questions, we began by updating existing theories of the legislative process to encompass the following four premises: (1) Other things being equal, politicians and parties seek opportunities to control bureaucratic resources along with opportunities to signal positions that are appealing to the public. (2) The long-term marginal impact of a particular type of bureaucratic reorganization on the performance of complex legal mandates, such as promoting homeland security, is far less certain than politicians tend to acknowledge. Despite public perceptions to the contrary, centralization is no guarantee of enhanced performance. Nonetheless, changes in bureaucratic structure can have predictable statutory, organizational, and budgetary consequences by forcing bureaucracies to cut back on the performance of particular missions. (3) As the responses to drug scares, energy shortages, and the September 11 attacks demonstrate, a newly attentive public may favor structural changes even while they remain ignorant about the details. (4) Even *within* parties, legislators have divergent interests depending on their committee assignments and seniority.

None of these conclusions should be controversial. But taken together, they hold underappreciated implications for our understanding of the design and implementation of legal mandates. As individual legislators, the President, and political parties jockey for advantage, the political game tends to suppress important prescriptive concerns about the costs and benefits of centralization, the transition costs associated with reorganizations, and the fit between congressional and executive branch organization. Moreover, the combined effect of crises and uncertainty about the long-term impact of reorganization allows Presidents to reshape administrative and regulatory policy and to assert greater control over bureaucratic discretion.

Hence, while the Administration sold the new mix of bureaucratic structure, budgets, and statutory changes as a means of better responding to future crises, our evidence suggests that the Administration exploited its legislative opening to enhance presidential control and reshape Agencies' administrative discretion. It chose that course despite the risks—identified by the White House's own advisers—that doing so would adversely affect the performance of the security functions that justified the merger in the first place.²⁶³ The President dismissed early consolidation efforts that seemed “kind of small to [him],” and directed his staff to “think big” as they forged a plan for the Department.²⁶⁴ In response, the secret group that made decisions about what to include in the President's proposal not only crafted a consolidation plan larger than anything legislators had proposed, but seriously considered adding three more major regulatory agencies to DHS—the Nuclear Regulatory

263. See BRILL, *supra* note 36, at 545; CLARKE, *supra* note 27, at 250.

264. See BRILL, *supra* note 36, at 397.

Commission, ATF, and the FAA. Despite the fact that many legislators anticipated the reorganization's adverse effect on legacy mandates, the HSA made statutory and organizational changes allowing legacy regulatory and administrative functions to be compromised.²⁶⁵ Republicans had a long record of wanting to control and limit the administrative activities of some agencies, such as FEMA and the Coast Guard, that were viewed as excessively intrusive or overly focused on social welfare policy. The goal was likely to be accomplished if the statutory and organizational changes made by the HSA were implemented in a revenue-constrained environment, as the President promised. And excluding supplemental appropriations, the Administration proved surprisingly adept at keeping revenues flat for some core functions while shifting resources away from legacy mandates.

The aftershocks from the Administration's decision to pursue reorganization have exacted a price. Key advisors within the Bush Administration learned early on that creating the Department risked making the problem of coordinating security worse. The concerns were not unfounded. Although our Article is not primarily a normative assessment, we can now revisit—in light of our analysis—the question of whether the creation of DHS enhanced homeland security. Attributing marginal security-related effects to changes in organizational structure is difficult, and indeed the existence of uncertainty about this plays a role in our account. Might the uncertainty conceal a positive probability that the statutory choices made in creating the Department could enhance the security of Americans at a time when many might be willing to trade off other government services in exchange for such improvements? We believe the answer is negative. The Department's creation is almost certainly related to a net loss in the efficiencies associated with homeland security.

To see why, recall that virtually no serious observer questioned that the transition costs of creating the Department would be pronounced.²⁶⁶ The case for transition costs (defined as obstacles diminishing the Department's efficient output of security-related services for some discrete length of time) is fairly straightforward. Problems included the introduction of uncertainty regarding internal lines of authority, disruptions in established links between bureaucratic subunits with one another and with the White House, a focus on setting up internal control structures rather than on performing the Department's substantive mission, transfer of authority to a department that initially was almost entirely devoid of resources to monitor all the security-related functions of its new bureaus, a continuing fragmentation of legislative oversight authority, and a depletion of key staff so that they could serve on detail in the central Department.²⁶⁷ From a circumstantial perspective, the performance of

265. See *supra* notes 90-104 and accompanying text.

266. See *supra* Part III.E.

267. For a detailed discussion of transition costs, see *supra* Part III.E. For sources

the TSA during its time at DHS and of FEMA with Katrina is entirely consistent with the presence of long-term transition costs.²⁶⁸ Indeed, the President's tremendous reluctance initially to create the Department in part reflected these costs.²⁶⁹

The question is then whether the potential security benefits are high enough to offset the transition costs. These benefits may arise from two sources: (1) efficiency gains from coordination and centralization, or (2) shifts in resources away from legacy mandates toward presumably more pressing security-related missions.²⁷⁰ With respect to efficiency gains from coordination and centralization, we found the Administration's theoretical case unconvincing.²⁷¹ It provided no reasonable explanation for why a single cabinet agency represented an improvement over the Homeland Security Council structure. No consideration is given in its public communications to the offsetting advantages of decentralization, which have been central to spurring aggressive antidrug enforcement and may play an important role in intelligence and policy innovation.²⁷² No discussion exists of the extent to which some agencies across cabinet departments have better coordination (such as ATF and FBI across the Treasury and Justice Departments) than other agencies within departments (such as the Navy and Army within Defense²⁷³ or DEA and FBI within Justice).²⁷⁴ And no attention is given to the reality that fragmentation

acknowledging their existence, see, for example, Mintz, *supra* note 235 (noting that one of the major architects of the new Department, former presidential aide Richard Falkenrath, had concluded that "many officials at the department were so inexperienced in grasping the levers of power in Washington, and so bashful about trying, that they failed to make progress on some fronts"). See also O'HANLON ET AL., *supra* note 213, at xxv-xxvi (noting that the Department merged "22 different agencies that contain more than 100 bureaus, branches, sub-agencies, and sections . . . including at least 80 different personnel systems"; and "[b]y far the biggest challenge Ridge and his people face[d] was] to undertake this unprecedented [organizational] task while clearly keeping their eyes on the main ball—which is not to organize for homeland security but to prevent, protect, and respond to a future terrorist attack on U.S. soil"); Haynes, *supra* note 47 (discussing the extent of transition costs); Kettl, *supra* note 8, at 1 ("Although the DOD reorganization involved more employees, by almost any other measure the DHS restructuring was harder. Even the large numbers vastly understate the scale and complexity of the job.").

268. See *supra* Part III.E.

269. Recall that because of common-pool and related collective action problems, we should expect the President to care more about efficiencies than other politicians, unless of course there is an offsetting political rationale for doing something—which we believe there was. See *supra* Part I.C.

270. For an example of an analysis—besides that of the White House—presuming such benefits, see O'HANLON ET AL., *supra* note 213, at 101-03.

271. See *supra* Part II.B.2.

272. See, e.g., POSNER, *supra* note 135.

273. See ZEGART, *supra* note 6, at 71 (describing long-running tensions between the Army and the Navy).

274. For a description of the differing cultures and tensions between the DEA and FBI, see JAMES Q. WILSON, *THE INVESTIGATORS: MANAGING FBI AND NARCOTICS AGENTS* (1978).

actually persists because of the relative decentralization of congressional control.²⁷⁵

Moreover, a theoretically coherent prescriptive case for the Department's creation would have been difficult for Congress to accept. If one examines the theoretical literature on organizations and bureaucracy,²⁷⁶ the best case we could envision for the value of centralization is one that involves either the value of distinctive expertise at the top of the Department or of concentrating accountability in one official to permit trade-offs across (rather than within) bureaus. But neither of these benefits of centralization are consistent with the Department's reality. It is difficult to accept that Ridge or Chertoff were simultaneously experts in customs interdiction, disaster response, and technical cyber-security. The resource-transfer goals could have been accomplished with congressional and presidential support of a White House-based Office of Homeland Security entailing fewer transition costs (which is, not coincidentally, what the President first chose to support).

This brings us to the difficult question of whether the security-related gains from the transfer of resources is enough to offset the transition costs. Such a prospect is unlikely. For one, homeland security threats may be plausibly viewed as encompassing natural disaster response functions, a position that the leadership of DHS has belatedly taken after Katrina and accords with President William McKinley's nineteenth-century observation that "I am more afraid of the West Indian Hurricane than I am of the entire Spanish Navy."²⁷⁷ Yet natural disaster response appears to have suffered not only from the transition costs associated with the merger but from the Administration's focus on statutory and administrative changes redirecting attention towards terrorism-related homeland security threats and away from natural disaster mitigation and response.²⁷⁸ For another, it does not appear that the security problems experts often cite as most pressing—involving efforts to secure weapons of mass destruction, strengthening public health and critical infrastructure, and enhancing response and recovery—have been meaningfully addressed by shifting resources within bureaus.²⁷⁹ Finally, even if internal shifts in bureau

275. See WILSON, *supra* note 7, at 242 ("The decentralization of Congress and the weakening of the seniority system has encouraged individual representatives and senators to become policy entrepreneurs, using their powers as chairmen of committees and subcommittees . . . to advance pet causes or call attention to themselves.").

276. See George P. Huber et al., *Developing More Encompassing Theories About Organizations: The Centralization-Effectiveness Relationship as an Example*, 1 ORG. SCI. 11 (1990).

277. BRINKLEY, *supra* note 10, at 333. President McKinley's take on homeland security is also mentioned in KERRY EMANUEL, *DIVINE WIND: THE HISTORY AND SCIENCE OF HURRICANES* (2005). Regarding the Department's belated change in focus, see Spencer S. Hsu, *Can Congress Rescue FEMA? Calls for Independence Clash with Bids to Fix Agency*, WASH. POST, June 26, 2006, at A19.

278. See *supra* Part III.E.

279. For a discussion of areas in homeland security policy that are broadly discussed

resources (as opposed to additional resources) were essential to addressing the preceding problems, those benefits could have been partially or almost entirely captured without the creation of the DHS.²⁸⁰ Without the creation of DHS and its administrative oversight apparatus, however, the President would have been forced to be much more explicit about the bureau-level changes wrought by the HSA legislation.

To explain these developments, our account shows how three crucial variables affecting homeland security policy—whether to create a new department at all, its overall size and scope, and its congressional oversight structure—have been driven in specific directions by political rather than prescriptive considerations. Rare circumstances may create exceptions to this pattern displayed by DHS. In some policy domains, such as those involving benefit payments to retirees, results may be so easy to observe that electoral constraints force politicians to care about whether an agency is well-organized to meet its stated goals. In other contexts, an agency, whose leaders' agenda aligns with prescriptively attractive policies, may find itself with a unique degree of autonomy, allowing it to leverage the mass public's reactions during a crisis.

These observations also raise some questions about the canonical justifications—grounded in expertise and accountability through presidential control—for judicial deference to agency legal interpretations. Although these questions do not augur for rejection of those justifications altogether, they ought to prompt scholars and policymakers to reexamine the prescriptive merits of vesting discretion in agencies that are not effectively designed to carry out their alleged functions.

There is a certain irony in the incapacity of federal officials to effectively address broadly held security goals during a crisis. Principle and intuition suggest that prescriptive concerns should be strongest in the midst of a national crisis, when dramatic events ostensibly impel lawmakers and executive branch officials to leave aside conventional political disagreements. Our analysis shows that it is otherwise in practice. Only in the presence of certain uncommon conditions can one expect prescriptive concerns about the statutory design of bureaucratic structure to take on much political significance. Lawmakers must evince unusual reluctance to use security policies as a vehicle

as priorities by experts and policymakers yet have failed to obtain increases in funding, such as securing materials that could be used to create weapons of mass destruction abroad, see Jacob N. Shapiro & Rudolph Darken, *Homeland Security: A New Strategic Paradigm?*, in STRATEGY IN THE CONTEMPORARY WORLD 295, 305 (John Baylis et al. eds., 2d ed. 2006).

280. Because the one near certainty in terms of prescriptive consequences involves transition costs, it seems reasonable that the burden for justifying the reorganization should be on those who claim the security benefits would exceed the transition costs. And if that burden can be carried, then the weak rationales the White House advanced are especially puzzling. We can think of no political reason why the White House would not want to offer its best rationales for the security benefits at the time when its strategy had shifted to trying to sell the Department and taking credit for its creation. See *supra* Part I.

for rewarding their jurisdictions, and an uncommon willingness to rethink the allocation of power within the legislature. They must resist the temptation to promote publicly appealing but conceptually unsound statutory fixes, thus providing precisely the sort of counterweight to conventional political competition that so rarely emerges in the game over bureaucratic structure. Bureaucratic actors must forge a rare degree of autonomy, and they must seek to use it in the service of prescriptively defensible goals, such as enhancing the technical competence of federal natural disaster response capacities. A President must be willing to assume the political risk of forestalling popular legislative changes likely to exacerbate bureaucratic problems, even if doing so eliminates a means of exploiting a crisis to advance longstanding policy goals. Or a substantial fraction of the electorate must display an uncommon degree of sophistication, sufficient to resist naïve arguments about the benefits of under-theorized bureaucratic reorganization. History reveals such circumstances to be unusual. Yet without them, a crisis bureaucracy is bound to be a bureaucracy in crisis.

APPENDIX

Table 1. Selected Agencies Considered for Transfer to DHS

Bureau Considered for Transfer ^a	Responsibilities for "Homeland Security" ^b	Non-Homeland Security Responsibilities	Transferred?
Animal Plant and Health Inspection Service (Agriculture)	Capable of providing personnel for support of inspections at the border	Regulate movement of animals and plants into and out of the country	Yes (partially)
U.S. Secret Service (Treasury)	Protect top U.S. officials; provide security at high-profile public events	Investigate financial fraud ("wire" and "access device" fraud) and counterfeiting, anti-counterfeiting policy development	Yes
U.S. Coast Guard (Transportation)	Patrol U.S. territorial waters; capable of responding in emergencies; can deploy as part of the Navy in wartime/emergencies; interdict drugs	Marine safety enforcement (regulate ships and companies owning ships); set rates for use of marine facilities and waterways; set rules for use of drawbridges and similar facilities; enforce marine environmental regulations (oil and chemical spills, marine water pollution rules); search and rescue	Yes
INS ^c (Justice)	Screen entrants at the border (including potential terrorists); enforce internal immigration laws	Provide immigration services to the public	Yes
FEMA	Provide disaster relief and recovery services in response to terrorist attacks	Provide disaster relief and recovery services for natural disasters and major industrial accidents; flood insurance; nutrition assistance; mitigate natural disasters	Yes
U.S. Customs Service ^c (Treasury)	Inspections at the border (screening for explosives, WMD); interdict narcotics	Enforce tariff and trade-related tax law; write and enforce trade regulations, including those involving child or forced labor, environmental provisions, and strategic trade rules	Yes
Critical Infrastructure Assurance Office (Commerce)	Promote private sector activities to protect critical infrastructure from terrorist attacks	Encourage private sector activity to protect critical infrastructure from natural disasters	Yes

Table 1 (cont.). Selected Agencies Considered for Transfer to DHS

Bureau Considered for Transfer ^a	Responsibilities for "Homeland Security" ^b	Non-Homeland Security Responsibilities	Transferred?
National Infrastructure Protection Center (Justice)	Investigate, analyze, and respond to man-made threats to critical infrastructure	Minimal	Yes
Office of Domestic Preparedness (Justice)	Offer grants for domestic preparedness	Respond to disasters (including non-terrorism related disasters)	Yes
Bureau of Alcohol, Tobacco, and Firearms (Treasury)	Enforce explosives law (regulation and criminal investigation)	Collect excise taxes on alcohol, tobacco, firearms, and explosives; regulate firearms extensively (including access, sales, and licensing)	No (moved to Justice)
Federal Aviation Administration (Transportation)	Protect aviation security	Regulate air traffic and aviation safety	No
State Department Visa Processing Functions	Screen visa applications (including requests by potential terrorists)	Screen visa applications (including those requested by everyone else)	No (but included in President's plan)
Transportation Security Agency (Transportation)	Manage national airport screening system; Non-aviation security responsibilities	Handle security involving threats other than terrorism	Yes
Nuclear Regulatory Commission	Reduce the vulnerability of nuclear power plants to terrorist attacks; safeguard nuclear materials used for civilian applications in the United States	Regulate nearly all aspects of civilian nuclear industry (including licensing of new nuclear reactors and civilian nuclear technologies); regulation of the ongoing use of nuclear technologies	No

Sources: Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified as amended at 6 U.S.C §§ 101-557 (2006)) (listing agencies included in DHS); BRILL, *supra* note 36, at 447-49 (describing the White House PEOC group's deliberations); OFFICE OF FED. REGISTER, NAT'L ARCHIVES & RECORDS ADMIN., U.S. GOVERNMENT MANUAL 2002-2003, at 107-353, 413-16 (2002) (describing agency functions); President's Plan, *supra* note 70 (describing agencies the President sought to move into the new Department); Presidential Decision Directive 63, *supra* note 22 (describing formation of National Infrastructure Protection Center); Press Release, Office of Justice Programs, Department of Justice, Attorney General Ashcroft Announces Nearly \$10 Million for New York City to Fight Terrorism (Apr. 23, 2002), *available at* 2002 WL 663507 (describing responsibilities of Office of Domestic Preparedness).

^a Displayed in **bold** if not slated for transfer before White House deliberations began.

^b Using Administration's definition focused on terrorism and explicit man-made threats.

^c Separated into a Bureau of Citizenship and Immigration Services (encompassing both Customs and INS criminal investigation functions) and a Bureau of Customs and Border Protection (encompassing both Customs and INS border enforcement and administration).

Table 2. Congressional Representation in HS-Center States and Districts

HS-Center	District	Representatives	Committees ^a	Losing?
Johns Hopkins (Baltimore, 21202)	MD (7)	Rep. Cummings (D)	Government Reform (9/19 D); Transportation (18/34 D)	Yes
		Sen. Mikulski (D)	Appropriations; Health	Yes
		Sen. Sarbanes (D)	Banking; Budget; Foreign Relations	No
USC (Los Angeles, 90089)	CA (33)	Rep. Roybal-Allard (D)	Appropriations (23/29 D)	No
		Sen. Boxer (D)	Commerce; Environment; Foreign Relations	No
		Sen. Feinstein (D)	Appropriations, Energy; Intelligence; Judiciary; Rules	Yes
Texas A&M (College Station, 77843)	TX (17)	Rep. Stenholm (D)	Agriculture (RMM)	Yes
		Sen. Gramm (R)	Banking (RMM); Budget	No
		Sen. Hutchison (R)	Appropriations; Commerce; Rules	No
Minnesota (Minneapolis, 55414)	MN (5)	Rep. Sabo (D)	Appropriations (4/29 D); Standards (2/5 D)	No
		Sen. Wellstone (D)	Foreign Relations; Health; Indian Affairs; Small Business; Veterans' Affairs	Yes
		Sen. Dayton (D)	Agriculture; Armed Services; Rules	Yes
Maryland (College Park, 20742)	MD (5)	Rep. Hoyer (D)	Appropriations (5/29 D); House Administration (RMM)	No
		Sen. Mikulski (D)	Appropriations; Health	Yes
		Sen. Sarbanes (D)	Banking; Budget; Foreign Relations	No
Michigan State Lansing, 48823)	MI (8)	Rep. Rogers (R)	Financial Services (36/37 R); Transportation (28/42 R)	Yes
		Sen. Levin (D)	Armed Services (Chair); Governmental Affairs (Chair); Intelligence; Small Business	No
		Sen. Stabenow (D)	Aging; Agriculture; Banking; Budget	Yes

Source: All congressional data taken from MICHAEL BARONE & RICHARD E. COHEN, THE ALMANAC OF AMERICAN POLITICS 2002 (2001).

^a The notation (x/x D) means the rank of the member, by party, on the committee. For example, if Smith is 24/28 D, he is ranked the 24th Democrat (in terms of seniority) out of all 28 Democrats on the committee. RMM means ranking minority member on the committee.

Table 3. Domestic Preparedness Grant Programs, 1998-2003

Fiscal Year	Program	Funding During Award Cycle
1998	State and Local Domestic Preparedness Equipment Support Program	\$12 million
1999	County and Municipal Agency Domestic Preparedness Equipment Support Program	\$37.1 million
	State Domestic Preparedness Equipment Program	\$53.8 million
2000-2001	State Domestic Preparedness Equipment Program	\$2.9 million
	Nunn-Lugar-Domenici Domestic Preparedness Equipment Program	\$15 million
	State Domestic Preparedness Equipment Program	\$145.3 million
2002	State Domestic Preparedness Equipment Program	\$315 million
	Citizen Corps and CERT Grants (FEMA)	\$21 million
2003	UASI Port Security Grant Program	\$75 million
	UASI Transit Security Grant Program	\$65 million
	UASI Grant Program I	\$96 million
	UASI Grant Program II	\$506 million
	State Homeland Security Grant Program	\$566 million
	State Homeland Security Grant Program II	\$1.5 billion

Source: U.S. Dep't of Homeland Sec., Office of Grants and Training, http://www.ojp.usdoj.gov/odp/grants_programs.htm.

Table 4. Budget Authority of Selected DHS Sub-Agencies, FY2001-2004

	FY2001	FY2002	FY2003	FY2004
APHIS ^a (millions)	634	880	1145	813
Coast Guard ^b (billions)	3.3	3.8	4.9	4.7
FEMA ^c (billions)	2.4	3.1	6.6	4.7

^a Sources: U.S. DEP'T OF AGRIC., FY 2004 BUDGET SUMMARY (2003), available at <http://www.usda.gov/agency/obpa/Budget-Summary/2004/16PROPLEG.htm>; U.S. DEP'T OF AGRIC., FY 2003 BUDGET SUMMARY (2002), available at <http://www.usda.gov/agency/obpa/BudgetSummary/2003/2003budsum.htm>; U.S. DEP'T OF AGRIC., FY 2002 BUDGET SUMMARY (2001), available at <http://www.usda.gov/agency/obpa/Budget-Summary/2002/2002budsum.htm>; U.S. DEP'T OF AGRIC., FY 2001 BUDGET SUMMARY (2000), available at <http://www.usda.gov/agency/obpa/Budget-Summary/2001/text.htm>. The acronym denotes the Animal and Plant Health Inspection Service.

^b Source: U.S. COAST GUARD, 2004 REPORT 37 (2004), available at http://www.uscg.mil/news/reportsandbudget/2004_report.pdf.

^c Sources: OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2003, at 322 (2002); U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2006, at 15 (2005).

