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## **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 discretion of the agencies through which modern governments operate. In this paper, we extend positive political theories of bureaucratic structure to encompass two new issues with important implications for lawyers and political scientists: responses to a crisis and the uncertainty surrounding major bureaucratic reorganizations. This perspective affords a better understanding of how agencies affect legal interpretation 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 development 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 issue. But more importantly, 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 homeland security responsibilities without additional budgets, the president forced these agencies to move resources out of their legacy mandates. Finally, we briefly discuss larger 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 presidential efforts to affect policies unrelated to direct purpose of the act; 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 policies through massive bureaucracies. Politicians spend considerable time reaching legislative compromises that delegate authority to the bureaucracy, while lawyers and judges argue over the meaning of such compromises. But bureaucratic agencies are often the ones most directly invested with legal power to spend money, impose penalties, 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 interpretation and over the execution of regulatory mandates.<sup>1</sup>

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<sup>1</sup> For just a few thought-provoking examples of this sprawling genre, see Cass Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, XX YALE L.J. XX (2006)(forthcoming); Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); 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); Thomas W. Merrill and Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

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

These gaps are evident in the persistence of certain puzzles about the largest government reorganization in a half-century – the creation of the DHS.<sup>8</sup> For instance, why did the President support the creation of DHS after initially opposing it? Why did the agency become so vast, including in the reorganization a wide range of components with little or no responsibility for homeland security? Did the nature of the crisis pressure the politicians that created DHS to forge a bureaucracy that was prescriptively effective, in terms of enhancing government capacity to undertake security-related functions, on the heels of the September 11 attacks? Even as the creation and operation of DHS continues to inspire controversy, policymakers and scholars have yet to address these questions.<sup>9</sup>

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<sup>2</sup> 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”).

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

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

<sup>5</sup> McCubbins, Mathew D., Roger G. Noll, and Barry R. Weingast. “Administrative Procedures as Instruments of Political Control,” *Journal of Law, Economics, and Organization* 3 (Fall 1987): 243-77.

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

<sup>7</sup> 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* 265 (1989) (discussing the difficulty in assessing the range of motivations for specific reorganization plans given that “presidents have taken to reorganizations the way overweight people take to fad diets...”).

<sup>8</sup> 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”).

<sup>9</sup> 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

These questions remain unanswered, even in the wake of the criticisms leveled at DHS and FEMA following the Katrina disaster, and the continuing existence of national security threats that the Department was allegedly designed to address. In particular, questions about the creation and structure of DHS matter because of the importance of bureaucratic structure in allocating power over the implementation and interpretation of law.

The colossal new DHS melded the functions of twenty-two previously-existing agencies, from the Treasury's Federal Law Enforcement Training Center and Customs Service, to Agriculture's Plum Island Animal Disease Center, to the previously independent Federal Emergency Management Agency. Upon its creation, the department gained regulatory authority over transportation security as well as matters as disparate as marine ecosystems and the migration of refugees. Its ranks swelled with nearly a quarter of a million federal employees ranging from border inspectors to computer scientists to actuarial researchers. Nothing of this scope had happened in the United States since the creation of the Department of Defense a half-century earlier.

Even when reorganizations do not reflect the scope associated with DHS or the Defense Department, it would be problematic to assume that structural changes are purely symbolic, in the sense of being devoid of legal and policy consequences.<sup>10</sup> Such an assumption ignores the aggressive infighting over structure among legislators, the executive branch, and organized interests.<sup>11</sup> Finally, ignoring the significance of changes in bureaucratic structure also neglects the findings of work in political science and sociology,<sup>12</sup> and the legal doctrines vesting valuable discretion in specific administrative agencies.<sup>13</sup> But we are only beginning to understand how changes in structure are significant in law and policy, and how that significance would affect bargaining over the counters of

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convincing (the President changed positions on the creation of DHS well before Rowley's congressional testimony).

<sup>10</sup> 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).

<sup>11</sup> See Zegart, *supra* note \_\_; PETER SZANTON, FEDERAL REORGANIZATION: WHAT HAVE WE LEARNED? (1981); RICHARD POLENBERG, REORGANIZING ROOSEVELT'S GOVERNMENT: THE CONTROVERSY OVER EXECUTIVE REORGANIZATION 1936-1939 (1966).

<sup>12</sup> 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* (1991). MORE GENERALLY, SEE: Terry Moe, "Political Structure of Agencies," in John E. Chubb and Paul E. Peterson, eds., *Can the Government Govern?* (Washington, DC: The Brookings Institution, 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, Caught in the Middle: The President, Congress, and the Political-Bureaucratic System* in *THE EXECUTIVE BRANCH* 312 (Joel D. Aberbach and Mark A. Peterson, eds. 2005).

<sup>13</sup> See Jerry Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005)

agencies such as DHS remains to be explained. Existing work provides important insights into how political officials use various *ex ante* and *ex post* techniques to control bureaucratic policy implementation; in particular, how they use bureaucratic structure to serve their political goals.<sup>14</sup>

We propose to answer the preceding questions by juxtaposing a detailed analysis of the legislative process creating DHS with a new theory of the impact of bureaucratic structure. Our theoretical approach extends existing accounts of bureaucratic structure to address key features of the DHS case that also arise in other stories of bureaucratic change – especially the role of crisis in loosening the constraints of organizational interests and the impact of senior legislators guarding their committee jurisdiction. In the process, our analysis fills several gaps in the legal and political science literature concerning matters such as how reorganizations differ from familiar procedural techniques for controlling the bureaucracy, such as environmental impact requirements or cost benefit analyses; and how presidents, legislators, and organized interests sometimes bargain about bureaucratic structure in the shadow of an engaged, rather than disconnected, mass public.

Our analysis shows how policy changes in the area of concern – in our case, homeland security – can be driven by the efforts of politicians and interest groups to affect regulatory and policymaking activities that do not directly concern the policy domains under public discussion. These indirect policy effects arise for two reasons. First, changes in 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. Second, politicians use the occasion of legislation to force changes elsewhere having little to do with principal issue being addressed.<sup>15</sup> While these themes are particularly relevant in the context of national and homeland security, they also hold important implications for (and in some ways, explicitly address) the more often-studied aspects of bureaucratic politics, affecting domains such as pharmaceutical and environmental regulation and (as painfully demonstrated by the response to Hurricane Katrina) federal emergency disaster relief. Our theory’s demonstrates how changes in the security sphere can impact – and perhaps even be driven by desires to affect – conventional regulatory policy.

Our project also reveals how these changes become possible because crises focus public attention enough to change the political logic of institutional design, creating pressures for new institutions even in the face of legislative,

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<sup>14</sup> 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 \_\_\_\_.

<sup>15</sup> 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 to 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 and Barry R. Weingast, *Political Foundations of the Thrift Debacle*, in *POLITICS AND ECONOMICS IN THE EIGHTIES* (Alberto Alesina and Geoffrey Carliner, eds. 1991).

bureaucratic, or prescriptive objections. In particular, crises may allow presidents the opportunity to gain greater control over statutory interpretation and discretion to administer regulatory powers by weakening the countervailing interest group and legislative dynamics that would ordinarily work against enhancements of executive power. This greater control contrasts with more typical settings where bargaining over institutional design happens against the backdrop of a public that is relatively passive and unlikely to be concerned about the details of a new or reorganized agency's responsibilities, such as the creation of the Consumer Product Safety Commission or when President Clinton created the Corporation for National Service.<sup>16</sup>

As a result, crises change the nature and implications of interest group pressures that ordinarily work to prevent policy changes, leaving legislators and the president to bargain in the shadow of the public's demand for change. Although a crisis dampens the interest group pressures that often lead to ineffective bureaucracy, it is unlikely to result in conditions favoring prescriptively attractive changes unless atypical conditions – not present in the case of DHS – arise. In the absence of conditions such as easily measured bureaucratic performance towards a widely shared goal, a crisis may even encourage politicians to design policies that are not helpful, or indeed, are perhaps highly undesirable, from a prescriptive perspective. The public's demand for action now combines with their inability to assess the implications of bureaucratic details to pressure political officials to act quickly and often hastily. As we show below, the centralization of functions in DHS may be viewed as precisely such an undesirable policy.<sup>17</sup>

We answer our principal questions about DHS by arguing that the president changed his mind in part about the reorganization because he did not want to be on the losing side of a major issue. But more importantly, he supported reorganization that included a massive new department to further domestic policy priorities independent of homeland security. By moving a large set of agencies to the new department, giving them new homeland security responsibilities without the promise of additional budgets, the president forced these agencies to draw resources away from their legacy mandates.

Our argument proceeds as follows. Part I recaps the homeland security story since just before September 11. This lays the groundwork for the theory and empirical analysis to follow. Part II develops the theory of bureaucratic and policy change in response to crises. Our theory analyzes the impact of public reactions to crises, and takes account of the huge potential opportunities for

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<sup>16</sup> See STEVE WALDMAN, *THE BILL* (1995).

<sup>17</sup> 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 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* (2005).

politically-motivated self-dealing by executive branch authorities and legislators. Part III applies the theory to the creation of DHS and related legislative enactments, providing empirical support for the theoretical conclusions. It helps explain, among other things, why President Bush supported the creation of DHS after initially opposing it, despite the enduring uncertainty about whether it would have any positive impact on security. Our theory also explains why the resulting department is so massive, including a host of major regulatory functions with only a tenuous connection to even the most expansive conception of security. Part IV addresses prescriptive implications and extensions.

From a prescriptive point of view, our conclusions are sobering. Even if more were known about the optimal bureaucratic structure and the division of legal responsibility for homeland security policy, our analysis implies that 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 by meaningful prescriptive concerns. We are not optimistic about the extent to which the creation of DHS and similar structural reforms materially enhance security, and we find support for the possibility that security-related goals have suffered due to the political factors affecting bureaucratic structure. Marginal improvements depend on solving problems of legislative oversight, and on whether competent bureaucrats will improbably succeed in forging autonomy and capacity in a world unlikely to support it. These scenarios remain elusive.

Despite such elusiveness, this analysis does not yield a blanket condemnation of bureaucracies created through high-profile reorganizations. Bureaucracies forged in crisis are not inexorably doomed to fail in carrying out their legal responsibilities, and there may yet be reasons to defer to their legal interpretations. Our aim is instead to highlight how difficult it is to avert such failure, the heightened political competition engendered by a crisis exacerbates these difficulties, and finally that such difficulties undermine some prevailing assumptions about the prescriptive merits of agency legal interpretations. We conclude by discussing promising avenues for further research and noting that the prospects 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 help quench the nation's rising thirst for energy, how intelligence operations are conducted, who gets turned away at the border, and what environmental standards must be met. Because bureaucracies wield so much power, the control of bureaucracies is a central part of the political game. 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 that story by providing a narrative of the principal events associated with the creation of DHS and the passage of a sprawling bill, the Homeland Security Act (HSA), creating the new department. The interwoven stories of the Homeland Security Act and the creation of the new department then set the stage for our analysis in the sections that follow.

#### *A. The Status Quo Before September 11: The Lay of the (Bureaucratic) Land*

The end of the Cold War had a major impact on debates about American security. Gone were frequent and pointed references to “balance of power,” “containment,” and “mutually-assured destruction.” By the end of 2001 policymakers discussing the security of the United States had replaced references to a balance of power, containment, and mutually assured destruction, focusing instead on terrorism, asymmetric warfare, and above all “homeland security.”<sup>18</sup> Terrorist attackers had struck several times during the Administration’s previous six years. They had attacked the World Trade Center in 1993, killing several people and blasting a nine-story hole in the buildings in an attempt to demolish the structures and kill hundreds of thousands. Although the 1995 Oklahoma City bombing was the work of domestic attackers, it killed 168 people and highlighted the vulnerabilities of the nation’s physical infrastructure. In response, the new presidential edict created a structure within the White House National Security Council to coordinate matters involving terrorism, its prevention, and the nation’s ability to prepare and respond to such attacks. Unlike previous directives, the focus was primarily on attacks targeting the United States itself.<sup>19</sup>

The perceived need for coordination of different agencies arose in part from the substantial number and widely disperse bureaucratic units relevant to preventing, preparing for, and responding to terrorist attacks or asymmetric warfare: the Defense Department, the Customs Service, the Federal Bureau of Investigation (FBI), the Federal Emergency Management Agency (FEMA), and state and local police and fire departments were among such agencies. Before

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<sup>18</sup> See FIRST ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS OF THE ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION 7 (1999)(discussing funding for “domestic preparedness and homeland defense”), avail. at <http://www.rand.org/nsrd/terrpanel/terror.pdf> (last accessed June 19, 2006); U.S. COMMISSION ON NATIONAL SECURITY IN THE 21<sup>ST</sup> CENTURY, SEEKING A NATIONAL STRATEGY: A CONCERT FOR PRESERVING SECURITY AND PROMOTING FREEDOM 14 (2000)(describing “homeland defense” as a preeminent security goal), avail. at <http://www.au.af.mil/au/awc/awcgate/nssg/phaseII.pdf> (last accessed June 19, 2006). The reports of these high-level blue-ribbon panels contrast sharply with the prevailing rhetoric describing U.S. national security challenges a mere 15 years earlier. Compare Office of the Secretary of Defense, U.S. Dep’t of Defense, Quadrennial Defense Review (1996)(failing to emphasize terrorism or homeland security as preeminent security challenges), avail. at <http://www.fas.org/man/docs/qdr/>, last accessed June 19, 2006.

<sup>19</sup> See REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 71-102 (2004)(“Commission Report”).

September 11, their functions were usually described through reference to conceptual categories such as “national security,” “law enforcement,” “disaster relief,” or “border protection,” both acknowledging the considerable scope of these agencies’ missions but also their disparate nature.<sup>20</sup>

For example, the national security dimension of what is now referred to as homeland security was commonly taken to encompass certain aspects of the work of the Departments of State and Defense, as well as the National Security Council, the Central Intelligence Agency, and other specialized intelligence units like the National Security Agency.<sup>21</sup> With a budget larger than the Gross Domestic Product of Russia, the Defense Department’s role in responding to terrorism and asymmetric warfare encompassed more than traditional military responses to threats abroad. Its capabilities also included fielding Special Forces, supporting technological developments through entities like the Defense Advanced Research Projects Agency, and (potentially) civil support functions. The State Department served as the nation’s diplomatic representative. It also performed crucial intelligence functions by gathering information from its myriad diplomatic posts spanning the globe. This department also boasted its own law enforcement agency in the form of the Diplomatic Security Service to help protect its embassies, and in those embassies performed the crucial regulatory function of approving foreigners’ visa requests.<sup>22</sup> The National Security Council served as the coordination mechanism through which the President shaped policy concerning foreign affairs, defense, and security. After 1998 its staff included the aforementioned Special Coordinator for Counterterrorism that served as the precursor to subsequent White House staff offices concerning homeland security.

Rounding out the coterie of national security bureaucracies were independent agencies devoted to intelligence. The CIA’s explicit core function of gathering and analyzing intelligence from multiple sources played out alongside a capacity to carry out covert operations.<sup>23</sup> By 2001, it had multiple task-forces working on terrorism-related issues, and an elaborate group focused almost entirely on Osama Bin Laden and al Qaeda.<sup>24</sup> Specialized intelligence entities like the National Security Agency further complemented these activities by engaging in electronic eavesdropping outside the United States and gathering considerable signals intelligence. A common characteristic of these entities is the relative paucity of formal legal constraints they faced in carrying out their activities -- when compared, for example, to domestic regulatory bureaucracies.<sup>25</sup> These agencies were nominally under the control of the president and his staff. True as that was, their work was also powerfully shaped by legislative oversight and bureaucratic entrepreneurs jostling for prestige, jurisdiction, and autonomy.

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<sup>20</sup> See generally *id.*; U.S. GOVERNMENT MANUAL (2000)(describing separate law enforcement, national security, and disaster relief missions for different government agencies).

<sup>21</sup> See Commission Report, *supra* note \_\_, at \_\_.

<sup>22</sup> See *id.* at \_\_.

<sup>23</sup> See *id.* at \_\_.

<sup>24</sup> See RICHARD A. CLARKE, *AGAINST ALL ENEMIES* (2004).

<sup>25</sup> See, e.g., *United States v. Stanley*, 483 U.S. 669 (1987).

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 using their longstanding prevention, investigation, and incident response capabilities.<sup>26</sup> The FBI historically has been the behemoth in the field, cornering vast budgets (compared to the other agencies) and statutory responsibility for serving as the lead counter-terrorism agency.<sup>27</sup> 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. Although the headquarters of the Justice Department, also known as Main Justice, were nominally in charge over overseeing the FBI, the nature of the relationship was considerable more complex and problematic.

Several other agencies besides the FBI played a role in security. Federal prosecutors worked on cases from a host of specialized law enforcement agencies elsewhere inside its own sprawling bureaucracy, such as the Immigration and Naturalization Service (INS) and the Drug Enforcement Administration (DEA), or performing crucial functions under the oversight of the U.S. Treasury Department. Of the Treasury agencies, Customs had the largest budget, staff, and responsibility. Like INS, it performed more than just investigative functions (in this case, tracking down money launderers, drug traffickers, and illicit brokers of technology subject to export 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 through the work of thousands of inspectors and analysts. The Secret Service investigated counterfeiting and fraud-related financial crimes in addition to serving its most visible role of protecting the President, and played a limited role in critical infrastructure protection through its responsibility to investigate wire and financial institution fraud. The Bureau of Alcohol, Tobacco, and Firearms collected billions of dollars in yearly excise taxes but had also 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, or among the thousands of local police departments who also assisted (at least in theory) in the prevention of attacks in the United States.<sup>28</sup>

Several regulatory, enforcement, and administrative agencies also included functions relevant to homeland security, particularly if the threats in question involved potential terrorist attacks. The INS served multiple inspection, 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, from drugs to explosives, from entering.

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<sup>26</sup> 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., Testimony of Paul H. O'Neill, Secretary of the Treasury, Before the Senate Committee on Appropriations, Subcommittee on Commerce, State, and the Judiciary*, 2001 WL 47932 (F.D.C.H., May 8, 2001).

<sup>27</sup> *See* Commission Report, *supra* note\_\_\_; Hart-Rudman Commission Report, *supra* note\_\_\_.

<sup>28</sup> *See* Commission Report, *supra* note\_\_\_.

Transportation security was handled largely through a tangle of overlapping functions nominally overseen from within the federal Transportation Department. The FAA looked after 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 had the lead on key aspects of port security, working with Customs. 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.<sup>29</sup>

Of these, 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 that come close to causing more damage in a year than most terrorist attacks in history put together.<sup>30</sup> These efforts complement those of state and local responders who are likely to nearly always be the first on the scene and to make up the bulk of the people responding to a terrorist attack.<sup>31</sup>

### *B. Core Features of the Status Quo*

Three features of the status quo environment appeared to characterize this mix of national security, law enforcement, regulatory, and disaster relief capability that would later be catalogued under the homeland security label. First, policymakers assumed homeland security bureaucracies to be capable of operating reasonably effectively even though they had largely separate reporting structures and bureaucratic identities. Nevertheless, some independent commissions, such as the Commission on National Security in the 21<sup>st</sup> Century (“Hart-Rudman Commission”) in 2000 complained about the fragmentation of responsibility for security-related problems. Occasionally, legislators augured for reform. In February 2001 House Speaker Hastert, for example, set up a working group on terrorism to consider improvements. Yet legislators tolerated the decentralization of bureaucratic power over national and homeland security.<sup>32</sup>

Second, policymakers appeared to acknowledge that virtually every bureaucratic unit that had a role to play in domestic or homeland security also had separate functions that were different in scope and therefore potentially in conflict with security. The ubiquity of mixed agency missions (encompassing security and non-security goals) was a common theme in proceedings such as the joint hearings on “Federal Counterterrorism Efforts” held in the House on April 24, 2001. Health policy, law enforcement, energy policy, and

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<sup>29</sup> See U.S. GOVERNMENT MANUAL (2000).

<sup>30</sup> See Wamsley, Gary L. and Aaron D. Schroeder, Escalating in a Quagmire: The Changing Dynamics of the Emergency Management Policy Subsystem, 56 PUB. ADMIN. REV. 235 (1996).

<sup>31</sup> See Charles R. Wise and Rania Nader, Organizing the Federal System for Homeland Security: Problems, Issues, and Dilemmas, 62 PUB. ADMIN. REV. 44, 46 (2002).

<sup>32</sup> See *House Speaker Forms Terrorism Panel*, AERO. DAILY & DEF. REP'T 254, 2001 WLNR 2059324 (February 15, 2001).

telecommunications priorities were components of security, but also encompassed other objectives. The Department of Health and Human Services, for instance, had some role to play in security from biological attacks, but also maintained larger public health portfolio. Customs was responsible for keeping bombs out, but it was also responsible for keeping dirty money from flowing out of the country, collecting billions of dollars in revenue, and stopping drug trafficking.<sup>33</sup>

Finally, there was enormous variation in existing coordination across relevant units. Some problems were undeniable, such 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. During the late-1990s, for example, federal officials foiled a plot to bomb traffic tunnels leading into New York City and some of its major landmarks. Surveying this status quo, newly-elected President George W. Bush and his aides decided to downgrade the status of the Special Coordinator created in the Clinton order, requiring him to report to the President through the National Security Adviser. Although the new President and his team seemed to believe that additional adjustments to homeland security policy might be needed later, the accepted wisdom among them suggested a belief that such changes could proceed on a slower track, overseen by a commission to be chaired by Vice President Cheney. Several months after the inauguration, two staff members were finally selected by the Vice President to assist in the review of terrorism-related activities, and showed up for their first meeting on September 10.<sup>34</sup>

### *C. Shocks and Responses: The Immediate Aftermath.*

The Administration's initial domestic response to the September 11 attacks focused on proposing substantive legal changes. Working groups at the Justice Department soon began pulling together the outlines of what would become the USA Patriot Act. So eager was the Department to craft the new bill that Attorney General Ashcroft discussed it on Sunday morning talk shows before even the Chairman of the House Judiciary Committee or the White House Counsel's Office had any copies of the proposal. Around the same time that legislators were negotiating changes to the Patriot Act, discussions between Congress and the White House began regarding the creation of a new federal bureaucracy to consolidate responsibility for transportation security.<sup>35</sup>

The President also used his executive powers that could be deployed without legislative approval. Immediately after the attack, the White House supported federal agents' aggressive use of immigration and material witness authority to detain scores of people almost immediately following the attacks.<sup>36</sup>

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<sup>33</sup> See U.S. Gov't Manual, *supra* note \_\_ at \_\_.

<sup>34</sup> See Clarke, *supra* note \_\_, at \_\_; Commission Report, *supra* note \_\_, at \_\_.

<sup>35</sup> See Wendy Haynes, *Seeing Around Corners: Crafting the New Department of Homeland Security*, 21 REV. POL. RES. 369 (2004).

<sup>36</sup> See STEVEN BRILL, *AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 12 ERA* (2003).

Almost immediately after the attack, the President signed executive orders using 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, including (among others) the Al-Qaeda who were even then suspected of having carried out the attack. Just nine days after the attack, on September 20, the President proposed creating an Office of Homeland Security in an address to a joint session of Congress. He did so in short order. On October 8, under existing statutory authority, the President appointed Pennsylvania Governor Tom Ridge to the newly created position of homeland security advisor. Funds for the office were drawn from existing White House appropriations to minimize legislative interference. These actions were accompanied by frantic discussion among national security aides regarding possible military responses, and developments involving victim relief that culminated, with legislative help, in a Victim Compensation Fund.<sup>37</sup>

As the invasion of Afghanistan played out and the Administration was preparing to build the case for war in Iraq, the White House staff also implemented two significant structural changes. First, Ridge sought in earnest to build a structure around his position to match the President's ambitious rhetoric about how the new Office of Homeland Security would "coordinate" policy by staffing a Homeland Security Council paralleling the structure of the National Security Council.<sup>38</sup>

The implicit presumption that underlay the creation of Ridge's office was about the value of coordination. A gap was presumed to exist not only in the provision of advice, but in the extent of coordination among a great many agencies and bureaus. White House officials indicated, moreover, that success in the arena of homeland security depended on enhancing such coordination.<sup>39</sup> 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 that of the new Homeland Security Office. 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

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<sup>37</sup> See Commission Report, *supra* note \_\_, at \_\_; Kettl, *supra* note \_\_, at \_\_.

<sup>38</sup> See Kettl, *supra* note \_\_, at \_\_; Brill, *supra* note \_\_, at \_\_; Tom Ridge, *U.S. is More Secure*, USA TODAY 11A (February 2, 2004).

<sup>39</sup> It is worth noting here that, in this context, the definition of "success" is not obvious. One might think of success as: (a) measurable improvement in security, (b) with neutral or positive political payoffs with the mass public, and (c) no corresponding, politically costly reduction in the effectiveness in whatever else the government's doing. Gauging success is complicated because the absence of attacks does not imply success. What can be said is that if there's a plausible argument for what structural changes were supposed to accomplish in homeland security, it would probably be something along the lines that's just been described. Anything different from that would require some detailed justification that might ultimately unconvincing on normative grounds. And these goals were also ultimately grounded in the Homeland Security Act. See generally Department of Homeland Security, Office of the Inspector General, *Major Management Challenges Facing the Department of Homeland Security*, EXCERPTS FROM THE FY 2005 DHS PERFORMANCE AND ACCOUNTABILITY REPORT (Dec. 2005).

a crisis, or whether the conflict between the NSC and the HSO would prove a major impediment to the goal of coordination.<sup>40</sup>

Sensing disarray, some legislators 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 S1449 to transform Ridge's entity into a new National Office for Combating Terrorism to achieve the aforementioned purposes. 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.<sup>41</sup>

In contrast, the President at this time sought to preserve the new status quo: no department, and a staff office to coordinate homeland security. From October 2001 until at least March of 2002, the President's Press Secretary insisted that creating a cabinet department was unnecessary, and possibly counterproductive.<sup>42</sup>

Unfortunately for the White House, the performance of the new Office during the anthrax attacks questioned the President's argument that coordination had been sufficiently bolstered by the creation of Ridge's Office. During the anthrax episode, some observers described Ridge's response as tentative and uncertain.<sup>43</sup> 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 period, despite 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.<sup>44</sup>

The ranks of the federal workforce would also swell with tens of thousands of new employees bound for an agency that legislators and the White House staff were frantically working to design – the Transportation Security Agency (TSA), an agency that would field over 40,000 federal airport screeners and assume complicated responsibilities over the security of the nation's transportation infrastructure.<sup>45</sup> The White House initially opposed the idea. The President and many of his closest aides 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 a recognition that

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<sup>40</sup> See Brill, *supra* note \_\_, at \_\_; Kettl, *supra* note \_\_, at \_\_.

<sup>41</sup> See Alison Mitchell, *A National Challenged: The Security Chief – Disputes Erupt on Ridge's Needs for His Job*, N.Y. TIMES p. 7 (Nov. 4, 2001).

<sup>42</sup> See Transcript of Ari Fleischer, White House Press Secretary, Press Briefing, Oct. 2, 2001.

<sup>43</sup> See Victoria Sutton, *Biodefense: Who's In Charge?* 13 Health Matrix 117 (2003).

<sup>44</sup> The Coast Guard also received a funding increase of \$282 million in 2002. (Thessin, 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).

<sup>45</sup> See Kettl, *supra* note \_\_, at \_\_.

the mass public was unlikely to trust private screeners given their inability to prevent the hijackings.<sup>46</sup>

Initially, conflict over the personnel rules that would govern the new screeners delayed its creation. Republicans still wanted private contractors to be heavily involved, or (at least) more flexible personnel rules to make it easier to fire employees or prevent them from unionizing. Democrats insisted on full-fledged civil service protections for the screeners.<sup>47</sup> Eventually Democrats achieved a compromise with the Administration on the creation of a new Transportation Security Agency, and the President signed the new law on November 19, 2001. 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 (bitterly opposed by FAA), lodging it elsewhere at Transportation.

#### *D. Initial White House Resistance to Reorganization*

The White House chose to sidestep another piece of structural politics, however. Since well before September 11, a number of legislators and blue-ribbon commissions had called for consolidating some agencies with a homeland security mandate in a cabinet-level agency.<sup>48</sup> The plans making the rounds on Capitol Hill focused on three functions: border security and enforcement, disaster response, and policymaking to facilitate the prevention of attacks (Kettl, 2003). A small number of legislators probably found such a proposal to be a convenient way of scoring some (position-taking) points for being concerned about a core valence issue, particularly if the reorganization in question did not augur a loss of power for some committee in which they had a vested interest.

Following the attacks, Senator Lieberman re-introduced legislation to centralize many homeland security operations in a single department. While some Republican legislators, such as Arlen Specter, expressed some interest, the President did not. His own view, articulated forcefully by Press Secretary Ari Fleischer time and again, was that such consolidation would constitute a waste of time at best. On March 19, 2002, for instance, in response to a questioner who asked about "[w]hy... the White House continue[s] to resist the idea of making the Office of Homeland Security a Cabinet-level department," Fleischer insisted that:

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 the myriad of activities the federal

<sup>46</sup> See Clarke, *supra* note \_\_, at \_\_; Kettl, *supra* note \_\_, at \_\_; Brill, *supra* note \_\_, at \_\_.

<sup>47</sup> See Brill, *supra* note \_\_, at \_\_. See also U.S. GAO, *Transportation Security Administration: Actions and Plans to Build a Results-Oriented Culture*, REPORT GAO-03-190 (April 29, 2003).

<sup>48</sup> See Brill, *supra* note \_\_, at \_\_; Clarke, *supra* note \_\_, at \_\_.

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. So the answer is, creating a Cabinet post doesn't solve anything. The White House needs a coordinator to work with the agencies, wherever they are.<sup>49</sup>

Several factors might have made the creation of a new department seem problematic from the President's perspective. The substantive benefits of effecting such a consolidation were not obvious, 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.<sup>50</sup> Moreover, career officials and political appointees within the administration were likely to resist the transfer. Opposition among the bureaucracy could have proven politically costly to the President (Gurulé Interview, 2004), increasing the risk that reorganization would backfire and potentially exposing the Administration to criticism in the press or on Capitol Hill.<sup>51</sup> Critics of previous reorganizations had, after all, pointed out that they had created such problems in the past.<sup>52</sup> 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 easily 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 almost certainly persist or grow. Though little is known about the impact of reorganizations on bureaucratic

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<sup>49</sup> Transcript of Ari Fleischer, White House Press Secretary, Press Briefing, March 19, 2002.

<sup>50</sup> Note that, if this were genuinely a concern, it might still be possible for the president to negotiate some agreement with the legislators in question.

<sup>51</sup> As an example of how Presidents might suffer such criticism of 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 bobbed 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 \_\_, at 145.

<sup>52</sup> See, e.g., Demetrios Caraley, *The Politics of Military Unification: A Study of Conflict and the Policy Process* (1966); Szanton, *supra* note \_\_, at \_\_; Wilson, *Bureaucracy*, *supra* note \_\_, at 264-67.

performance, it's widely acknowledged that it suffers at the outset.<sup>53</sup> 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 heavy weight 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, administrates [sic] flood insurance in addition to coordinating the federal response to disasters.) 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.<sup>54</sup>

The White House emphatically followed that path, insisting that Ridge's office would 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.<sup>55</sup>

Despite the fact that Democrats controlled the Senate, Congress was broadly supportive of the President in the two months following the attack. The Administration had 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 cooperation. Senator Graham, for example, agreed to shelve S1449, the bill he introduced making Ridge's position subject to Senate confirmation and imbuing the office with direct authority over terrorism budgets. The extent of congressional support contributed to an impression of considerable (if not frantic) policy change and implementation. The burst of activity seemed to push the limits of what the nation's political machinery could digest in such a short time – 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 the creation of a new White House staff office. With the anthrax attacks, the war in Afghanistan, and non-security issues demanding attention, White House aides may have concluded

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<sup>53</sup> See Brian Balogh, Joanna Grisger, and Philip Zelikow, *Making Democracy Work: A Brief History of 20<sup>th</sup> Century Federal Executive Reorganizations*, WORKING PAPER: UNIVERSITY OF VIRGINIA, MILLER CENTER FOR PUBLIC AFFAIRS 5 (July 22, 2002).

<sup>54</sup> See Brill, *supra* note \_\_, at 54.

<sup>55</sup> See *id.* at 54-55 (describing the negative reaction of Vice President Cheney's aides to the prospect of creating a new department).

that they had done enough to lay the bureaucratic foundation for enhanced security in the coming years.

### *E. Shaping a Reorganization.*

White House reluctance probably emboldened a score of legislators calling for a new cabinet department focused on security. Surveys suggest those calls resonated with a growing proportion of the public,<sup>56</sup> making the policy terrain more complex for the White House. By late October 2001, what had begun as an unlikely (if not downright outlandish) crusade to forge agencies into a new super-bureaucracy began to pick up support among both Republican and Democratic legislators.<sup>57</sup> Led by Democratic Senator Joseph Lieberman in the Senate and Republican Representative Mac Thornberry in the House, the enthusiasm of legislators for a new department was not squelched by the lack of support (or outright opposition) from lawmakers with powerful committee posts.

Second, the latent concern of the mass public with homeland security issues appeared to continue relatively unabated from the end of 2001 into the middle of 2002.<sup>58</sup> Legislative support for the homeland security restructuring picked up speed after TSA's creation in November, between December 2001 and March 2002. By May, Lieberman's bill was picking up steam even among Republicans. The early history of the new White House Office of Homeland Security was largely enveloped in debates about whether a new federal department should exist. The answer from the White House through the rest of 2001 and early 2002 remained an emphatic "no."

But a few months later, the President changed his tune. On June 7, President Bush unveiled his proposal for a new Department of Homeland Security.<sup>59</sup> Hints that something was in the works had appeared since April, when Budget Director Mitch Daniels publicly stated that the President could propose reforms at a later date.<sup>60</sup> What Daniels did not say was that the President had already set the process in motion. Late in 2001 Ridge floated a plan to consolidate Customs and INS. Lawmakers quickly shot it down. In the next three months, the President had several conversations with Ridge and Chief of Staff Andrew Card, and possibly a small number of other senior aides about the merits of creating a new department to administer homeland security.<sup>61</sup>

By March, a half-dozen mid-level aides to Ridge, Card, and Daniels were holding secret meetings, held in the cramped confines of the Presidential Emergency Operations Center (PEOC) deep under the East Wing of the White House.<sup>62</sup> Participants in the meetings, held in the unusual locale to avoid

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<sup>56</sup> See *infra* Part III (discussing results from surveys).

<sup>57</sup> See Haynes, *supra* note \_\_, at \_\_.

<sup>58</sup> See *infra* Part III.

<sup>59</sup> See STEPHEN FLYNN, *AMERICA THE VULNERABLE* 39 (2003); Brill, *supra* note \_\_, at \_\_.

<sup>60</sup> See Brill, *supra* note \_\_, at \_\_.

<sup>61</sup> See *id.*, at 397; Haynes, *supra* note \_\_, at \_\_.

<sup>62</sup> See Brill, *supra* note \_\_, at \_\_.

attracting attention, now suggest that their deliberations were driven largely by prescriptive concerns about the organizational merits of consolidating various units. The group was also driven by concerns about what could be sold on Capitol Hill, as underscored by the fact that the small group in the PEOC was soon expanded to include staff from the White House legislative affairs operation.

Although we cannot determine the participants' precise mix of concerns as they applied a blend of hastily-forged rules of thumb and political considerations, 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 thus far, or even by the independent commissions that had occasionally recommended some consolidation. "The PEOC group," noted one commentator, "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."<sup>63</sup> The working group's willingness to contemplate an even larger department is demonstrated by their inclination to seriously consider moving the FBI, the FAA, and ATF into the Department (moves that were ultimately rejected). 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.<sup>64</sup>

The 35-page legislative proposal that emerged from the meetings of the "PEOC group" sought to establish four primary "directorates" – border and transportation security, information analysis and critical infrastructure protection, science and technology, and preparedness and emergency response – at the core of the new department. 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.<sup>65</sup> The plan's starkest feature sought to move some 22 agencies into DHS, despite the fact that not all their functions conform to even the most expansive definition of homeland security. The search, rescue, and maritime regulation portions of the Coast Guard were to be entirely absorbed by the new department, as were the social insurance and natural disaster regulation functions of the Federal Emergency Management Agency (such as flood insurance) were placed in the new department. As one commentator observed, "emergency food and shelter, flood insurance, natural hazard mitigation, and the maintenance of data on firms, have little application to homeland security."<sup>66</sup>

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<sup>63</sup> *Id.* at 449.

<sup>64</sup> See Brill, *supra* note \_\_, at \_\_; Haynes, *supra* note \_\_, at \_\_.

<sup>65</sup> See, White House, Proposed Homeland Security Act (June 2002)("President's Plan")(on file with author).

<sup>66</sup> See Eli Lehrer, *The Homeland Security Bureaucracy* 4 (Spring 2004). This is less true only if one accepts an exceedingly pliable definition of the concept of "homeland security," encompassing virtually all safety

In contrast, previous proposals for the creation of a homeland security agency had contemplated more modest changes. For example, Republican Representative Mac Thornberry's pre-September 11 bill, introduced in March of that year, essentially contemplated moving FEMA, Customs, the Coast Guard and border patrol to the new agency.<sup>67</sup> Unlike the President's plan, agencies like the Secret Service, APHIS, the investigative and regulatory functions of immigration authorities, health related functions such as the national vaccine stockpile, and Treasury's Federal Law Enforcement Training Center were left untouched.<sup>68</sup> The reorganization's mixing a wide range of legacy missions with new homeland security responsibilities raised the question of how the tradeoffs were to be made across these missions.<sup>69</sup>

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. They sought to garner support from among scholars. And at 8pm Eastern Time, the President spoke to the nation about the plan.<sup>70</sup> The elaborate roll-out confirmed the President and his staff were now joining a chorus of support for the reorganization. The Administration's ambition, though, was not only to join but to lead the reorganization drive. The familiar cadences of legislative language that formed the building blocks of the new proposal broke from past plans in the larger scope of agencies to be included (such as the Secret Service and the regulatory functions of the Coast Guard), 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.

Behind the scenes, several factors may have helped dissipate the Administration's previous resistance. Its legislative affairs staff documented rising support for consolidation among legislators.<sup>71</sup> Security issues almost certainly continued holding much of the public's attention, particularly given the congressional testimony of FBI "whistleblower" Colleen Rowley, who had unsuccessfully sought to get authority to search the computer of alleged terrorist Zacarias Moussawi, and continued public debate about whether an independent commission would ultimately be created to investigate the September 11 attacks.<sup>72</sup> The White House opposed that Commission too. It might have seemed politically risky to the President and his aides to oppose the new

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and security challenges. Such a definition goes even beyond the expansive working definition used earlier in this paper.

<sup>67</sup> See HR 4660 (introduced by Mac Thornberry)(June 24, 2002).

<sup>68</sup> See HR 1158 (March 21, 2001).

<sup>69</sup> Note how the relevance of this question can be understood in at least two ways: either because the legislation itself allows for some flexibility or because, 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's the issue that would be most likely to be used to judge her. Cf. Wilson, *Bureaucracy*, *supra* note \_\_\_, at \_\_\_.

<sup>70</sup> See Brill, *supra* note \_\_\_, at \_\_\_.

<sup>71</sup> See Clarke, *supra* note \_\_\_, at 250.

<sup>72</sup> See Commission Report, *supra* note \_\_\_.

department and 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.<sup>73</sup> But these developments fail to account for the choices the White House made regarding the size, scope, and prescriptive merits of the new agency.

#### *F. Striking Legislative Bargains*

The President's June announcement found Congress still mired in divisions about the merits of creating a new department. Journalists and commentators continued questioning whether the department would be created.<sup>74</sup> But support remained vigorous among members of the Senate Government Affairs committee, whose members had proposed renaming the committee "Homeland Security and Governmental Affairs" almost certainly stood to gain prestige, power, and influence to gain if their expectation were fulfilled and the new department was put 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.<sup>75</sup>

These divisions 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 had something to lose from the reorganization; (b) those members who sat the committees likely to gain oversight power over the new DHS; (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.

With both the President and a growing number of legislators supporting the broad goal of the department's creation, there followed a period of intense bargaining. In the House, Speaker Hastert and the Republican leadership created a two-track process to evaluate the bill, christened the "Homeland Security Act." Over a dozen committees with existing jurisdiction over various aspects of homeland security would mark up the bill, but their votes would be

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<sup>73</sup> 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 and Paul J. Quirk, *Reconsidering the Rational Public: Cognition, Heuristics and Mass Opinion*, in *ELEMENTS OF REASON* 153 (Arthur Lupia, Mathew D. McCubbins and Samuel L. Popkin, 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).

<sup>74</sup> See Kettl, *supra* note \_\_, at \_\_.

<sup>75</sup> See *id.*; Lehrer, *supra* note \_\_, at \_\_. See also *infra* Part III (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 \_\_.

considered advisory in nature. Meanwhile, Hastert would empanel a Select Committee on Homeland Security – including most of the chairs of existing committees with jurisdiction over homeland security, to make final decisions on the House version.<sup>76</sup>

Hastert's move is understandable. If the leadership had left the decisionmaking solely to the existing standing committees with existing authority, they were likely to oppose the major reorganization that the President was now publicly committed to support and a growing chunk 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.

What the markups revealed was 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 cabinet agency. 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 committees sought to limit the presidential powers in the new bill, such as those allowing the White House to appoint assistant secretaries without Senate confirmation.

Although the first stage of advisory markups appears symbolic since the Select Committee would have final say, the procedure resulting in these votes could also be understood as an 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 leadership was likely to be quite wary of a wholesale redistribution of power within the legislature, which was an almost inevitable consequence of legislation to transfer control of agencies currently overseen by a host of separate departments with different congressional overseers. The markups thus allowed the committees to reveal what portions of the proposed changes were politically most costly 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 legislation became the basis for the final bill, described below, and passed the full house on July 26, 2002.<sup>77</sup>

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

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<sup>76</sup> See *Bush Security Plan Seeks Boost in Power*, HOUSTON CHRON. A2 (July 16, 2002), avail. at 2002 WLNR 13619969; *No Quick Homeland Security Fix*, CHICAGO TRIB. 22 (July 17, 2002), avail. at 2002 WLNR 12640049.

<sup>77</sup> See CONG. QUART. ALMANAC 2001 AND 2002 [CITE – Dara to insert sources from July 6, 2005 memo].

recapture the initiative. In late July, the Senate Governmental Affairs Committee approved a Lieberman-sponsored version of the homeland security bill (S2452) 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. The Senate then received the House version of the HSA (HR5005), which allowed the President, among other things, the power to exempt parts of government from federal labor management relations statutes.<sup>78</sup> Lieberman and his allies sought to substitute his new bill for the House version. But Senator Phil Gramm filibustered cloture motions to limit debate.<sup>79</sup> 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 on its version of the HSA. Ironically, the Democrats were exposed to the charge that they were opposed to the creation of a Department that they had played such a key role in forcing the President to accept.<sup>80</sup>

The elections brought more bad 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.<sup>81</sup>

### G. *The Final Bill*

On November 25, 2002, the President signed the HSA and declared victory. Indeed, on the surface, the final bill established a department that was quite similar to what President Bush had proposed. Consistent with the

<sup>78</sup> See CQ WEEKLY, 2028 (July 27, 2002).

<sup>79</sup> 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 CONG RECORD – HOUSE, H5804 (July 26, 2002).

<sup>80</sup> See Clarke, *supra* note \_\_, at \_\_. The Democrats in the Senate also pursued additional changes that complicated negotiations. During the Senate floor debate on the Homeland Security Act, Senator Hollings proposed a seemingly innocent amendment adding the Attorney General, the new DHS Secretary, and the FBI Director to statutory positions on the National Security Council. The amendment failed on a nearly straight party-line vote, 48 to 49 against (THOMAS Website, 2005 – ADD PIN CITE). Had it passed, it might have weakened the rationale for a separate Homeland Security Council, which was one of the most visible features of the Bush White House's response to September 11.

<sup>81</sup> With respect to civil service provisions, law gave the president most of what he sought, including the power to abrogate, for a period of up to five years, many civil service protections for key DHS employees. HR 5005 ("Homeland Security Act," or "HSA"), Section 841(a)(2). The law allows the Secretary, in conjunction with the Director of OPM, to prescribe a "human resource management system" for the Department, waiving civil service provisions governing compensation, evaluation, reward, and punishment of employees.

President's proposal, the core functions of the department were grouped into four directorates: Border and Transportation Security (including the bulk of the agency's employees and resources), Intelligence and Infrastructure Protection (incorporating some of the smaller infrastructure protection offices absorbed from Commerce 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) (Senate Govt. Affairs Committee, 2002).<sup>82</sup> As Table 1 indicates, not every agency that the White House working group considered placing within the Department ended up in the new agency. 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.

**Table 1: Selected Agencies Considered for Transfer to DHS<sup>83</sup>**

<i>Agency sub-component considered for transfer (in <b>bold</b> if not slated for transfer before the President's plan)</i>	<i>Responsibilities for "homeland security" (broadly defined)</i>	<i>Non-homeland security responsibilities</i>	<i>Transferred?</i>
<b>Animal Plant and Health Inspection Service (Agriculture)</b>	(Capable of providing inspection support at the border)	Regulate the movement of animals and plants into and out of the country (affecting individuals, small businesses, and large agribusiness interests)	YES (partial; portions left at Agriculture after legislative changes)
<b>U.S. Secret Service (Treasury)</b>	Protect top U.S. government officials, provide security at high-profile events	Investigate financial fraud ("wire" and "access device" fraud), counterfeiting (borderline homeland security)	YES
U.S. Coast Guard (Transportation)	Patrol U.S. territorial waters, potential incident response capacity in emergencies, can be deployed as part of the Navy in	Marine safety enforcement (regulating ships and companies owning ships) Set rates for the use of marine and water	YES

<sup>82</sup> Despite the rich variety of functions suggested by the existence of these four directorates, nearly 90% of the new department's employees and 65% of its budget were in the Border and Transportation Security Directorate. *Protecting the Homeland: The President's Proposal for Reorganizing Our Homeland Defense Infrastructure*, HEARINGS BEFORE SUBCOMMITTEE ON TECHNOLOGY, TERRORISM, AND GOVERNMENT INFORMATION, SENATE COMMITTEE ON THE JUDICIARY, 107<sup>th</sup> Cong, 2002, (Statement of Ivo Daalder).

<sup>83</sup> Sources: Brill, *supra* note\_\_ (describing the White House PEOC group's deliberations); President's Proposed Homeland Security Act (describing the agencies the President sought to move into the new department); HR 5005 (listing agencies actually included in the new agency); U.S. Government Manual (2002)(describing agency functions).

	wartime/emergencies; Drug interdiction (borderline non-homeland security)	facilities; Set rules for the use of drawbridge and similar facilities; Marine environmental regulatory enforcement (oil and chemical spills, marine water pollution rules) Search and rescue (borderline homeland security)	
Immigration and Naturalization Service (separated into: Bureau of Citizenship and Immigration Services, an investigative bureau merged with portions of Customs, and a border enforcement and administration bureau merged with portions of Customs)(Justice)	Screen entrants at the border (including potential terrorists); enforce internal immigration laws (borderline non-homeland security)	Provide immigration services to the public (borderline homeland security);	YES
FEMA (independent)	Disaster relief and recovery services in response to terrorist attacks	Disaster relief and recovery services in response to natural disasters and major industrial accidents; Flood insurance	YES
U.S. Customs Service (separated into: Bureau of Customs and Border Protection, encompassing portions of INS focused on border enforcement and administration; and enforcement bureau encompassing both Customs and INS criminal investigation functions)(Treasury)	Inspections at the border (screening for explosives, WMD) Narcotics interdiction (borderline non-homeland security)	Tariff and trade-related tax enforcement; Write and enforce elaborate trade regulations, including those involving child or forced labor, environmental provisions, and strategic trade rules	YES
<b>Critical Infrastructure Assurance Office</b> (Commerce)	Promote private sector activities to protect critical infrastructure from terrorist attacks	Encourage private sector activity to protect critical infrastructure from natural disasters	YES
National Infrastructure Protection Center (Justice/FBI)	Investigate, analyze, and respond to manmade threats to critical infrastructure	Minimal	YES
Office of Domestic Preparedness (Justice)	Domestic preparedness grants (borderline non-homeland security)	Disaster response functions (including for non-terrorism related disasters)	YES
Bureau of Alcohol,	Explosives enforcement	Collection of excise	NO (moved to

Tobacco, and Firearms (Treasury)	(regulation and criminal investigation)	taxes on alcohol, tobacco, firearms, and explosives Extensive firearms regulation (including access, sales, and licensing)(borderline homeland security)	Justice Department; not included in President's reorganization plan but move to Justice consistent with refocusing on law enforcement and away from regulation – particularly given that alcohol and tobacco tax and trade left back at Treasury)
Federal Aviation Administration (Transportation)	Aviation security	Regulating air traffic and aviation safety	NO (left at Transportation; left out of President's plan)
State Department Visa Processing Functions	Screen visa applications (including those requested by potential terrorists)	Screen visa applications (including those requested by everyone else)	NO (included in President's plan, but left at State after congressional changes)
Transportation Security Agency (Transportation)	Manage national airport screening system Non-aviation security responsibilities	Security responsibilities involving threats other than terrorism	YES

Despite the White House's relative success in creating such a vast department, the legislative bargaining process had produced a bill with some important differences from the President's proposal. 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 in length hints at some of the complexities lurking beneath the surface of the HSA. Unlike the original White House bill, for instance, the resulting HSA included language explicitly emphasizing the importance of non-homeland security missions (Section 101). In fact, legislators supplemented the blanket entreaty for the new Department to "ensure that the functions of the agencies and sub-divisions within the Department that are not related directly to securing the homeland are not diminished or neglected except by a specific explicit Act of Congress" with more specific language with respect to

some agencies. 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 (Section 888). 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 Treasury (Section 412),<sup>84</sup> and providing that FEMA should carry out an “all hazards” mission instead of placing response to terrorist attacks above its other missions (Section 507).

In contrast with the sweeping presidential powers contained in the original proposal, the final bill denied the powers sought by the White House to directly control the timing of agency transfers, to redistribute appropriations among different agencies, and 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)(Sections 231-237; 312-313). Over time these institutions would almost certainly serve as conduits for federal spending benefiting particular regions or industries.<sup>85</sup>

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 (Title XI). Pilots gained a right to be armed (Title XIV). Airlines obtained new insurance and financial protections (Title XII), and the Department gained new regulatory powers to protect manufacturers of “anti-terrorism” technologies from liability (Sections 861-865).<sup>86</sup>

Together these features of the resulting bill evince four recurring themes in the legislative bargaining process. First, although the new bill granted the

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<sup>84</sup> This provision does not, however, 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 (Section 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 413-417 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.

<sup>85</sup> See relevant sections, HSA.

<sup>86</sup> See *id.*

Secretary of Homeland Security sweeping powers of “direction, authority, and control” over the new Department (Section 102), legislators had 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, the pork barrel connection. 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 new department would – true to its name – emphasize homeland security over a plethora of legacy missions. In response, lawmakers made modest efforts to stress the continued importance of the agencies’ myriad non-homeland security responsibilities.<sup>87</sup>

Equally noteworthy is what the bill omitted -- congressional organization. Section 1503 described 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,” but the bill required no actual changes in structure. Thus, as tens of thousands of inspectors, agents, and government employees began a long journey towards their positions in the new agency in late November 2002, the congressional oversight structure over the department’s components remained largely unchanged.<sup>88</sup>

Earlier the White House had sought to bolster its reorganization plan by arguing that too many congressional committees were involved in overseeing homeland security.<sup>89</sup> It now 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

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<sup>87</sup> *See id.*

<sup>88</sup> *See* Kettl, *supra* note \_\_\_ at \_\_\_. *See also* *Quelling Qualms on Security*, DALLAS MORNING NEWS 12A (Jan. 9, 2005), avail. at 2005 WLNR 24731284 (discussing House committees’ reluctance to yield turf to the newly permanent Homeland Security Committee); *Balancing Civil Liberties and National Security Needs*, TESTIMONY OF MARY A. FETCHET, FOUNDING DIRECTOR, VOICES OF SEPTEMBER 11<sup>TH</sup>, BEFORE THE HOUSE GOVERNMENT REFORM (June 7, 2006), avail. at 2006 WLNR 9751148 (“In the current structure, most congressional committees have some jurisdiction over homeland security, making the current system prone to turf battles and inertia... everyone is in charge so no one is in charge”)

<sup>89</sup> *See* President’s Plan, *supra* note \_\_\_.

reaction to the repeated standing committee “advisory” markups seeking to limit the size and scope of the new department. Although such votes had not succeeded in limiting the scope of the sprawling new department, they had changed 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 1 ½ 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 Hill.<sup>90</sup>

How well this sprawling arrangement would function was something of a mystery in mid-2003, when the Department ostensibly opened its doors, although one could easily predict that the sheer size and complexity of this structure would cause problems.

## **Part II. THE NEW POLITICAL THEORY OF BUREAUCRATIC ORGANIZATION AND PERFORMANCE: THE POLITICAL-BUREAUCRATIC SYSTEM**

To understand the creation 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.<sup>91</sup> This perspective emphasizes a series of non-obvious implications about bureaucratic structure, incentives, and performance. In contrast to the traditional literature on bureaucracy,<sup>92</sup> which primarily seeks to explain

<sup>90</sup> Susman, Thomas M., *Congressional Oversight of Homeland Security*, 30-FALL ADMIN. & REG. NEWS 2 (2004).

<sup>91</sup> See, for example, John A. Ferejohn and Charles R. Shipan, *Congressional Influence on Administrative Agencies: A Case Study of Telecommunications Policy*, in CONGRESS RECONSIDERED (Lawrence C. Dodd and Bruce I. Oppenheimer, eds., 1989); MORRIS FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1981); Mathew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POLI. SCI. 165 (1984); McNollgast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? (John E. Chubb and Paul E. Peterson, eds., 1989); John Ferejohn and Charles Shipan, *Congressional Influence on the Bureaucracy*, 6 J. LAW, ECON. & ORG. S1 (1990); Terry M. Moe, *An Assessment of the Positive Theory of ‘Congressional Dominance’*, 12 LEG. STUD. Q. 475 (1987); and Barry R. Weingast and Mark J. Moran, *Bureaucratic Discretion or Congressional Control: Regulatory Policymaking by the FTC*, 91 J. POL. ECON. 765 (1983). Recent surveys of this now vast literature include Huber and Shipan (2006) [CITE] and Weingast, *supra* note\_\_. DAVID EPSTEIN AND SHARYN O’HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (1999).

<sup>92</sup> See, e.g., ALVIN GOULDNER, PATTERNS OF INDUSTRIAL BUREAUCRACY (1954); Herbert Kaufman, *The Direction of Organizational Evolution*, 33 PUB. ADMIN. REV. 300 (1973); JAMES G. MARCH AND HERBERT A. SIMON, ORGANIZATIONS (1993); PHILIP SELZNICK, TVA AND GRASSROOTS: A STUDY IN THE SOCIOLOGY OF FORMAL ORGANIZATIONS (1966); and HERBERT SIMON, ADMINISTRATIVE BEHAVIOR (4<sup>TH</sup> ED. 1997).

bureaucratic inefficiency from what could be called an “internalist” perspective (one focusing largely on the goals and routines of the bureaucracy itself), the new approach discussed here places greater emphasis on explaining inefficiency from an “externalist” perspective (one based on factors in a bureaucracy’s political environment, especially the various legislation it faces).<sup>93</sup>

Our analysis takes as its point of departure the central insight in recent political science scholarship on agencies. Delegation to bureaucracy tends to occur when political officials believe they will be better off as a result.<sup>94</sup> In part, delegation is an efficacy measure, allowing the government to do much more than if Congress controlled all policymaking. One to two million bureaucrats and their consultants (now far more numerous than in 1980) can accomplish more than 535 legislators and their staff.<sup>95</sup>

Delegation nonetheless comes with costs. Specifically, delegation creates a range of problems for political officials, and it is how they attempt to mitigate these problems that to a large degree defines how bureaucracies are structured, how they behave, and the decisions they make. An “information problem” arises because delegation to bureaucracies create information asymmetries, whereby the bureaucracy – experts by design – know so much more than political officials about the policy decisions within their jurisdiction that the bureaucrats can potentially use this information to manipulate political officials.<sup>96</sup> Moreover, “multiple principal problem” reflects the separation of powers system, whereby the bureaucracy has political principals in both houses of Congress and in the executive branch.<sup>97</sup> Because these principals want to move bureaucratic policy in different directions, it is hard for them to coordinate against a bureaucracy that

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<sup>93</sup> The “internalist” literature is not without value. For instance, 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 environment. 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-units 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, *Bureaucracy*, *supra* note \_\_. 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. Indeed, by definition, the creation and reorganization of agencies involves a host of external political actors likely to harbor competing agendas.

<sup>94</sup> *See*, e.g., Epstein and O’Halloran, *supra* note \_\_, at \_\_; JOHN D. HUBER AND CHARLES SHIPAN, *DELIBERATE DISCRETION? THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY* (2002); D. RODERICK KIEWIET AND MATHEW MCCUBBINS, *THE LOGIC OF DELEGATION* (1991). For a more qualitative perspective on the opportunities and perils of delegation (from politicians’ perspective), see Wilson, *Bureaucracy*, *supra* note \_\_, at \_\_; and LAWRENCE S. ROTHENBERG, *REGULATION, ORGANIZATIONS, AND POLITICS: MOTOR FREIGHT POLICY AT THE INTERSTATE COMMERCE COMMISSION* (1994).

<sup>95</sup> *See* U.S. STATISTICAL ABSTRACT (2004).

<sup>96</sup> *See*, e.g., WILLIAM A. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971). Indeed, a great deal of the literature emphasizes this as the single most important effect of bureaucracy (though we will disagree).

<sup>97</sup> *See* Weingast, *supra* note \_\_, at \_\_.

deviates from the policy understanding produced in the original legislation: as long as the deviations benefit one of these principals, no corrective legislation can be passed to bring the bureaucracy back into line. Absent other corrective means for political officials to control bureaucrats, the multiple principle problem creates the danger (from the perspective of members of Congress and the White House) that the bureaucracy has a relatively free reign over policymaking. Finally, a “political turnover problem” arises because tomorrow’s officials are likely to have policy goals that differ from today’s, and will use their tools and techniques of influence to move policy away from the goals of today’s officials.<sup>98</sup>

At one level, these problems seem insurmountable. Indeed, it is hard to imagine from first principles how they are solved. But political officials did not solve them all at once: as Carpenter (2000) emphasizes, many bureaucracies in the late 19th century exhibited far more autonomy than do most of today’s.<sup>99</sup> To mitigate these problems, political officials have devised a wide range of political and administrative mechanisms to mitigate these problems.<sup>100</sup>

We call the set of mechanisms devised to mitigate the three problems the “political-bureaucratic system.”<sup>101</sup> The set of mechanisms fall into two categories, *ex ante* controls and *ex post* controls. *Ex ante* controls are those put in place at the time of agency’s creation. *Ex post* controls are mechanisms designed to react to agency policy decisions, in part to adjust agency policy after an agency begins policy implementation.

The basic outline of our theory can be summarized briefly. First, interest groups have influence on the process because they affect the reelection prospects of political officials.<sup>102</sup> Interest group activity implies a bias toward those groups who are active. But this influence is not simply general influence. It works through the political system. Interest groups in the President’s support constituency have more influence than those who are not. Similarly, those interests represented on the relevant congressional subcommittees that oversee various agencies have more influence than those who are not. Second, a range of inter-branch dynamics shape the legislative process. As lawmakers bargain, key legislators are themselves engaged in negotiation with organized interest groups and with the president. The resulting congressional process – combining internal negotiations among legislators, 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 intra-branch

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<sup>98</sup> See Lewis, *supra* note \_\_, at \_\_. See also Rui J.P. de Figueiredo, Jr., *Electoral Competition, Political Uncertainty, and Policy Insulation*, 96 AM. POL. SCI. REV. 321 (2002)(modeling the political conditions under which legislators would seek insulation). For an insightful discussion of specific examples where politicians foster insulation, see Wilson, *Bureaucracy*, *supra* note \_\_, at \_\_.

<sup>99</sup> See DANIEL CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY* (2002).

<sup>100</sup> See McNollgast, *supra* note \_\_, at \_\_; Moe, *supra* note \_\_.

<sup>101</sup> Were political officials unable to control the bureaucracy, they would create far less of it. See Jeffrey S. Banks and Barry Weingast, *The Political Control of Bureaucracies Under Asymmetric Information*, 36 AM. J. POLI. SCI. 509 (1992). The fact that the government bureaucracy is so vast in part reflects the success of this system.

<sup>102</sup> See Moe, *supra* note \_\_, at \_\_.

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. Differences in how attentive and informed is the public affect the induced preferences of representatives over various institutional design questions. Fifth, a crisis dramatically transforms public attentiveness and can therefore dramatically change the political pressures on a give issue. All of these factors can interact in potentially complex ways. This part develops a theory of how these different political domains interact to affect bureaucratic politics in particular, and the policymaking process more generally.

#### 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.<sup>103</sup> 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. 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, granting majority (and sometimes filibuster or veto-override) pivots bargaining power. Third, each house of Congress has a range of institutions whose effect are to grant further bargaining leverage and veto gates over legislation, 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, these legislators 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. This bargaining power implies that institutional features of national politics have a direct effect on the form and content of legislation. Below we will survey a series of implications that congressional institutions have for the shape of legislation. For now, we mention one that we believe is the most important, namely, the effects of political compromise on the shape of legislation.

Typically, legislation begins with proponents who favor legislation that addresses a particular problem.<sup>104</sup> Often, the legislation is designed efficiently in

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<sup>103</sup> See, e.g., KENNETH PREWITT, AN INTRODUCTION TO AMERICAN GOVERNMENT (1977). Traces of this perspective can also be found in legal scholarship emphasizing the virtues of representative political institutions. Cf. JOHN HART ELY, DEMOCRACY AND DISTRUST (emphasizing the extent to which the resolution of political problems through representative political institutions is preferable to the alternatives).

<sup>104</sup> 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 and Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1412 (2003).

the sense that, given the sponsors' definition of the problem, the legislative proposal addresses the problem directly. This proposal is often relatively short. More importantly, the proposal typically has little chance of passing in this form. In opposition to the legislation's sponsors are the opponents who see 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; namely, the moderates. As the moderate 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 the 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.<sup>105</sup>

Ackerman and Hassler's classic study of "clean coal-dirty air" illustrates this point. In the mid-1970s, environmentalists sought to control sulfur-dioxide emissions, a major sources of which was sulfur in coal burned by electric companies to generate electricity. To reduce this, utilities could either switch to low-sulfur coal or add "scrubbers" to their waste stacks that would eliminate the sulfur from the exhaust emissions. In the face of these choices, each utility would choose the method that minimized its costs. Naturally, some utilities would switch from burning high sulfur coal to low sulfur coal. But this raised potential political opposition. High sulfur coal tended to come from the older coal regions (e.g., Pennsylvania, West Virginia, and Kentucky) whereas the low sulfur coal tended to come from the new coal regions in Montana and Wyoming. Moreover, the older coal regions were unionized whereas the new ones were not. Put simply, optimal way to address the problem implied losses of jobs for unionized coal members.<sup>106</sup>

Unfortunately for the pro-environmental coalition, there were insufficient votes in Congress to pass such a measure. In the end, supporters of the legislation agreed to compromise with the representatives of the older coal regions to require that every utility in the country – regardless of whether they burned high or low sulfur coal – add scrubbers. This requirement at once raised

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<sup>105</sup> *See id.*

<sup>106</sup> *See* BRUCE A. ACKERMAN AND 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 (1981).

the cost of removing sulfur from emissions, lowered the overall environmental cleanup per dollar spent, but saved union jobs.<sup>107</sup>

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.<sup>108</sup> The latter provisions 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 the sense 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 the Problems of Delegation.*

### *i. The Imprint of Legislative Politics on Legislation and the Bureaucracy*

The divisions among legislators 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, or the process by which politics inevitably distort the goals of the legislation as legislators transform a proposal into a vehicle that will pass Congress.

**(1) The distributive tendency and goal distortion.** An inevitable effect of the legislative process is that benefits from a program must tend to 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 state 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 also means that the legislation will have difficulty passing. A small minority of districts gain by the legislation, while most legislation 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*

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<sup>107</sup> See *id.*, at \_\_\_. Although it is possible, at least in theory, to imagine a case for the technology-based regulations that Ackerman and Hassler excoriate (e.g., in the basis of how industry adoption of the scrubber technologies would create path-dependent effects making it easier to pass future, more effective regulations), such a case would have been wildly implausible at the time of the Clean Air Act amendments, nor has it been borne out in subsequent history.

<sup>108</sup> See McNollgast, *Structure and Process*, *supra* note \_\_\_, at \_\_\_; Rodriguez and Weingast, *supra* note \_\_\_, at \_\_\_.

*tendency* implies a high likelihood of goal distortion.<sup>109</sup> 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 programs, the Department of Energy's National Laboratory system, and (as discussed below) DHS' programs to fund emergency preparedness grants as well as research and development.<sup>110</sup>

**(2) 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 aspects 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 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 to occur because House committee members had added different add-ons to the legislation than had the Senate committee members. The House members sought additional benefits for housing, while the Senate members sought to address an issue in banking regulation unrelated to savings and loans. Because the two committees could not agree on how to compromise these additional parts, the legislation died in 1986, allowing the problem to mushroom.<sup>111</sup>

Second, another type of intra-chamber conflict concerns the distribution of power and authority within the chamber. Put simply, committee members typically seek to enhance the discretion, scope, and authority of their committees, even at the expense of others.<sup>112</sup> 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 following the October War in the Middle East, it suddenly became a national issue. Within each chamber, a wide range of committees

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<sup>109</sup> See Kenneth A. Shepsle and Barry R. Weingast, *Political Solutions to Market Problems*, 78 AM. POL. SCI. REV. 417 (1984).

<sup>110</sup> See, e.g., MARY A. HOLMAN, *THE POLITICAL ECONOMY OF THE SPACE PROGRAM* (1974); Harold Orlans, *'D & R' Allocations in the United States*, 3 SCIENCE STUD. 119 (1973); Patrick S. Roberts, *Shifting Priorities: Congressional Incentives and the Homeland Security Granting Process*, 22 REV. POLICY RES. (2005).

<sup>111</sup> See Romer and Weingast, *supra* note \_\_\_, at \_\_\_.

<sup>112</sup> DAVID C. KING, *TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION*. (1997).

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.

Another example concerns Senator Edward Kennedy, as chair of the Judiciary Subcommittee of Senate Administration Practices and Procedures Committee, threatening Senate Commerce Committee with a jurisdiction fight over airline regulation in the mid-1970s.<sup>113</sup> For several decades, the Commerce Committees had preserved a regulatory system centered on the Civil Aeronautics Board (CAB) that fostered oligopoly markets and protection for incumbent firms against new entrants. In the context of the consumer revolution criticizing old-style economic regulation and the emergence of highly competitive, low priced intra-state markets within California and Texas, Kennedy sought to challenge this system. His hearings were sufficiently successful at generating support for airline regulatory reform that, although he chose not to challenge the Commerce Committee's jurisdiction, he forced that committee to produce the Airline Deregulation Act of 1978 dismantling the old system, engineering greater competition in the industry and providing for the end of the CAB.<sup>114</sup>

The upshot is simple. As new policy issues emerge and as political support for existing issues changes, committees negotiate over who has authority on a given issue or a given aspect of an issue. As the CAB story suggests, the interests on the opposing committee can often be quite different, so this authority has significant policy implications.

**(3) Congressional jurisdictions.** Congressional committees and subcommittees are intimately involved in bureaucratic oversight.<sup>115</sup> 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 parallels the structure of the bureaucracy, and vice versa. They 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.<sup>116</sup>

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

<sup>113</sup> See *id.*; and Weingast, "Regulation, Deregulation, and Reregulation," *supra*, note 4, at 165.

<sup>114</sup> See Steven A. Morrison and Clifford Winston, *Airline Deregulation and Public Policy*, 245 SCIENCE 707 (Aug. 1989).

<sup>115</sup> Indeed, some observers have called the relationship among congressional subcommittees, agencies, and interest groups "cozy little triangles" and "iron triangles." See Fiorina, *supra* note \_\_, at \_\_.

<sup>116</sup> See Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA: "Quis Custodiet Ipsos Custodes" (Who Shall Watch the Watchers)?* 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, Mark A. Peterson, and Jack L. Walker, *Interest Groups, Iron Triangles, and Representative Institutions*, 14 BRIT. J. POLI. SCI. 161 (1984).

must, for example, because of budgetary tradeoffs – 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 types of goals, in part because the legislative 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. If the two separate subcommittees retain jurisdiction over the different pieces of the now reorganized bureau, coordination will be impeded because 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 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 extent 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 better able make a coherent tradeoffs between the two activities and hence to realize the efficiency gains.

**(4) Partisan electoral goals.** A fourth principle relevant for bureaucratic structure is that the two national parties have incentives to use legislation to enhance their members' electoral goals at the expense of the other. Parties with majorities in Congress typically have 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.” Sometimes that works, but sometimes it simply sounds like an excuse, one that fails to convince voters.

#### *ii. 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.

**(1) The Role of Crises.** For our purposes a crisis can be understood as (a) an exogenous shock sharply raising demand for policy changes in a particular domain that (b) is 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.<sup>117</sup> 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 policies 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.<sup>118</sup> 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 such 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.<sup>119</sup>

Taken together, these four effects have several implications for a crisis response. First, this response is sometimes (and perhaps often) ill-considered. 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.

As an example, consider the response to the thalidomide episode about drug safety. Thalidomide was a drug given to pregnant women in the 1950s and early 60s to reduce the effects of morning sickness, but had disastrous side

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<sup>117</sup> See Jon A. Krosnick, *Government Policy and Citizen Passion: A Study of Issue Publics in Contemporary America*, 12 POL. BEHAVIOR 59 (1990); Jon A. Krosnick and Shibley Telhami, *Public Attitudes Toward Israel: A Study of the Attentive and Issue Publics*, 39 *Int'l Stud. Q.* 535 (1995); Mark Peffley and Jon Hurwitz, *International Events and Foreign Policy Beliefs: Public Response to Changing Soviet-U.S. Relations*, 36 AM. J. POL. SCI. 431 (1992).

<sup>118</sup> 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.

<sup>119</sup> See Lewis, *supra* note \_\_, at \_\_; Zegart, *supra* note \_\_, at \_\_ (discussing differences in the President's incentives because he responds to a national constituency).

effects induced by impairing fetal development. Many so-called thalidomide babies were born without arms or legs.<sup>120</sup>

Prior to the thalidomide episode, Senator Estes Kefauver (D-TN) was highly critical of 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, namely, that they actually produced the effects that the manufacturers claimed. Of course, the problem of efficacy is largely independent of the problem of drug safety, which involves side effects.<sup>121</sup>

In the wake of the thalidomide episode, the Congress quickly passed Kefauver's proposals even the episode involved drug safety while the legislation largely addressed the problem of efficacy. This case exhibits two separate ironies. First, the 1962 Drug Amendments have been shown to have massive negative effects on the introduction of new drugs in the United States relative to Europe, Canada, and Japan. Second, under the existing regulatory scheme thalidomide had never been introduced in the United States (the side effects occurred from its distribution in Europe and Canada).<sup>122</sup>

Thus, the policy imperative created by a crisis combines with a public inattentive 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 delay that eventually yields a policy better aimed at the problem.

Second, 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 allow legislators and the president more room to bargain over policy changes given the extent of public demand.

Nonetheless, it is wrong to assume that this window for policy innovation is more likely to lead to prescriptively attractive policies. With interest groups less able to stop or water down a legislative change, the president and the legislature take center stage. But, as will emerge below, their competing objectives are likely to lead them to create bureaucracies ill-equipped to achieve stated purposes, except under special conditions. In contrast, politicians might

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<sup>120</sup> See Samuel J. Rascoff and 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).

<sup>121</sup> See Daniel Carpenter, *The Gatekeeper: Organizational Reputation and Pharmaceutical Regulation at the FDA*, unpublished manuscript on file with author (2006)(providing a detailed qualitative account of the development of the FDA, noting that even an account emphasizing the role of bureaucratic autonomy acknowledged the impact of the Thalidomide scare on the FDA's political environment).

<sup>122</sup> See Paul J. Quirk, *The Food and Drug Administration*, in *THE POLITICS OF REGULATION* 191 (James Q. Wilson, ed. 1980)

work hard 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 existed, a crisis could 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.

**(2) The Role of Uncertainty.** The relationship between bureaucratic institutions and performance is hardly an exact science. This implies a significant degree of uncertainty about policy effects associated with any reorganization. Moreover, the larger and more extensive the reorganization, the greater the uncertainty.

Consider a reorganization designed to create greater coordination among related agencies. Putting the agencies together under a single umbrella with greater centralization holds the potential for greater coordination. But it also has a range of potentially negative effects.

First, 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.

Second, centralization can diminish the competition among agencies and risks creating a bureaucracy with a monopoly of control over a massive portion of the government's operation.<sup>123</sup> As students of bureaucracy have long observed, the absence of competition tends to imply less efficient performance.<sup>124</sup> Competition among multiple agencies with similar goals allows outsiders to judge their relative performance. When rewards to bureaucrats (e.g., higher budgets, promotions, personal reputation) go to the higher performers, competition provides incentives for innovation and efficiency. Moreover, a great many areas of governmental operation have elements of competition through 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.

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. Rivalries within a single

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<sup>123</sup> See Lewis, *supra* note \_\_, 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.”); [CITE Posner, Hoover Press book on domestic intelligence reform].

<sup>124</sup> See, e.g., THRAINN EGGERTSSON, *ECONOMIC BEHAVIOR AND INSTITUTIONS* (1990).

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 the 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.<sup>125</sup>

Fifth, on a pragmatic level, reorganization and centralization may well decrease efficiency in the short run, as the transactions costs of combining computer systems and designing compatible operating procedures across formerly separate agencies takes considerable time and effort and in the short run may considerably impair performance.

Taken together, these factors suggest that centralization is likely to have two separate effects. On the positive side, it holds the 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. On the negative side, centralization creates two different categories of problems. Uncertainty about its effects is a basic fact of organizational politics; and greater ability to coordinate in a centralized organization at the same time creates monopolization that reduces incentives for bureaucracies to efficiently carry out their supposed purposes. 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 that they could have counter-intuitive effects<sup>126</sup>

#### *D. Implications: Policies Are Not Designed to Succeed*

In combination, these principles imply that policy is often, perhaps even typically, not designed to succeed at achieving its stated goals. These principles explain why we consider both "bureaucracy" and "bureaucratic" pejorative labels.

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 is that the legislation's proponents alter the legislation in a way that advantages those holding veto power. In combination, these imply a wide range of factors that distort the goals of the legislation. Legislation rarely addresses policy problems directly. Indeed, sometimes they are designed to fail.

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<sup>125</sup> See Daniel Carpenter, *Adaptive Signal Processing, Hierarchy, and Budgetary Control in Federal Regulation*, 90 AM. POL. SCI. REV. 283 (1996).

<sup>126</sup> See Balogh et al., *supra* note \_\_, at \_\_; Wilson, *Bureaucracy*, *supra* note \_\_, at \_\_;

Moe (1989) describes the process of negotiation over the creation of the Occupational Safety and Health administration (OSHA) in 1972.<sup>127</sup> Labor sought a powerful, streamlined agency located in the (friendly to labor) Department of Labor and subject to the sole jurisdiction of the congressional committees overseeing labor issues (again, friendly to labor). President Nixon sought labor's vote and wanted to support the legislation, but predictably sought to minimize the harm to his business constituents. This led him to propose a series of compromises in the legislation. The inability to pass the legislation designed solely to benefit labor led congressional proponents to a series of legislative compromises that greatly reduced the ability of the agency to provide benefits. For example, the legislation created a new agency, the National Institute of Occupational Safety and Health (NIOSH), lodged in another cabinet department (the then Health, Education, and Welfare) overseen by different congressional committees with goals differing from the promotion of labor's interest. Before OSHA could write a health regulation, NIOSH first had to write a "criteria document." The legislation therefore lodged a significant portion of OSHA's agenda control with another agency. The legislation also allowed states to create their own implementation plans. OSHA was also subject to an independent review board.<sup>128</sup> As Moe concludes:

While this 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, 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.<sup>129</sup>

This section emphasized a series of political tendencies, all of which add up to a distortion of the goals that politicians tend to emphasize to the public. The political principles discussed here show how the writing of legislation designed to pass creates pressures that often break the link between the goals of legislation and what the legislation actually does. The distributive tendency reflects congressional legislation 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. All this can be exacerbated by a mismatch between congressional committee jurisdiction and the organization of a bureaucracy. Put simply, the greater the dispersal of jurisdiction, the less coherent will be bureaucratic policymaking. Finally, partisan

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<sup>127</sup> The discussion of OSHA draws on Moe (1989) and Cornell, Noll, and Weingast (1976).

<sup>128</sup> See Moe, Politics of Bureaucratic Structure, *supra* note \_\_, at \_\_.

<sup>129</sup> See *id.* at 289-90.

electoral goals often affect legislation. 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 CREATION OF THE DEPARTMENT OF HOMELAND SECURITY

Our theory of the political-bureaucratic system provides a lens through which to interpret the legislative developments that led to the creation of DHS. In this Part, we use the theory to interpret the legislative politics that forged DHS. In the process, we return to our two principal questions concerning the formation of the DHS: why did the President change his mind to propose reorganization qua mega-centralization? Why did the President create a DHS that is so “fat” – that is, contains so many bureaucratic units, many of which are only tangentially related to homeland security? We will also consider the issue of whether the politicians that created DHS were under pressure to create a prescriptively more effective bureaucracy on the heels of the September 11 attacks. The answers to these questions turn out to be intimately related.

#### A. *The Political Influence of Congress*

The theory of the political-bureaucratic system suggests several ways in which domestic American politics puts its special stamp on legislation. Put simply, politics shapes both the legislation’s objectives and how it achieves those objectives. Before answering the main questions of this paper, we address how this political system affected the legislation.

Consistent with this theory is the observation that the president’s bill was short – about 50 brief provisions in the administration’s draft – while the congressional legislation went on for 200 provisions, many of them in the lengthy and convoluted legislative argot characteristic of lawmakers’ desire for controlling the bureaucracy.<sup>130</sup> This difference between the President’s short proposal and the final congressional legislation reflects more than just filling in details and gaps; it reflects the effects of the congressional politics engineering the new bureaucracy to serve the interests of its member; that is, to conform with the political-bureaucratic system.

Each of the principles discussed in the theoretical section applies to this case, including: goal distortion and the distributive tendency, multiple veto points forcing alterations in the legislation, intra-congressional 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 succeed at the stated objective of homeland security.

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<sup>130</sup> See *supra* notes \_\_ (discussing provisions of the HSA designed to monitor changes in functions of the Coast Guard and other agencies placed within DHS).

Consider the impact of goal distortion as it plays out through the distributive tendency. Calculating the optimal allocation of funds is a complex task (as 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 like 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 all that more attractive to strategic terrorists.<sup>131</sup>

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 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. This seems exactly what has happened.

Early in 2006, for example, DHS Secretary Michael Chertoff, in response to sharp criticism, made the astounding public announcement that thenceforth, the Department would base its homeland security grant allocation on risk factors. On January 4, 2006, Chertoff announced new rules about the distribution of such funds, based on the risk of terrorist attack to 35 urban areas deemed to be especially vulnerable to attack. In response to the criticism about the old rules, Chertoff 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 amounted to such "party favors."<sup>132</sup> This admission, therefore, implicitly acknowledged that the Department had *not* based its assessments on risk factors prior to this time.<sup>133</sup>

Indeed, a wide range of reports have suggested that DHS spending has become just another source of congressional pork, especially though spending money in rural states with relatively low risks of terrorist attack.<sup>134</sup> Thus, while the port of New York and New Jersey is widely regarded as the highest risk, it received only \$6.6 million in FY 2005, about equal to Memphis and far behind Houston's \$35.3 million.<sup>135</sup> The recent attempts to renew the Patriot Act in late 2005 witnessed considerable congressional wrangling over the various formulas for spending. The House plan sought a greater emphasis on risk, while assuring each state a minimum of 0.25 percent of the total funds. The Senate, with its greater rural bias, beat back this plan so that the original law would prevail, with

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<sup>131</sup> See Robert Powell, *Defending Against Terrorist Attacks with Limited Resources*, Unpublished Working Paper (2005)(on file with author).

<sup>132</sup> Dan Eggen, *D.C. May Benefit as DHS Bases Grants on Risk*, WASHINGTON POST (January 4, 2006).

<sup>133</sup> *Better Late than Never*, WASHINGTON POST A14 (January 5, 2006).

<sup>134</sup> *The Congress From Nowhere*, N.Y. TIMES (Nov. 18, 2005); *Failing on Homeland Security*, N.Y. TIMES, (Dec. 6, 2005); and *Risky Funding*, WASHINGTON POST A14 (Nov. 21, 2005).

<sup>135</sup> *Failing on Homeland Security*, *supra* note\_\_.

its guaranteed minimum of 0.75 percent for each state. As a consequence, the allocation of funds has been widely criticized for failing to focus on security and instead being just another source of congressional pork. This topic may well be revisited as the Congress reconsiders the Act's renewal early this year.<sup>136</sup>

Other scholars have also argued that federal homeland security funds are not distributed to the states according to any principled calculation of risk, resulting in sparsely populated states receiving far more money per capita than densely populated states. Patrick Roberts (2005) calculated the per capita homeland security grant spending for FY 2003 and FY 2004 and found, in both instances that 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. This small state-bias was the direct result of legislators delivering as much pork to their home districts as possible.<sup>137</sup>

In effect, 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 behave this way, 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 all to do with their reelection prospects.

Another policy realm where legislators' reelection concerns seem to be paramount to security concerns is the creation of the so-called "Homeland Security Centers of Excellence." There are currently six such "HS-Centers," located at the following universities: Johns Hopkins (created in December 2005); the University of Southern California (created in November 2003); Texas A&M (created in April 2004); Minnesota (created in April 2004); Maryland (created in January 2005) and Michigan State (created in October 2005). Each 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 terrorist attacks.<sup>138</sup> We hypothesized that these centers were not awarded on the basis of merit, but were instead created in the districts of legislators who were poised to lose committee jurisdiction as part of the transfer. Table 2 suggests this may have been the case: all of the new centers are located in areas where at least one member of the congressional delegation stood to lose a measure of committee power. 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.

<sup>136</sup> See Roberts, *supra* note \_\_, at \_\_.

<sup>137</sup> See *id.*

<sup>138</sup> U.S. Dep't of Homeland Security, *Homeland Security Centers of Excellence* (200x), avail. at [www.dhs.gov](http://www.dhs.gov). (ast accessed January 3, 2006).

**Table 2: Congressional Representation in HS-Center States and Districts<sup>139</sup>**

HS-Center	District	Representatives	Committees	Losing Jurisdiction?
Johns Hopkins (Baltimore, 21202)	MD (7)	Rep. Elijah Cummings (D)  Sen. Barbara A. Mikulski (D)  Sen. Paul S. Sarbanes (D)	Govt Reform (9 of 19 D); Transportation (18 of 34 D)  Appropriations; Health  Banking; Budget; Foreign Relations	Yes  Yes  No
USC (LA, 90089)	CA (33)	Rep. Lucille Roybal-Allard (D)  Sen. Barbara Boxer (D)  Sen. Diane Feinstein (D)	Appropriations (23 of 29 D)  Commerce; Environment; Foreign Relations  Appropriations, Energy; Intelligence; Judiciary; Rules	No  No  Yes
Texas A&M (College Station, 77843)	TX (17)	Rep. Charles Stenholm (D)  Sen. Phil Gramm (R)  Sen. Kay Bailey Hutchinson (R)	Agriculture (RMM)  Banking (RMM); Budget  Appropriations; Commerce; Rules	Yes  No  No
Minnesota (Minneapolis, 55455)	MN (5)	Rep. Martin Olav Sabo (D) Sen. Paul Wellstone (D)  Sen. Mark Dayton (D)	Appropriations (4 of 29 D)  Foreign Relations; Health; Indian Affairs; Small Business; Veterans' Affairs  Agriculture; Armed Services; Rules	No  Yes  Yes
Maryland (College Park, 20742)	MD (5)	Rep. Steny Hoyer (D)	Appropriations (5 of 29 D); House Administration (RMM)	No
Michigan State (East Lansing, 48823)	MI (8)	Rep. Mike Rogers (R)  Sen. Carl Levin (D)	Financial Services (36 of 37 R); Transportation (28 of 42 R)  Armed Services (Chair); Govt Affairs; Intelligence; Small	Yes  No

<sup>139</sup> All Congressional data from Michael Barone and David Cohen, *The Almanac of American Politics 2002*, Washington, D.C.: National Journal, 2001.

		Sen. Deborah Stabenow (D)	Business  Aging; Agriculture; Banking; Budget	Yes
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A third example of the new “foothold” for federal funding that DHS created was 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.<sup>140</sup> 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 its grant-making abilities have grown exponentially since the transfer. In FY 1998, the Office of Domestic Preparedness awarded \$12 million through a single grant program. As Table 3 indicates, by FY 2003, the office was in charge of meting out funds in seven separate programs, each ranging in total funding from \$19 million to \$1.5 billion.<sup>141</sup> 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.<sup>142</sup>

**Table 3: Office of Domestic Preparedness Grant Programs, 1998-2003**<sup>143</sup>

Fiscal Year	Name and Description of Program	Total Funding Provided in 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

<sup>140</sup> See Roberts, *supra* note \_\_, at \_\_.

<sup>141</sup> See *House Appropriators Add \$1 Billion to Homeland Security Request*, DEF. DAILY (June 24, 2003), avail. at 2003 WLNR 12779928.

<sup>142</sup> See *id.* (“Other allocations include \$.4 billion for the Office of Domestic Preparedness... an \$888 million increase above the administration’s request.”).

<sup>143</sup> U.S. Department of Homeland Security, Office of Domestic Preparedness Grant Program, [http://www.ojp.usdoj.gov/odp/grants\\_programs.htm](http://www.ojp.usdoj.gov/odp/grants_programs.htm). Last accessed January 14, 2006.

2002	State Domestic Preparedness Program -- Citizen Corps and CERT Grants (FEMA)	\$315 million  \$21 million
2003	CERT Guidance (FEMA) -- UASI Port Security Grant Program -- UASI Transit Security Grant Program -- UASI Grant Program I -- UASI Grant Program II -- State Homeland Security Grant Program -- State Homeland Security Grant Program II	\$19 million  \$75 million  \$65 million  \$96 million  \$506 million  \$566 million  \$1.5 billion

The staggering increases in domestic preparedness were just one example of how the creation of DHS constituted the largest government reorganization in a half-century. The primary stated rationale for creating a huge organization was coordination of the largely separate agencies and resources already relating to homeland security. The administration emphasized that too many separate pieces of the governmental apparatus had homeland security-related responsibilities, and they lacked the means to coordinate their activities into a larger whole. As we discussed previously, this argument suggested that there were too many gaps in missions and missed priorities. Centralizing all these separate units into a single organization, so the rationale goes, would allow for this type of coordination.

Reality turned out to be more complicated, in part because realizing gains from centralization and coordination is not so simple. The reason concerns two theoretical issues raised in Part II; namely, uncertainty about the effects of massive reorganization and the potential mis-match between the structure of congressional jurisdiction and oversight with the organization of the bureaucracy. We consider these in turn.

Uncertainty from reorganization arises from a range of causes, all of which call into doubt whether centralization qua DHS will have significantly positive effects. First, centralization creates a far more massive organization, implying that organizational leaders have much greater difficulty mastering the various pieces. This has been quite evident with the Department's very public misunderstanding of FEMA in the Hurricane Katrina disaster. Second, centralization creates greater monopolization, making for considerably less

competition among bureaus and agencies. Competition has several effects, including a greater emphasis on innovation and the provision of comparative yardsticks by organization leaders and outsiders can judge differential agency performance. Third, 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. Fourth, in addition, substantial short-run costs arise from centralization as agencies undergo the transactions costs of integrating personal, information, financial, management, and field systems.

Taken together, these four factors raise serious questions about whether centralization has had a net increase in the effective provision of homeland security. Yes, centralization yields greater potential for coordination, but the full extent of those benefits are profoundly uncertain (at best) even if one focuses exclusively on homeland security as it is traditionally understood, and come at a considerable cost.<sup>144</sup>

The second potential problem with sprawling reorganizations turns out to be a massive problem in practice with DHS; namely, the mismatch of congressional jurisdictions and bureaucratic centralization. Although the reorganization made massive changes in bureaucratic organization, Congress declined to engineer the parallel changes in congressional oversight. Legislators showed significant resistance to any bureaucratic reorganization that could have potentially resulted in the loss of their committee power, even in the aftermath of the crisis. This reluctance is evident in the amendments drafted by each of the twelve committees to which the initial bill was referred in the House. 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 amendment to transfer the Secret Service and the Federal Law Enforcement Training Center from Treasury to the DOJ.

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 Don Young (R-Alaska), 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.<sup>145</sup>

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<sup>144</sup> See generally Lewis, *supra* note \_\_, at \_\_ Regarding the application of this insight to intelligence issues, see Posner

<sup>145</sup> 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

Legislators could not be certain that the policy preferences reflected in these votes would be reflected in the final bill, particularly in the House where the leadership had centralized ultimate control of the bill with a Select Committee on Homeland Security (discussed further below). But the votes almost certainly represent committee legislators' bargaining positions in the process and thus, the votes shed light on legislators' preferred outcomes.

Legislators also showed significant resistance to any wholesale reorganization of committee jurisdiction at the time of the passage of the HSA. President Bush reportedly made some early attempts to encourage Congress to solve the jurisdictional issue.<sup>146</sup> But despite these pleas from the president, legislators, such as Young and James Sensenbrenner (R-WI), chair of the Judiciary Committee, made repeated statements opposing jurisdictional changes. As noted above, the language that finally passed in the HSA briefly states that each House of Congress should review its committee structure "in light of the reorganization of responsibilities within the executive branch by the establishment of the Department," but stops short of requiring that any such changes takes place.

Finally, Republican leadership created the special nine-member House Select Committee on Homeland Security in July 2002.<sup>147</sup> The committee was intended to streamline the committee markup process—all markups made by other committees were essentially filtered through the Select Committee, which had the final say on any revisions to the president's bill.<sup>148</sup> Because of its Select Committee status, the committee members were appointed by then-Speaker Dennis Hastert, who chose to populate the chairmanship and membership of the committee with a significant number of existing committee chairs. This decision had a two-fold effect: (1) the president's version of the HSA was ensured a mostly intact, albeit controversial, passage through the House and (2) major committee chairs were appeased that their jurisdictions would remain relatively unscathed.

Despite these dynamics, existing theories of bureaucratic creation do not adequately take account of intra-legislative bargaining over committee jurisdiction. By ignoring the delicate balance of Congressional maneuvering, other theories fail to provide an accurate picture of the creation of public bureaucracies and the shaping of legislative mandates.<sup>149</sup>

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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." (pg. IV)

<sup>146</sup> Lydia Adetunji, *Bush Warns of Homeland Security Turf Battles Ahead*, FIN. TIMES, June 8, 2002, accessed December 12, 2005.

<sup>147</sup> See *supra* note \_\_, at \_\_ (discussing the establishment of the select committee).

<sup>148</sup> 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, 2004), accessed January 1, 2006.

<sup>149</sup> See Kettl, *supra* note \_\_, at \_\_; Haynes, *supra* note \_\_, at \_\_.

The mismatch of bureaucratic and congressional organization implies that the structure of bureaucratic incentives created through congressional oversight work against the effects of centralization. This problem raises another variant on the congressional common pool problem. All members of Congress want to achieve significant homeland security. Yet members also want to control a piece of the bureaucracy so that they can claim credit for helping to steer a critical and visible policy<sup>150</sup>; and to influence bureaucratic provision of security and funds in ways that benefit their constituents, even at the costs of the overall program's goals. 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 to their constituents, these members are likely to use their oversight jurisdiction to impede coordination.

Because the creation of the DHS made massive changes to the bureaucracy while leaving the existing structure of congressional jurisdictions in place, congressional incentives work against the goals of centralization and coordination.<sup>151</sup> Indeed, the congressional forces push to maintain the status quo. The reason is that 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. Each agency, set of constituencies, and congressional overseers represented a separate subsystem. In particular, the existing set of congressional overseers served an old set of interests representing the older set of priorities. Leaving the old congressional jurisdictions intact allows representatives of the old, uncoordinated system to pull their agencies away from the coordination goals of the new system and to serve their old constituents' goals rather than to pursue new goals. To the extent that the reorganization sought to re-orient the missions of various agencies, the very separate set of jurisdictions works against this.

Finally, leaving the old, piece-meal set of congressional jurisdiction intact has another, wholly pragmatic effect working against the integration of all these functions: the new agency's leaders must report to all of the separate congressional committees. In a small scale reorganization, this might not be a problem, but one involving so many different agencies necessarily involved even more congressional subcommittees. Indeed, as we noted above, Susman reports that in the first six months of 2004, "DHS officials testified before 126 hearings, or about 1 ½ per day of legislative session" and that "Secretary Ridge estimated that he has been called to appear before 80 different committees and subcommittees."<sup>152</sup> Put simply, this byzantine structure of congressional oversight implies that far too much of the DHS leaders' time has been spent

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<sup>150</sup> See Fiorina, *Congress: Keystone*, *supra* note \_\_\_\_.

<sup>151</sup> Fiorina makes this point more generally. See Morris P. Fiorina, "Congressional Control of the Bureaucracy," in Dodd and Oppenheimer, *Congress Reconsidered* 2nd ed. (1981).

<sup>152</sup> See Susman, *supra* note \_\_\_\_, at 3.

preparing and giving testimony before Congress, and further implies far less time spent on departmental priorities.

The reorganization also served the majority party's electoral goals. 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 strategy seemed to work: those Democrats who opposed these pieces were painted as being against homeland security and several key members, most notably Senator Max Cleland, lost their reelection bids.<sup>153</sup>

Evidence from polling data further reinforce this notion. In 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. In a poll of registered voters, a July 2002 CBS News/New York Times poll 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.<sup>154</sup> 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.<sup>155</sup>

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<sup>153</sup> See, e.g., Josh Kraushaar, *Veteran Operatives*, CONG. DAILY (Feb. 2, 2006), avail. 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 JOURNAL-CONST. B1 (Feb. 2, 2005), avail. at 2005 WLNR 8625211. Kemper notes that:

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.

<sup>154</sup> Survey by CBS News/New York Times, October 27-October 31, 2002. Retrieved January 14, 2006 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut., [www.ropercenter.uconn.edu/ipoll.html](http://www.ropercenter.uconn.edu/ipoll.html).

<sup>155</sup> Survey by CBS News/New York Times, October 27-October 31, 2002. Retrieved January 14, 2006 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut., [www.ropercenter.uconn.edu/ipoll.html](http://www.ropercenter.uconn.edu/ipoll.html). Other polling organizations revealed similar patterns. In an October 2002 poll, NBC News/Wall Street Journal found that 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 Street Journal and Hart and Teeter Research Companies, October 18-October 21, 2002. Retrieved January 15, 2006 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut. <<http://www.ropercenter.uconn.edu/ipoll.html>>.

Similarly, in an October 2002 poll, NBC News/Wall Street Journal, respondents reported to be more likely to vote for the Republican candidate. In a series of polls of likely voters taken between September and immediately before the midterm election, respondents increasingly reported leaning more towards the Republican candidate than the Democratic one, with 51% preferring the Republican candidate and 45% preferring the Democratic candidate two days before the election. CNN/USA Today/Gallup Poll,

Additionally, the president's job approval ratings were still quite favorable as the midterm election neared—although the president's job approval rating hovered at 67% and 63%, respectively, in the last two Gallup polls before the midterm election, his approval jumped to 68% by November 8, 2002. These numbers clearly show that voters were responding 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.

### *B. The Political Influence of the President*

Our emphasis thus far has been on the Congress. The President also had major political influence over DHS design and performance. Perhaps the most important influence concerned the administration's plan to create a far more massive reorganization than those previously proposed reorganization plans. What accounts for the President not simply accepting the notion of reorganization but proposing one so much larger than any other?

One commonly-mentioned trope that can help provide an answer concerns what may be termed a "bandwagon" effect. To the extent that some form of reorganization was likely to pass, the President's public image was best served by being in favor of DHS rather than by opposing it and losing.<sup>156</sup> In this vein, the president also had an incentive to differentiate his plan from others so as to be able to claim credit for the reorganization.<sup>157</sup> Although this factor undoubtedly came into play, it can hardly explain why the President's alternative plan was so massive. The President could have gotten on the bandwagon with a reorganization that differed somewhat from those in Congress without being so massive.

Another idea concerns the President's need to reinforce the public's perceptions of his leadership abilities. From this perspective, perhaps the President sought to use the issue of homeland security to demonstrate his leadership qualities, and a major piece of this was guiding the nation's new legislative effort.<sup>158</sup> Undoubtedly this factor also colored the President's actions, but it also 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

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9/20/2002; 10/3/2002; 10/21/2002; 10/31/2002. Generic House Ballot Test Polls, Polling Report, <http://www.pollingreport.com/2002.htm>

<sup>156</sup> For a cogent review of the somewhat contradictory evidence providing limited support for modest bandwagon effects, see Richard Nadeau, Edouard Cloutier, and J.H. Guay, *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 Kettl, *supra* note \_\_, at \_\_, and Clarke, *supra* note \_\_, at \_\_.

<sup>157</sup> Ackerman and Elliott 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 Bruce A. Ackerman, Donald Elliott and John Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J. LAW, ECON. & ORG. 313 (1985).

<sup>158</sup> See Kettl, *supra* note \_\_; Brill, *supra* note \_\_.

failure hardly convey the dynamic leadership qualities that they presumably seek to project. Ironically, the White House's initial reluctance to proceed with a massive reorganization in the face of potentially strong legislative and bureaucratic opposition may have been spurred in part by concerns for safeguarding a compelling image of presidential leadership, unmarred by the potential calamity of the plan's defeat.<sup>159</sup> 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.

So why did the reorganization include so many different bureaucracies whose missions are only tangentially related to homeland security? Another piece of the puzzle will help guide us to the answer: 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 significant degree of uncertainty about the effects of reorganization combined with the lack of congressional jurisdiction led to questions over whether centralization would yield net benefits for homeland security. All this the administration understood in advance, and weighed against centralization.

Our thesis is that a major reason why DHS encompassed such a massive reorganization is that it furthers 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. It seems that legislators understood that the creation of the new department would almost certainly have consequences for domestic policy. First, legislators were clearly concerned about what the new 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, an agency tasked with disaster recovery, and the Coast Guard, an agency responsible for a wide array of maritime regulation, to DHS. The HSA ultimately included a provision in Title I of the act which explicitly requires DHS to respect the non-terrorism related functions of the so-called "legacy missions" of the transferred agencies. 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

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<sup>159</sup> Lyndon Johnson's plan to merge the Labor and Commerce Departments into a unified Department of Business and Labor is but one example of a failed reorganization plan that tarnished a president's public image. See I.M. Desteler, *Reorganization: When and How?* In *FEDERAL REORGANIZATION: WHAT HAVE WE LEARNED?* 114, 122 (Peter Szanton, ed. 1981)("[T]he Johnson proposal failed abysmally once it became public; important interests opposed it, and hardly anybody understood it except a handful of insiders and specialists. Congress never gave it serious attention").

its work, but still allowing the Secretary to make some reductions on non-homeland security work (Section 888).

These provisions in the final version of the HSA demonstrate the extent to which political actors recognized the domestic regulatory policy stakes of the creation of the Department.<sup>160</sup> As the committee report accompanying these provisions 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 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.<sup>161</sup>

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, tangential to homeland security, have any impact on homeland security, the administration values the diversion of resources out of the legacy mandates for which it disapproves.

To understand Bush's strategy, we begin with the Reagan Administration. A major policy goal of President Ronald Reagan was to "get the government off the backs of the American people"; that is, to reduce what many Republicans believed as big government and governmental waste. This included a wide range of governmental programs that they 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 he took office, he

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<sup>160</sup> See *supra* notes \_\_ (discussing provisions imposing monitoring requirements).

<sup>161</sup> U.S. Senate, Committee on Governmental Affairs, *Non-Homeland Security Mission Performance Act of 2003: Report of the Committee on Governmental Affairs, United States Senate, To Accompany S. 910*, U.S. GPO (Jul. 29, 2003). As noted in Part I, a bi-partisan group of legislators successfully added S. 910 to the HSA. These provisions created 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.

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.<sup>162</sup>

This strategy failed. Constituencies benefiting from the agency's regulation took the agencies to court in an attempt to get them to enforce the existing set of laws administered by the relevant agencies. The courts agreed and, absent agency proceedings that decided on a different enforcement strategy, forced them to continue administering the law as they had. Ann 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.<sup>163</sup>

Bush's goals were not the same as Reagan's, and he did not share the same ideological commitment to the market.<sup>164</sup> 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 could not work.

The policy reactions to 9/11 provided Bush with a unique opportunity to reduce a range of domestic policies that he disapproved. The new strategy sought to bring a wide range of agencies with domestic programs within the umbrella of the DHS. This umbrella had three separate pieces useful for 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 September 11, more than 50 percent of all coast guardsmen are now [in mid-

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<sup>162</sup> 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).

<sup>163</sup> See, e.g., Evan J. Ringquist, *Political Control and Policy Impact in EPA's Office of Water Quality*, 39 AM. J. POLI. 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).

<sup>164</sup> Indeed, Bush's commitment to social policy goals implied that he believed the government should pursue a wide range of other goals.

2002] focused on homeland security.”<sup>165</sup> 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 mission.”<sup>166</sup>

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. Were the agency 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 three percent of its resources is 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.

In short, the creation of DHS allowed Bush to transfer resources out of agency legacy mandates into new homeland security concerns. Notice that, because Bush does not value these legacy mandates, this statutory/ bureaucratic approach makes 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 that DHS was, to some extent, a presidential power-grab and, as such, 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 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.

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<sup>165</sup> George James, *A Line in the Water*, N.Y. TIMES, SEC. 14WC (MAY 26, 2002), AVAIL. AT 2002 WLNR 2065132.

<sup>166</sup> *See id.*

In addition to the legislation's language, floor statements reveal legislators' weariness of conferring more power on the president. Senator Robert Byrd (D-WV) 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..."<sup>167</sup> This comment is representative of the deep distrust Congress felt over what they perceived as a presidential grab for increased authority.

Legislators' efforts to control presidential power indicate the extent to which the President viewed the fight over DHS not only as one over the appropriate degree of centralization that should govern homeland security policy, but over the extent of direct presidential control over the regulatory, bureaucratic, and legal functions that would be vested in the new department. Although legislative responses limited how much power the President achieved through the HSA, its creation almost certainly 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 Department 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 served the same purpose of increasing executive power. By virtue of being placed within DHS, the DHS hierarchy could make it clear to the devoted and highly skilled bureaucrats specializing in the legacy mandates that they were no longer the agency's priority, and therefore were less likely to be promoted into the agency's senior management. All this meant that these bureaucrats would be treated less well, and would be more likely to leave.<sup>168</sup> At the very least, the DHS umbrella gave Bush officials and agency leaders opposed to the agency's legacy mandate additional tools with which to sabotage the agency's ability to perform these mandates.<sup>169</sup>

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<sup>167</sup> *Congressional Record*, September 3, 2002 (Senate), pg. S0846.

<sup>168</sup> See, e.g., R.G. Edmonson, *DHS Moving Ahead After Port Worker ID Delays*, J. COMMERCE (May 17, 2006), avail. 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 13 (April 3, 2006) avail. at 2006 WLNR 5395365 ("More turnover rattled the Department of Homeland Security..."); Spencer S. Hsu, *Weaknesses in Nation's Emergency Preparedness Exposed Yet Again by Katrina*, WASHINGTON POST WP-Bus (Oct. 15, 2005) avail. at 2005 WLNR 16732955 ("Personnel turnover, constantly changing priorities and splicit responsibilities among federal agencies... sap the nation's ability..."); *Homeland Security Struggles with 'Extraordinary' Turnover*, EXTREME TECH.COM (June 10, 2005) avail. at 2005 WLNR 9519206; Chris Cillizza, *Bills Scold Executive Branch*, ROLL CALL (May 25, 2005) avail. 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.").

<sup>169</sup> Why was the Department not even larger still? As with past reorganization efforts, the White House was likely to best achieving 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

The disastrous performance of DHS and FEMA in the aftermath of the August 2005 Hurricane Katrina is a natural consequence of the dynamics we have addressed in this paper. As the legacy missions were downgraded, many of experienced workers left the agency. Both a congressional committee and the White House issued reports detailing the mistakes made during the recovery efforts following the hurricane. The reports, which were 520 and 228 pages, respectively, show how FEMA was unprepared for an emergency on the scale of Katrina. The congressional report blamed both Chertoff and Michael Brown, then-director of FEMA, for failing to coordinate the federal response. Both DHS and FEMA were indicted for “lack[ing] adequate trained and experienced staff.”<sup>170</sup> The White House report goes so far as to suggest that certain disaster recovery responsibilities be transferred out of DHS, such as having DOJ oversee law enforcement and having HHS take over distributing aid to victims.<sup>171</sup>

### C. *The Role of the Post-9/11 Crisis*

The crisis following 9/11 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 his rapidly declining public approval rating. The weekend before the 9/11 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%.<sup>172</sup> But this moment of popularity was relatively short-lived, and Bush’s approval rating steadily dropped over the next eight months to a post-9/11 low of 70% immediately 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—even after the passage of the USA Patriot Act, the creation of the TSA, the invasion of Afghanistan and a spate of executive actions involving terrorist financing, law enforcement and intelligence operations. The crisis, therefore, allowed Bush to present himself as a compelling leader with ideas for enhancing domestic security and prepared to make difficult decisions. To this end, he took visible command of the policymaking process and shepherded the various legislation through the process, legislation that had clearly – in a public sense – 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. As the centralization plans in

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functions were placed in the department; (2) the hidden domestic policy implications of the reorganization might become starkly apparent to the public; and (3) 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).

<sup>170</sup> Executive Summary of Findings, Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, [http://katrina.house.gov/full\\_katrina\\_report.htm](http://katrina.house.gov/full_katrina_report.htm) (Last accessed March 21, 2006).

<sup>171</sup> Amanda Ripley, *Speed-Read: The White House Katrina Report*, TIME (February 23, 2006) avail. at <http://www.time.com/time/nation/article/0,8599,1167076,00.html> (last accessed March 21, 2006).

<sup>172</sup> Frank Newport, *The American Public Reacts*, THE GALLUP POLL NEWS SERVICE, (September 24, 2001), avail. at [www.gallup.org](http://www.gallup.org). Last accessed January 14, 2006.

Congress were gaining momentum, the President stepped boldly into the political thicket, turning an about face on his previous opposition to centralization and taking command of these efforts with a plan that far out-paced those in Congress as to the scope and breadth of reorganization.

Perhaps the most important aspect of a crisis is that the attentive public demanded quick action. Especially in a national security crisis where the public feels vulnerable, quick action is needed to assure citizens that they are not at risk or that their risk has been significantly lowered. Perhaps most significantly, the public cares deeply about terrorism and homeland security issues. Even before 9/11, Gallup reported that a significant proportion of Americans were concerned about being victims of a terrorist attack. In a poll in April 2000, 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.<sup>173</sup> 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 U.S.<sup>174</sup> In the weeks following the attacks, as might be expected, the number of respondents concerned about terrorism increased, with 48% 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.<sup>175</sup>

Moreover, the evidence suggests that the public was broadly supportive of the president's plan. Although only limited public opinion data are available regarding the creation of DHS prior to the announcement of President Bush's endorsement of DHS on June 7, 2002, Americans generally seemed to support the idea of a cabinet-level Department of Homeland Security. 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.<sup>176</sup> Additionally, a January 31, 2002 poll found that 84% of respondents approved of Bush's request to spend \$38 billion on homeland security.<sup>177</sup> After President Bush made the June 7, 2002 announcement in which he endorsed the creation of DHS, public opinion reflected a belief that DHS was a good idea. In a typical poll, Gallup found that 72% of respondents approved of the creation of DHS.<sup>178</sup> The widespread popularity of the idea of DHS clearly show the extent of a potential position-taking benefit that legislators and the president could achieve by supporting the creation of DHS.

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<sup>173</sup> *Terrorist Attacks: Public Opinion from April 1995-January 2001*, THE GALLUP POLL NEW SERVICE, (September 11, 2001), avail. at [www.gallup.org](http://www.gallup.org). Last accessed January 14, 2006.

<sup>174</sup> *Id.*

<sup>175</sup> Gallup Poll, September 20-21, 2001. [www.gallup.com](http://www.gallup.com). Last accessed January 14, 2006.

<sup>176</sup> Survey by Time, Cable News Network and Harris Interactive, September 27, 2001. Retrieved January 14, 2006 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut. [www.ropercenter.uconn.edu/ipoll.html](http://www.ropercenter.uconn.edu/ipoll.html)

<sup>177</sup> Survey by The Los Angeles Times, January 31, 2002. Retrieved January 14, 2006 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut. [www.ropercenter.uconn.edu/ipoll.html](http://www.ropercenter.uconn.edu/ipoll.html)

<sup>178</sup> Frank Newport, *Americans Approve of Proposed Department of Homeland Security*, THE GALLUP POLL NEWS SERVICE (June 10, 2002) avail. at [www.gallup.org](http://www.gallup.org). Last accessed January 14, 2006

As legislators and the President pursued the creation of the massive department, the political environment was affected by the public's inability to assess the intricacies of the plan. This absence of public capacity had three separate effects on crisis policymaking. First, citizen demand for policies to make them feel secure meant that political officials preferred quick action that is less well-considered and well-designed to slower action that is 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 details, put legislators seeking better plans (or who oppose the plans) at a political disadvantage. Opposition most ostensibly 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.<sup>179</sup>

All three effects appeared to have an impact on homeland security policymaking. As we have emphasized, the uncertainty associated with the centralization plan meant that no one knew at the outset whether such a massive reorganization would serve goals of greater coordination. The public inattentive to details allowed the president to create a massive reorganization that served other domestic policy interests. Opponents who sought to improve the administration's plan just prior to the 2002 congressional elections fared poorly in those elections. This caused the opposition to cave as the new congressional session began.

#### *D. Budget Politics and Homeland Security*

Evidence from the budgets of transferred agencies is consistent with our hypothesis suggesting that the creation of DHS was an attempt to expand executive authority. First, 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

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<sup>179</sup> 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 and David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 AM. J. POL. SCI. 951 (2001) (the use of cognitive short-cuts, or heuristics *increase* the probability of a correct vote by political experts but *decrease* the probability of a correct vote by novices). But see Arthur Lupia and Mathew 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, Mathew D. McCubbins, and Samuel Popkin, eds. 2000) (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.

component parts.<sup>180</sup> We argue that this push for budget-neutrality implies that the Administration had ulterior motives for the creation of DHS; namely, that by giving new homeland security mandates to the agencies within DHS and by not giving the agencies any new funding to perform these mandates, the president forced resources out of legacy regulatory functions of the agencies transferred to DHS. The evidence also reveals that the growth in DHS funding has been primarily in the grant-making programs, not in the sub-agencies.

President Bush was not able to keep his “revenue-neutrality” pledge. While there have been some increases in the budgets of the subcomponents, the increases do not reveal an order of magnitude change in available resources for administrative and regulatory activity. As Table 4 shows, agencies with domestic policy/regulatory functions such as APHIS, the Coast Guard, Customs, and FEMA may have gotten more funding, but almost certainly not enough to let them continue pre-existing levels of activity as well as assuming the new security-related (or, in the case of FEMA, terrorism mitigation-related) functions. The constraints on funding suggest that, even if agencies with mixed missions received new funding (and despite some of the language in the HSA), the agencies placed under DHS were likely to face pressures to make trade-offs in carrying out their missions.

**Table 4: Budgets of Selected DHS Sub-Agencies, FY2000-2006<sup>181</sup>**

	FY2000	FY2001	FY2002	FY2003	FY2004	FY2005
APHIS (millions)	559	634	880	1145	813	976
Coast Guard (billions)	--	3.3	3.8	4.9	4.7	5.2
Customs (billions)	1.8	2.4	3.1	2.8	--	--
FEMA (billions)	--	2.4	3.1	6.6	4.7	5.0
INS (billions)	4.3	4.9	5.6	6.3	3.7	3.9

An even more revealing picture of resource allocation in the new department emerges when we focus on the Coast Guard – one of the largest entities within the new department and one with particularly important domestic regulatory functions. In Figure 1, it is clear that several major programs of the

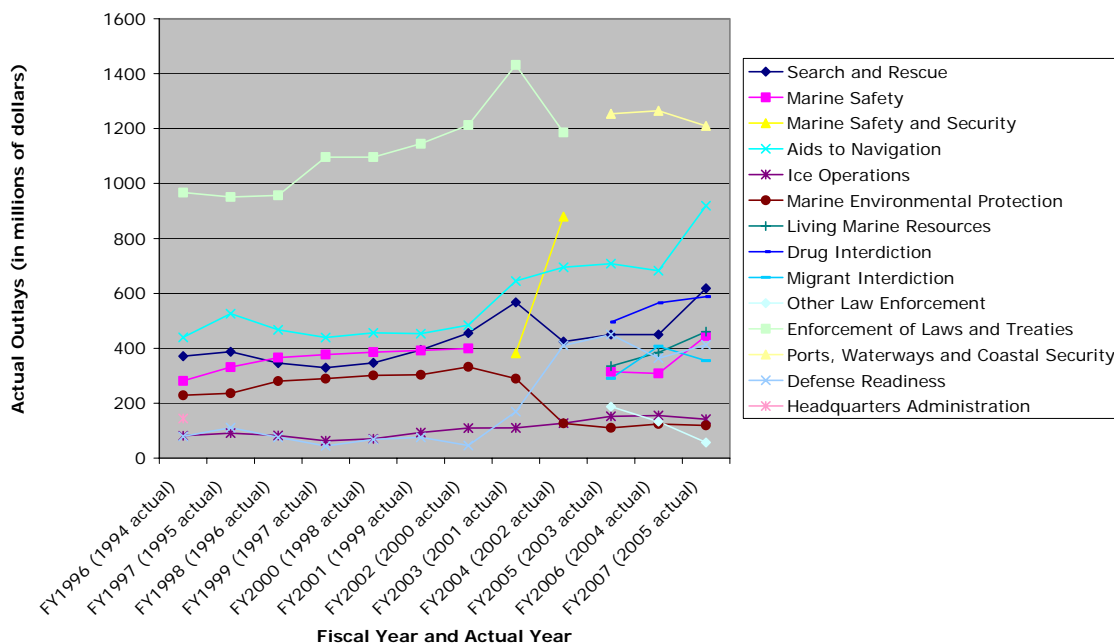
<sup>180</sup> See *Take Time on Homeland Plan*, HARTFORD COURANT A8 (June 20, 2002) (“Mr. Bush says his proposal will be revenue-neutral...”); *Looking for Fiscal Patriots*, MILWAUKEE JOURNAL-SENTINEL 10 (June 17, 2002) avail. at 2002 WLNR 3684322 (“Mr. Bush’s proposed Department of Homeland Security would be revenue neutral, the president’s aides insist...”).

<sup>181</sup> Figures drawn from the official budget figures of separate agencies, drawn either from their websites or from OMB. Details on file with author.

Coast Guard experienced a sharp decline in FY2003; most notably, these programs include Marine Environmental Protection and Search and Rescue, both of which were on a fairly strong upward budgetary trajectory from FY1996 onward. On the other hand, programs presumably focused on security-related issues, like Defense Readiness and Marine Safety and Security experienced a dramatic increase in the same period. The addition of new security-oriented responsibilities has been a source of controversy since DHS was created. In a debate in about the FY2006 Coast Guard reauthorization, Howard Coble, R-N.C., commented “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.”<sup>182</sup>

**Figure 1**

**Coast Guard Actual Outlays FY1996-2007  
ALL PROGRAMS**



**E. Conclusions**

Our theoretical framework provides answers to the puzzles stated at the outset. Consider the first two puzzles, Why is DHS so big and why does it include so many agencies whose mission is tangentially related to homeland security? Part of the answer is that Bush sought to take the lead in providing homeland security, defining his presidency around it. But he also used the DHS umbrella as a means for disguising a wide-ranging transformation of domestic policies. Forcing them under the homeland security umbrella had two separate, reinforcing effects. First, as explained, the reorganization forced agencies to

<sup>182</sup> Kathleen Hunter, “House Adopts Revision to Coast Guard Reauthorization,” CQ TODAY June 26, 2006.

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. Bush valued this transformation, not necessarily because this improved homeland security, but because this transforms a variety of domestic programs. Finally, consider the third puzzle: why did Bush insist that this policy be budget neutral despite the fact that he's 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.

In short, 9/11 provided Bush with a unique opportunity to transform his relatively lackluster presidency into a popular one with focus. It also allowed him to transform many of the national government's domestic policy priorities. Creating an umbrella organizational structure in DHS and moving a great many domestic agencies within it, allowed the administration to transfer resources, personnel and priorities away from the agencies' legacy mandates into various homeland security concerns. Clearly, some of the agencies now make significant contributions to homeland security. But many, including FEMA, are likely to end up with less ability to serve their original purpose. These observations about the likely domestic policy impacts of the creation of DHS suggest that legal changes impacting security policy should not be understood in a vacuum: they must be understood politicians' incentives to affect domestic regulatory policy as well. This view contrasts with a number of commonly-accepted positions take by legal scholars and political scientists emphasizing what could be called "security-exceptionalism," where security is assumed to be a unique domain that is conceptually separate from domestic regulatory policy.<sup>183</sup>

Although Lieberman's proposal was nearly as large in scope as Bush's, their proposals differed in important ways. First, part of Lieberman's motivation was power grab – to enhance the authority of a relatively minor committee, Government Affairs, of which he was ranking minority member and likely to become chair if the Democrats were to recapture the Senate. In other words, the extensive scope of both proposals had political motivations rather than prescriptive rationales for homeland security. Second, Bush's proposal was wider in scope. Third, Bush's proposal had more elements, including weakening of civil service and provisions to appoint Assistant Secretaries without Senate Confirmation. Finally, and perhaps key, Bush's sought to impose budgetary restrictions on agencies so as to force agencies to substitute homeland security efforts for their legacy mandates.

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<sup>183</sup> See, e.g., Zegart, *supra* note \_\_, at \_\_ (emphasizing how the security context is allegedly "different" from the domestic regulatory context; Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 S.M.U. L. REV. 205, 207 (2000)(emphasizing how security-related policies are treated as distinct in the context of judicial and legal debates, and how "national security has been a 'jurispathic' element in litigation that kills debates that would rage in other areas.").

Even if the focus remains on security policy as it is traditionally understood, we find no evidence that the existence of a crisis increasing the public salience of security created pressure among politicians to forge a more prescriptively effective bureaucracy. The uncertainty associated with the massive reorganization implies that it is not obvious that it will serve the administration's stated goals of centralized coordination of the national government's disparate homeland security resources. It is clear, however, that politics in many ways hinders this objective. First, the distributive tendency has distorted DHS's spending priorities away from high risk targets to areas of significantly lower priority. Second, the lack of reorganization of congressional oversight jurisdictions works to preserve the non-coordination status quo, directly hindering the goal of centralization and coordination. Third, the partisan goals added some extreme measures relatively independent of the goal of homeland security. Fourth, the DHS structure represents a clever domestic political innovation, allowing Bush to attain goals in ways that Reagan failed. Reagan's direct attempt to circumvent or ignore domestic regulatory laws largely ended in disaster.<sup>184</sup> 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.

The crisis aspect of policymaking pushed for quicker solutions, making it likely that plans for a new department were less well-designed from a prescriptive perspective than they might have been had the legislative process moved more slowly.<sup>185</sup> The public demanded "action now." In combination with the public's inability to analyze details, the demand for quick action provided the Bush administration with the opportunity to use this new policy to further its domestic policy agenda.

A final way to understand the logic of our thesis is to contrast it with an alternative administrative approach. Suppose 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

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<sup>184</sup> See *supra* notes \_\_\_ (discussing the limits of President Reagan's capacity to dilute regulatory enforcement).

<sup>185</sup> For instance, legislators would almost certainly have spent additional time considering some of the shortcomings in the structure of the department that eventually materialized. These involved, among other problems, the absence of any substantial secretarial staff to oversee the functions of the department in its first year; uncertainty about the lines of communication between key agency sub-units, such as FEMA, and the White House; how the Department would measure the "enhanced coordination" that was sought; and how (or, indeed, whether) such enhanced coordination for terrorism-related prevention, response, and investigation could be achieved in a manner that minimized the impact on the agency's "legacy" mandates. For examples of how these concerns actually affected the operation of the department, see *supra* notes \_\_\_ (discussing turnover and management problems). See also DHS Inspector General Report, *supra* note \_\_\_. The argument is not that legislators would have resolved these prescriptive concerns with the benefit of additional time. Rather, given greater time to consider the proposal, at least some legislators would have had an incentive to promote greater consideration of prescriptive concerns: (a) legislators opposing the reorganization (and therefore searching for compelling arguments against it); and (b) small clusters of legislators for whom prescriptive concerns would matter if they did not conflict with more direct political goals.

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 EIS's, HSIS's are likely to have had mixed implications. To be done seriously, they would take considerable effort. But 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 substitute a considerable portion of resources and personal away from their legacy mandates.

#### IV. IMPLICATIONS

We have directed most of our attention thus far to the interplay of political forces shaping the structure of DHS. By explaining the political incentives that played a role in the legislation creating the new agency, we have illustrated how agency reorganizations can have indirect effects on regulatory policies not directly related to the immediate area of public concern that triggered interest in reorganization. Crises, meanwhile, change the scope of political bargains that can be made to restructure bureaucracies and enhance executive power. What they fail to do in the absence of extraordinary circumstances, however, is to coax politicians towards building a bureaucratic structure to discharge legal responsibilities in a prescriptively effective manner, where effectiveness is defined as achieving politicians' publicly-professed goals.<sup>186</sup>

In the Part that follows, we discuss two extensions of the argument. First, we discuss some tentative prescriptive observations raising questions about the traditional legal rationales for judicial deference to agency legal interpretations. We suggest, in particular, that our account of the creation of DHS ought to give observers pause before they reflexively accept the proposition that widely-held goals will be advanced through such deference. Second, we describe how reorganizations appear to constitute an under-appreciated technique through which executive authorities enhance control of bureaucratic functions.

##### A. *Some Tentative Prescriptive Observations.*

Most discussions of agency reorganization implicitly assume that there is some prescriptively attractive combination of decisions to reorganize, scope of reorganization, and degree of centralization in legislative oversight. Discussions of homeland security are no exception. Our account reveals these implicit assumptions to be strikingly cavalier. Far less is known about the prescriptive merits of particular reorganization strategies – both within the context of homeland security and beyond it. Admittedly, careful observation of the

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<sup>186</sup> In the context of the creation of DHS, those goals focused most emphatically on enhancing the federal government's capacity to prevent, respond to, and recover from terrorist attacks. As noted above, the legislation added to these goals that of adequately discharging legacy missions involving natural disaster response and recovery, regulatory activity (particularly involving marine safety and environmental regulation, immigration, and trade-related rules), and non-terrorism related law enforcement.

subtleties of public organizations reveals certain changes in agency structure that could make it easier for agencies to carry out their ostensible goals. In fact, we have offered a number of examples ranging from consumer product safety to coal regulation where structural changes could improve the fit between an agency's asserted goals and its capacity to perform its mission. But even if there were a nearly ideal package of attributes governing a reorganization of some key government function – a package including elements such as the decision whether to reorganize at all, the scope of reorganization, and the degree of centralization sought in legislative oversight – our account also raises the question of whether the political process leaves much room for prescriptive concerns to matter.

To this question, our answer is “generally, no.” There may be exceptions, but the burden ought to be on those who want to make a case that those exceptions apply. Otherwise political considerations will drive some of the aforementioned decisions, potentially pushing the bureaucracy in highly problematic directions. Perhaps public skepticism about arguments regarding the politics of structure can gradually raise the demands on politicians making unsupported arguments about structural changes.

Our skepticism about the prescriptive merits of bureaucratic reorganizations leads us to question the most frequently-asserted justifications for courts to defer to agency legal interpretations. Under the familiar *Chevron* doctrine, courts tend to defer to “reasonable” agency interpretations of law where a statute does not explicitly resolve the question before a court.<sup>187</sup> A common justification for deferring to agency interpretations – indeed, one that even antedates *Chevron* – focuses on agency expertise.<sup>188</sup>

Our case study, rooted in a large literature on the political control of agencies, raises questions about that rationale. 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, it seems that the case for deferring to expertise is stronger when the interpretation itself were 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 the Department of Homeland Security). It is ironic that, aside from the difficulty of discerning an interpretation's intellectual author, at least one prominent scholarly account argues for the opposite approach (i.e., affording greater deference to agency interpretations originating with an agency head). We are agnostic about the merits of deference to sprawling agencies created in the midst of a crisis. Future work should carefully investigate the practical consequences of changing existing standards of judicial deference in cases involving

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<sup>187</sup> See *Chevron v NRDC*, 467 U.S. 837 (1984)(*Chevron*). For some cogent examples of the prescriptive scholarship on the scope of the *Chevron* doctrine, see Cass R. Sunstein, *Chevron Step 0*, 92 VA. L. REV. 187 (2006); Thomas W. Merrill and Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001).

<sup>188</sup> See, e.g., Sunstein, *Beyond Marbury*, *supra* note \_\_, at \_\_ (suggesting that “*Chevron* reflects a salutary appreciation of the fact that the executive is in the best position to make the judgments of policy and principle on which resolution of statutory ambiguities often depends”).

administrative action. We simply point out that expertise is an unpersuasive intellectual basis on which to justify deference to the statutory interpretation decisions of a department whose creation was so thoroughly a function of politics rather than fidelity to some obviously persuasive prescriptive standard.

Although the expertise rationale has remained a constant refrain in courts' justification of deference to agencies, two other rationales are even more intimately associated with the *Chevron* doctrine. One holds that deference to agency interpretation is justified because of the democratic accountability of the executive branch, which is presumed to respond to the public's priorities regarding particular regulatory policies.<sup>189</sup> Another suggests that statutory ambiguities tend to suggest explicit congressional decisions to bestow on the agency the power to interpret the law and make policy judgments about how best to interpret its statutory authority. Although both of these rationales are somewhat different from the invocation of expertise, our account also suggests that these rationales should be treated with skepticism.

The reference to accountability suggests some preference among the mass public for lodging interpretive power in a particular sort of bureaucracy (and, through it, in the Administration). Yet ironically, the evidence suggests that the public supported the creation of DHS because it sought a more prescriptively effective way of organizing the bureaucratic units with security-related functions. Our analysis suggests that this rationale alone fails to explain not only the size and scope of DHS, but the underlying decision to create it. Moreover, the logic of 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.<sup>190</sup> The opposite seems to have occurred in the case of DHS – impacts on regulatory policy, ranging from environmental enforcement to trade-policy occurred without the President or his Administration taking explicit responsibility for them.

Nor is heightened deference easy to justify by treating ambiguous statutes as explicit legislative delegations of authority to an agency, at least not in the context of this agency. Although the Homeland Security Act vests all the authority of the Department's bureaucratic sub-components in the Secretary, nothing in the sequence of events resulting in the passage of the legislation suggests that legislators sought to vest substantial law-interpreting authority in the Department. Their goal, instead, was to pass legislation that would respond to an intense demand from the public in the aftermath of a crisis.

The preceding arguments do not suggest, necessarily, that courts should assert greater control over legal interpretations. The question of whether, and if so, when, courts are prescriptively superior interpreters compared to agencies is a complex one.<sup>191</sup> Indeed, it is a choice that is likely to depend heavily on the

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<sup>189</sup> See *Chevron*, 467 U.S. at \_\_\_. See also *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43-44 (1983)(State Farm).

<sup>190</sup> Cf. *State Farm*, 463 U.S. at \_\_\_.

<sup>191</sup> Cf. Cass R. Sunstein and Adrian Vermeule, *Interpretation and Institutions* 101 MICH. L. REV. 885 (2003).

context, a fact that complicates the project of those who prefer across-the-board rules to definitively settle the question of when courts should defer to agency legal interpretations. Our point is this: 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. The relative merits of courts and agencies as interpreters in such a world depends on empirical guesses about how courts interpret the law compared to agencies, the potential legislative responses to different regimes, and the normative goals that one seeks to achieve. Given the highly abstract nature of many discussions regarding the merits of judicial deference to agency legal interpretations, we suspect that it is particularly important to occasionally refocus such discussion on the political realities that determine how agencies are actually designed, and how they are likely to function in the real world.

*b. Different Contexts.*

Although the primary focus of this project is to explain the largest bureaucratic reorganization of federal legal responsibilities in two generations, our theory has broader implications. In particular, our theory suggests that government reorganizations can be tools for politicians, particularly presidents, to enhance their political control of the bureaucracy and to reshape how the public views the core missions of particular organizational sub-units. 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 ultimately resulted in today’s Department of Health and Human Services), and the creation of the Department of Energy under Carter.

In 1939, President Roosevelt finally secured from Congress the 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 forerunner of the sprawling Department of Health, Education, and Welfare (now two separate cabinet agencies), the reorganization that created the FSA appears to have served multiple functions. 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.<sup>192</sup> In effect, the agency served to market (with Roosevelt’s help) its programs as critical elements of a national security

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<sup>192</sup> The Roosevelt Administration’s determination to emphasize national security aspects of the FSA are 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 Mariano-Florentino Cuéllar, *Securing Bureaucratic Institutions: The Federal Security Agency and the Political Design of Legal Mandates, 1939-1953*, Unpublished Working Paper (2006)(on file with author). [CITE Roosevelt reorganization message mentioning the essential nature of the reorganization to bolster the nation’s national security]. See also [CITE FSA Services document, including introductory language focused on national security along with description of war-related functions for the agency].

strategy 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.<sup>193</sup> Second, the creation of the FSA allowed the newly created, centralized supervisory staff to function as an additional layer of political appointees supplementing the meager White House staff.<sup>194</sup> The FSA's fate showcases presidential control sought through agency reorganization, some interest in shaping public perceptions of the core goals of the affected agencies; distinguishing it from the current example – Roosevelt appeared to 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.

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 department is partly by politicians' desire for position-taking credit, this argument does not explain the legal powers that the president sought to give the new department. In fact, the Carter Administration 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. This provoked opposition in Congress, resulting in a compromise that denied the President everything he sought but nonetheless enhanced his legal control over regulating energy prices.<sup>195</sup> Second, Carter incorporated a broad range of agencies with national security responsibilities in addition to agencies focused on the matters more directly associated with domestic energy concerns.<sup>196</sup> By moving these agencies, such as the National Laboratory System, into an executive department with a new mission and a layer of political appointees, the President enhanced his influence over these agencies. In particular, the extent of presidential influence on these organizational sub-units through the creation of the new department was almost

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<sup>193</sup> See Cuéllar, *supra* note \_\_. Indeed, 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 administering the internment camps housing Japanese Americans. See [CITE National Archives administrative history summary for the FSA].

<sup>194</sup> See Cuéllar, *supra* note \_\_. See also [CITE some other sources mentioning the FSA]. 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* (1997).

<sup>195</sup> See [CITE newspaper coverage from when the President was fighting for the creation of the Department of Energy].

<sup>196</sup> See [CITE examples of sources discussing the dual functions of agencies now in Energy that previously were almost exclusively focused on national security, such as the national labs].

certainly greater than what the president could have accomplished had the sub-units remained in the notoriously insular national security bureaucracy.<sup>197</sup>

These further applications suggest that executive efforts to insist on “presidential administration” of public bureaucracies long predate recent Administrations, as do legislative efforts to rein in such moves. Our tentative conclusion regarding the value of reorganizations to presidents seeking to enhance bureaucratic control contrasts with a perspective advanced in some quarters of the literature, suggesting that presidential efforts to control the bureaucracy began in earnest during the Clinton Administration.<sup>198</sup>

### CONCLUSION

This article used the evolution of homeland security policy after September 11 as a case study to demonstrate the impact of the politics of structure on the design of legal mandates. Despite significant previous work on bureaucracy and security, few scholars have developed 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 of the development of the new Department of Homeland Security so far have failed to fully address crucial questions, such as why the president switched from opposition to support of the 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, our theory begins with four simple premises that are essential to understanding the law and politics of bureaucracy:

- (1) Other things being equal, politicians seek opportunities to control bureaucratic resources along with opportunities to signal positions that are appealing to the public, and parties differ in their substantive policy agendas.
- (2) The prescriptive impact of bureaucratic reorganizations on the implementation of complex mandates like promoting security is highly uncertain. This holds for complex reorganizations designed to enhance coordination.

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<sup>197</sup> See [CITE some account of the history and impact of the creation of the Department of Energy]. Cf. Lewis, *supra* note \_\_, at \_\_ (discussing the creation of the National Nuclear Security Agency, emphasizing how the insulation of some security-related functions at the department 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).

<sup>198</sup> Our view of how presidents can use reorganizations to control the bureaucracy makes us skeptical of the conclusion in some recent scholarship suggesting that presidential control of the bureaucracy is a relatively recent phenomenon. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (“Presidential Administration” began in earnest in the Clinton Administration, and its major elements involve credit-claiming and direct control).

(3) As the responses to drug scares, energy shortages, and the September 11 attacks demonstrate, large chunks of the public can become broadly interested in seeing structural changes even while they remain naïve about the details.

(4) Even *within* parties, legislators have divergent interests depending on their committee assignments and seniority.

While none of these presumptions are controversial, taken together they hold a number of surprisingly under-appreciated descriptive implications for law and politics. Theories of bureaucracy, for example, should more explicitly incorporate the possibility that crises can engage the public with an issue enough to make public reactions an important factor in institutional design. Leading theoretical work on the bureaucracy rarely addresses this. Nor do existing theories fully attend to institutional subtleties that can become warped in the midst of a crisis. While we know agency structure can affect regulatory functions, crises create new opportunities for realigning those functions to give more control to political appointees. And legislative bargaining can involve considerable intra-branch conflict as well as inter-branch and partisan conflict.

The aftershocks from the Administration's decision to pursue reorganization make plain how all of this of this matters in the real world. The Administration's position was inconsistent with its previous views. Even leaving this aside, we find that the most compelling arguments offered by the Administration and other supporters of consolidation are incoherent at worst, or at least vastly oversimplified and unconvincing at best. This is not surprising. Existing bureaucratic alignments are themselves a function of political pressure and path dependence. Far from suggesting that a radically new institutional design is bound to be superior, these pre-existing political legacies only highlight the forces inevitably at play during the creation of DHS. As key advisors within the Bush Administration learned early on, such a creation entailed a risk that policies would actually get worse.

In fact, 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 – are likely to be most influenced by political circumstances. Those circumstances tend to diminish or even suppress the relevance of prescriptive concerns. Rare circumstances may help bring about occasional exceptions. In some policy domains, such those involving benefit payments to retirees, results may be so easy to observe that electoral constraints may force politicians to care about whether an agency is well-organized to meet its stated goals. In others, an agency may find itself with a unique degree of autonomy – allowing it to leverage the mass public's reactions during a crisis – and there may happen to be some alignment between the agenda of the agency's leaders and what's prescriptively attractive. They also raise some questions about some of the canonical justifications – grounded in expertise, congressional delegation, and accountability through presidential control – for judicial deference to agency legal interpretations. Although these questions do not augur for rejection of the 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.

In short, though principle and intuition suggest that prescriptive concerns about how to organize the government functions and legal authorities should be strongest in the midst of a crisis, our analysis shows that it is otherwise in practice. If prescriptive concerns are to matter, politicians must encounter the sort of counterweight that rarely emerges in the political game over bureaucratic structure. That game may play out differently when bureaucratic actors forge a rare degree of autonomy and seek to use that autonomy in prescriptively-attractive ways, or when an electorate shows a degree of uncommon sophistication that translates leads it to resist naïve arguments about the benefits of reorganization. Such circumstances would be unusual at best, and probably even less likely in the midst of a crisis. But without them, a crisis bureaucracy is bound to be a bureaucracy in crisis.