

# Report for Congress

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## **Homeland Security: Management Positions for the Proposed Department**

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# Homeland Security: Management Positions for the Proposed Department

## **Summary**

Congress is currently considering proposals, H.R. 5005 and S. 2452, to create an executive department that will address the national need for homeland security. The proposals would transfer organizational units, functions, and personnel from several departments and agencies.

A hierarchy of positions would be established to manage the department and its activities. Some would be newly created, and some would be drawn from those transferring agencies. This report analyzes the proposals in light of the provisions for appointment of that managerial hierarchy. It identifies the positions to be created and the apparent effect on current positions in the transferring agencies.

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# Homeland Security: Management Positions for the Proposed Department

## Introduction

The principal House and Senate proposals under consideration by Congress for organizing to prevent and respond to domestic terrorism call for the creation of a new department in the federal executive branch.<sup>1</sup> H.R. 5005,<sup>2</sup> passed by the House of Representatives, would create a Department of Homeland Security. S. 2452<sup>3</sup> would create a Department of National Homeland Security. Each proposal calls for a new structure, rather than the reorganizing of an existing administrative entity, and each includes statutory provisions for staffing the top echelons of management within the new organization.

The Constitution and existing statutes provide a discernable framework for departmental appointments and pay levels, which is described below. Following a discussion of this framework, this report identifies the provisions of the House and Senate proposals that would create positions in the new department, and it provides an analysis of the provisions within this context. It also discusses the current appointment requirements for the administrative management of the eight largest units slated for transfer and how those positions would be treated under these

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<sup>1</sup>For overview of the departmental proposals, see “Department of Homeland Security,” by Harold C. Relyea, in the *CRS Electronic Briefing Book on Terrorism*, available at [<http://www.congress.gov/brbk/html/ebter220.html>]; and CRS Issue Brief IB93026, *Executive Branch Reorganization and Management Initiatives*, by Harold C. Relyea. See also CRS Report RL31513, *Homeland Security: Side-by-Side Comparison of H.R. 5005 and S. 2452, 107<sup>th</sup> Congress*, by the CRS Homeland Security Team.

<sup>2</sup>H.R. 5005, “To establish the Department of Homeland Security, and for other purposes,” was introduced June 24, 2002, by request, by Rep. Richard K. Arney with 114 cosponsors. It was passed by the House on July 26, 2002. All discussions of the House proposal refer to H.R. 5005, as passed.

<sup>3</sup>S. 2452, “A bill to establish the Department of National Homeland Security and the National Office for Combating Terrorism,” was introduced May 2, 2002, by Sen. Joseph I. Lieberman with 5 cosponsors. It was referred to Senate Governmental Affairs Committee and reported (S.Rept. 107-175) on June 24, 2002. (A similar bill, H.R. 4660, was introduced May 2, 2002, by Rep. William (Mac) Thornberry with 40 cosponsors. It was referred to House Committee on Government Reform.) The Senate Governmental Affairs Committee again considered the bill on July 24 and 25, and adopted substitute language at that time. All discussions of the Senate proposal refer to this substitute. See: “TEXT OF AMENDMENTS — SA4467,” *Congressional Record*, daily edition, vol. 148, 107<sup>th</sup> Cong., 2<sup>nd</sup> sess., Aug. 1, 2002 (Washington: GPO, 2002), pp. S7967-S8003.

proposals. The report identifies the appointment status for other units proposed for transfer, as well as those proposed to be created.

Each of the proposals deviates in some ways from the existing appointments framework. These differences and problems that may result are identified throughout the report. At the end, options for congressional consideration are explored.

In this report, all discussions of provisions in the proposals are based on H.R. 5005 as passed by the House on July 26 and sent to the Senate and on the substitute language to S. 2452 adopted by the Senate Committee on Governmental Affairs on July 25, 2002.

## **The Departmental Framework for Political Appointments**

The President and the Senate share the power to appoint the principal officers of the United States, an arrangement established by the Constitution:

... he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law ... (Article II, sec. 2, cl. 2)

The provision also empowers Congress to allow for the appointment of “inferior Officers” by the President alone, the courts, or department heads. The distinction between principal and lower offices has been statutorily defined with the creation of each new office, and Congress has the ability to further refine this definition when shaping legislation.

The principal officers in a department are established in the organic legislation or reorganization plan.<sup>4</sup> Currently more than 1200 presidentially appointed civilian executive or legislative branch positions require Senate confirmation (PAS positions).<sup>5</sup> More than 330 of these are in the 14 existing executive departments. Within the departments, the first four levels — secretary, deputy secretary, under secretary, and assistant secretary — are nearly always PAS positions. Some staff officers, including the chief financial officer and the general counsel, are also routinely subject to confirmation. The persons filling those positions are generally

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<sup>4</sup>For information on the appointment status of PAS positions within the executive departments currently, see CRS Report RL31346, *Presidential Appointments to Full-Time Positions in Executive Departments During the 107<sup>th</sup> Congress, 2001-2002*, by Henry B. Hogue.

<sup>5</sup>U.S. Congress, Senate, Committee on Governmental Affairs, *Policy and Supporting Positions*, 106<sup>th</sup> Cong., 2<sup>nd</sup> sess., Committee Print, S. Prt. 106-54, Nov. 8, 2000 (Washington: GPO, 2000). Hereafter referred to as Plum Book 2000.

considered to be the top policy decision makers in the federal government, having the responsibility to implement statutes.

Some executive branch positions are staffed through presidential appointments not requiring confirmation (PA positions). Those positions are rare in operational agencies; they are generally found in the White House Office and filled by persons who directly staff and advise the President. There are rare instances in which a position is placed at an executive level but is exempted by statute from a confirmation requirement.

In addition to PAS and PA positions, two types of non-presidential appointments are used to staff most other policy-making positions in the departments. The ranks of program managers are most commonly filled by career and noncareer members of the Senior Executive Service (SES). The number of noncareer SES is statutorily limited to 10% throughout the government and 25% of total SES within any given department or agency.<sup>6</sup>

Schedule C positions are used to fill lower-level positions that are excepted from the competitive service because of their confidential or policy-determining character. Most Schedule C positions are paid at rates on the General Schedule<sup>7</sup> but are excepted from civil service requirements. For example, the personal secretary or executive assistant to a departmental secretary would serve in a Schedule C position. The Office of Personnel Management is responsible for approving these positions.

## Compensation

Senior-level appointees are generally compensated according to the Executive Schedule, which has five pay levels. The correspondence between rank and level is fairly consistent across the existing departments. Level I is often referred to as Cabinet rank, and is generally accorded to departmental secretaries. Level II, usually that of deputy secretaries, is the rate corresponding to the salary for Members of Congress and for U.S. District Judges. Pay rates range from \$121,600 to \$166,700.<sup>8</sup> Almost without exception, statutory positions on the Executive Schedule are positions requiring confirmation.

The current compensation package for the recently created position of Under Secretary of Transportation Security, head of the Transportation Security Administration (TSA), is a noteworthy exception to these compensation arrangements. This under secretary, a PAS position with a five-year term, is compensated at Executive Level II. In addition, in a departure from usual practice, the position carries with it statutory provision for an annual bonus not to exceed 30%

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<sup>6</sup>5 U.S.C. 3134.

<sup>7</sup>The General Schedule is the pay and classification system for the majority of the rank and file white collar staff of the federal government. Pay rates are found through the Office of Personnel Management Website at [<http://www.opm.gov/oca/payrates/index.htm>].

<sup>8</sup>Executive Schedule positions are listed at 5 U.S.C. 5312-5316.

of the annual rate of pay.<sup>9</sup> If that bonus were applied, the aggregate pay for the under secretary would be \$195,000 in 2002.<sup>10</sup>

## **Management Provisions for the Proposed Department**

### **Secretary**

Each proposal would establish the position of Secretary as the head of the new department. The Secretary would be a PAS position, compensated at Level I of the Executive Schedule.<sup>11</sup>

H.R. 5005 provides that the Secretary would have direction, authority, and control over the department. All functions of all officers, employees, and organizational units of the department would be vested in the Secretary. Specific functional authorities are detailed, including delegation of authority, promulgation of regulations, and entering into agreements.

S. 2452 would not explicitly vest all functions of subordinate units and employees in the Secretary. However, the section that establishes the position identifies a number of specific duties for the position, and additional responsibilities and authorities are noted throughout the bill. Vesting all functions in the Secretary may give him or her a greater capacity for effectively delegating responsibility and managing the department.

### **Deputy Secretary**

Each proposal would establish the position of deputy secretary as a PAS position, compensated at Level II of the Executive Schedule.<sup>12</sup> Both proposals would name the deputy secretary as the first in line of succession to act on behalf of the Secretary.

Under H.R. 5005, no specific duties, responsibilities, or authorities are ascribed to the deputy secretary. S. 2452 would assign the responsibilities, in addition to acting on the Secretary's behalf, of assisting the Secretary in departmental administration and operations and performing such duties as the Secretary might prescribe.

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<sup>9</sup>P.L. 107-71, Sec. 101(c)(1) and (2); Nov. 19, 2001; 115 Stat. 602.

<sup>10</sup>The salary for the Vice President, the Speaker of the House of Representatives, and the Chief Justice of the United States is \$192,600, effective January 2002.

<sup>11</sup>H.R. 5005, Sec. 102(a) and Sec. 902; S. 2452, Sec. 102(a) and Sec. 114.

<sup>12</sup>H.R. 5005, Sec. 103(a)(1) and Sec. 902; S. 2452, Sec. 103(a) and Sec. 114.



## Under Secretaries

H.R. 5005 would establish five under secretary positions, and S. 2452 would create seven. The proposals have three under secretaries with identical names: for Science and Technology; for Emergency Preparedness and Response; and for Management.<sup>13</sup> In addition, H.R. 5005 would create an Under Secretary for Information Analysis and Infrastructure Protection and an Under Secretary for Border and Transportation Security.<sup>14</sup> S. 2452, on the other hand, would establish four additional under secretaries: for Border and Transportation; for Intelligence; for Critical Infrastructure Protection; and for Immigration Affairs.<sup>15</sup> All the under secretary positions would be PAS positions compensated at Level III of the Executive Schedule.<sup>16</sup> Under the Senate plan, the Under Secretary for Emergency Preparedness and Response could simultaneously serve as Director of the Federal Emergency Management Agency if nominated and confirmed to both positions.<sup>17</sup> S. 2452 also specifies that the Under Secretary for Management would report to the Secretary.

S. 2452 also provides for the compensation, at Level III of the Executive Schedule, of an Under Secretary of Immigration Affairs in the Department of Justice.<sup>18</sup> Whereas an earlier portion of the section would create an Under Secretary for Immigration Affairs in the Department of Homeland Security, the establishment of, and appointment authority for, such a position in the Department of Justice is unclear. At present, there are no other under secretaries in the Justice Department; titles there are usually based around the term “attorney general” rather than “secretary.”

## Assistant Secretaries

H.R. 5005 proposes two separate categories of assistant secretaries. The bill would create up to four PAS positions with no specified functions and up to eight PA positions to “assist the Secretary in the performance of the Secretary’s functions.”<sup>19</sup> In addition, Sec. 412(a)(2) would establish an Assistant Secretary of the Bureau of Border Security, who would report to the Under Secretary of Border and Transportation Security. It is unclear whether or not this position is to be counted as one of the assistant secretaries in the two categories above. Likewise, the

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<sup>13</sup>For establishment of these positions in the House bill, see H.R. 5005, Secs. 103(a)(3), (5), and (6). Titles III, V, and VI of the bill set out the authorities and responsibilities for these positions. For establishment and responsibilities of these positions in the Senate proposal, see S. 2452, Secs. 135(c)(2), 134(a)(2) and (b), and 104.

<sup>14</sup>H.R. 5005, Sec. 103(a)(2) and (4). Titles II and IV of the bill set out the authorities and responsibilities of these positions.

<sup>15</sup>S. 2452, Secs. 131(a)(2) and (b), 132(a)(2) and (b), 133(a)(2) and (b), and 1103.

<sup>16</sup>Compensation provisions are found at H.R. 5005, and Sec. 902 and S. 2452, Secs. 114 and 140.

<sup>17</sup>S. 2452, Sec. 134(d).

<sup>18</sup>S. 2452, Sec. 1103.

<sup>19</sup>H.R. 5005, Secs. 103(a)(7) and (d)(2).

appointment authority is not specified. All assistant secretaries would be compensated at Level IV of the Executive Schedule.<sup>20</sup>

S. 2452 would establish up to five assistant secretaries as PAS positions. The general responsibilities of each would be described by the President when submitting the nomination. Functions would then assigned by the Secretary as appropriate.<sup>21</sup> These positions would be compensated at Level IV of the Executive Schedule.<sup>22</sup> In addition, the proposal would create an Assistant Secretary for Immigration Affairs within the Bureau of Immigration Services and an Assistant Secretary for Enforcement and Border Affairs within the bureau of the same name.<sup>23</sup> These positions are not included in the five assistant secretary positions discussed above. Unlike those PAS positions, they would be appointed by the Secretary, in consultation with the Under Secretary of Immigration Affairs, and would report to the under secretary. Like the other five, these two positions would be compensated at Level IV of the Executive Schedule.

As noted, H.R. 5005 would create eight presidentially appointed assistant secretary positions not subject to Senate confirmation; this would be a marked departure from past practices in the other departments. PA positions<sup>24</sup> are almost all in the White House Office. It is rare for positions in the executive departments to be designated as PA positions; nearly all principal officers in these organizations are statutorily designated as PAS positions. At the current time, as far as it can be determined, there is only one PA position in the executive departments.<sup>25</sup> PA positions are generally made for personnel who will be working in close proximity to the President and are privy to the confidential policy discussions conducted by leaders of agencies in the Executive Office of the President. Appointees to PA positions do not come under the same scrutiny as nominees to PAS positions. By and large, presidential appointees to PA positions act as advisers, while those nominated to PAS positions are primarily policy decision makers who administer programs. The latter group are responsible for implementing statutes.

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<sup>20</sup>H.R. 5005, Sec. 902(4)

<sup>21</sup>S. 2452, Sec. 105.

<sup>22</sup>S. 2452, Sec. 114.

<sup>23</sup>S. 2452, Secs. 1104(a) and 1105(a).

<sup>24</sup>As of September 2001, the Office of Personnel Management reported 86 full-time and 111 part-time presidential appointees not requiring Senate confirmation, [<http://opm.gov/feddata>], with link to "Data from the CPDF." Visited July 2, 2002.

<sup>25</sup>42 U.S.C. 284(a) provides that "The Director of the National Cancer Institute shall be appointed by the President." The other health institute directors are appointed by the Secretary of Health and Human Services. All the directors report to the Secretary.

It should be noted here that the Plum Book for 2000 erroneously lists four other departmental positions as being presidential appointments not requiring confirmation. The Assistant Secretary of Defense for Force Management Policy, the Deputy Secretary of Education, the Deputy Secretary of Labor, and the Department of Transportation Administrator, Research and Special Programs Administration, all are statutory positions requiring Senate confirmation.

The designation of some assistant secretary positions, but not others, as PAS positions might also challenge the present constitutional framework for political appointments. As noted above, the Constitution provides that “Officers of the United States” require confirmation, whereas “inferior Officers” may be appointed by the President, and others, without Senate approval. In both proposals, some assistant secretaries would be placed in the former category, and others in the latter category. The proposals implicitly alter the distinction between principal and lower offices, dividing one title into two categories.

This creation of assistant secretary positions of different stature also might cause confusion or disharmony in the new agency. The likely effect of the provisions in H.R. 5005 would be to create, in a department, a mix of officers sharing the same title and pay rate, but having significantly different appointment standing. The bill is silent on the details of the 12 positions, the authorities they would exercise, or the responsibilities they would bear, making the reason for the distinction among them less clear. One could speculate that the assistant secretaries subject to confirmation would be line officers responsible, at the direction of the Secretary, for managing designated programs and that the other assistant secretaries might serve the Secretary as advisers or on special projects. If so, Schedule C positions might be used in lieu of the PA positions. As discussed above, the status of the proposed Assistant Secretary of the Bureau of Border Security is unclear.

S. 2452 would create up to five assistant secretaries appointed by the President and two other assistant secretaries appointed by the Secretary. In contrast to the House bill, the two assistant secretaries in the Senate proposal who are given an inferior status are given distinct functions. Nonetheless, because all assistant secretaries would have the same title and pay level, this arrangement also might cause confusion or discord.

## **Other Proposed Presidentially Appointed Positions Requiring Senate Confirmation**

The positions identified in this section would be established as PAS positions by one or both proposals.

**Inspector General.** Both proposals provide for the creation of an inspector general (IG) position, appointed as provided in Sec. 3(a) of the Inspector General Act of 1978.<sup>26</sup> The referenced section of the Inspector General Act provides for the appointment by and with the advice and consent of the Senate. Both would place the IG at Level IV of the Executive Schedule,<sup>27</sup> on a par with other departmental IGs.<sup>28</sup> Both proposals include provisions that would give the Secretary greater authority, direction, and control over the IG under certain circumstances than is provided for

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<sup>26</sup>H.R. 5005, Sec. 103(b) and S. 2452, Sec. 106. In the House bill, authority and control of the Office of Inspector General are set out in Sec. 701.

<sup>27</sup>H.R. 5005, Sec. 902 and S. 2452, Sec. 114.

<sup>28</sup>5 U.S.C. 5315.

in the IG statute. These provisions also include steps to be taken to notify Congress under such circumstances.

**General Counsel.** Both bills would provide for a general counsel as chief legal officer of the department, to be appointed by the President and paid at Level IV of the Executive Schedule.<sup>29</sup> Unlike the House bill provisions, under the Senate bill the general counsel would require Senate confirmation. The Senate bill also provides additional detail regarding the general counsel’s responsibilities.

Each of the 14 existing departments has a statutory departmental legal counsel, usually referred to as a general counsel. Those positions are paid at Level IV of the Executive Schedule<sup>30</sup> and all require confirmation as part of the appointment process.

**Chief Financial Officer.** Under the provisions of the Chief Financial Officers Act of 1990,<sup>31</sup> there are established, in each of the executive departments, chief financial officers (CFOs). Both proposals would establish the position of chief financial officer as a PAS position in the new department.<sup>32</sup> The CFO would be compensated at Level IV, as are the current departmental CFOs. Current law provides that the CFO reports directly to the head of the agency, in this case the Secretary. Notwithstanding this provision of law, Sec. 602 of the House bill provides that the CFO would report to the Secretary, or to “another official of the Department, as the Secretary may direct.”<sup>33</sup>

**Civil Rights Officer.** A Civil Rights Officer would be created, as a PAS position, by the Senate proposal.<sup>34</sup> Compensation for this position is not provided. The House bill would create an Office of Civil Rights and Civil Liberties, led by a director.<sup>35</sup> The bill is silent on the appointment process and compensation for this position.

## Other Proposed Departmental Positions

Each of the following departmental positions would be created by one or both proposals, with either appointment by the Secretary or no specified appointment process.

**Chief Information Officer.** Chapter 35 of Title 44 of the U.S. Code sets out the requirements for the coordination of federal information policy. Under 44 U.S.C. 3506, each agency head is directed to designate a chief information officer. The

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<sup>29</sup>H.R. 5005, Secs. 103(d)(1) and 902; S. 2452, Secs. 109 and 114.

<sup>30</sup>5 U.S.C. 5315.

<sup>31</sup>P.L. 101-576, Nov. 15, 1990, Sec. 205.

<sup>32</sup>H.R. 5005, Sec. 103(a)(8) and S. 2452, Sec. 107(a).

<sup>33</sup>H.R. 5005, Sec. 602.

<sup>34</sup>S. 2452, Sec. 110(b).

<sup>35</sup>H.R. 5005, Sec. 604.

CIOs are to be paid at Level IV of the Executive Schedule and to report directly to the agency head (secretary).<sup>36</sup> S. 2452 would establish a CIO position that conforms with this statute.<sup>37</sup> H.R. 5005 would create the CIO as a PA position, to be compensated at Level IV of the Executive Schedule.<sup>38</sup> The CIO would be required to report to the Secretary or to “another official of the Department as the Secretary may direct.”<sup>39</sup>

The provisions creating this new office in each bill are each unusual among provisions that establish high-level positions generally. As noted above in the discussion of assistant secretary positions, the creation of a PA position in a department, as provided in the House bill, is very unusual. This is as true for CIOs as other officers. In addition, changing the status of appointment for one CIO could affect the CIO Council.<sup>40</sup> The CIO position proposed in S. 2452, like current departmental CIO positions, is unusual in that it is excepted by statute from the competitive service, is not a presidentially appointed position, but is on the Executive Schedule.

**Chief Human Capital Officer.** S. 2452 would create a Chief Human Capital Officer for the new department.<sup>41</sup> The Secretary would appoint or designate a such an officer. Compensation is not specified. The Senate proposal would also create similar positions in other federal departments and agencies. (See “Cross-Agency Positions,” below.)

**Privacy Officer.** Both proposals would create a Privacy Officer, to be appointed by the Secretary.<sup>42</sup> Neither provides for compensation for this position.

**Counternarcotics Officer.** H.R. 5005 would create the position of Counternarcotics Officer, to be appointed by the Secretary.<sup>43</sup> Compensation is not specified in this provision.

**Special Assistant to the Secretary.** The House bill would establish a Special Assistant to the Secretary who would function as a liaison to the private sector.<sup>44</sup> This position would be appointed by the Secretary. The compensation is not specified.

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<sup>36</sup>P.L. 104-106; Feb. 10, 1996; 110 Stat. 684-686.

<sup>37</sup>S. 2452, Secs. 108, 114.

<sup>38</sup>H.R. 5005, Secs. 103(d)(4) and 902.

<sup>39</sup>H.R. 5005, Sec. 603.

<sup>40</sup>The Chief Information Officer Council was established under Executive Order 13011, “Federal Information Technology,” July 16, 1996. S. 803, as passed the Senate June 27, 2002, would establish a statutory authority for the Chief Information Officer Council.

<sup>41</sup>S. 2452, Sec. 112.

<sup>42</sup>H.R. 5005, Sec. 205; S. 2452, Sec. 111(b).

<sup>43</sup>H.R. 5005, Sec. 769.

<sup>44</sup>H.R. 5005, Sec. 102(f).

**Chief Homeland Security Liaison Officer.** S. 2452 would establish a Chief Homeland Security Liaison Officer in conjunction with an Office for State and Local Government Coordination within the Office of the Secretary.<sup>45</sup> The officer would be appointed by the Secretary. Compensation is not specified in the provision. This officer would coordinate the activities of homeland security liaison officers in each state, to be designated by the Secretary. H.R. 5005 would also establish the office, but has no provision for additional positions.<sup>46</sup>

**Director, Office of International Affairs.** Both proposals would establish an Office of International Affairs in the Office of the Secretary.<sup>47</sup> The office would be headed by a director appointed by the Secretary. The provisions do not specify compensation.

**Director, National Clearinghouse on Emergency Preparedness.** The Senate proposal would establish a National Clearinghouse on Emergency Preparedness within the department.<sup>48</sup> The clearinghouse would be headed by a director. The provision does not specify the type of appointment or level of compensation for this position.

## **Agencies Proposed to Be Transferred**

Under the provisions of the House and Senate proposals, several entities, including authorities, functions, personnel, assets, and, as determined to be necessary, obligations or liabilities are proposed to be transferred into the new department. The legislative proposals are mixed in terms of how they address the status of the current heads of those units.

### **Animal and Plant Health Inspection Service, Department of Agriculture**

The Senate proposal would transfer some functions of the Animal and Plant Health Inspection Service (APHIS) from the Department of Agriculture to the new department. The portion of the agency that administers law relating to agricultural quarantine inspections at points of entry would be affected.<sup>49</sup> Organizationally, the functions would be performed under the direction of the Under Secretary for Border and Transportation Protection.

Under the House bill, functions related to the agricultural import and entry inspection that are currently performed by the Department of Agriculture would be

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<sup>45</sup>S. 2452, Sec. 137.

<sup>46</sup>H.R. 5005, Sec. 777.

<sup>47</sup>H.R. 5005, Sec. 770 and S. 2452, Sec. 113.

<sup>48</sup>S. 2452, Sec. 152.

<sup>49</sup>S. 2452, Sec. 131(c)(3).

transferred to the new department.<sup>50</sup> As with the Senate bill, the functions would be performed under the direction of the Under Secretary for Border and Transportation Security.<sup>51</sup>

There is no further staffing provision in either bill related directly to those functions. Currently, the APHIS administrator is a career incumbent in the Senior Executive Service.<sup>52</sup>

## Federal Emergency Management Agency

S. 2452 proposes to transfer the Federal Emergency Management Agency (FEMA) into the new department, stating that the 10 regional offices would be “maintained and strengthened.”<sup>53</sup> FEMA would be a “distinct entity” within the new department, and the lines of authority between that entity and departmental leaders are not clear. Although the Under Secretary of Emergency Preparedness and Response would be responsible for “[c]arrying out all emergency preparedness and response activities carried out by the Federal Emergency Management Agency before” the transfer of the agency,<sup>54</sup> it does not appear that the under secretary would be given authority over the agency itself. It also does not appear that the Secretary would be given this authority.

The Director of FEMA is currently a PAS position compensated at Level II of the Executive Schedule. Several other officials within FEMA are PAS positions.<sup>55</sup> There appears to be no provision in the bill that would vitiate this arrangement or that would specifically incorporate it. As noted above, Sec. 134(d) would allow one individual to serve as both Under Secretary of Emergency Preparedness and Response and Director of FEMA, if nominated and confirmed to each office. The section further provides that such an individual would not be authorized to “receive pay at a rate of pay in excess of the rate of pay payable for the position to which the higher rate of pay applies,” but does not appear to more specifically set the rate of compensation.

H.R. 5005 would transfer the “authorities, functions, personnel, and assets” of FEMA, including the functions of the director, to the new department.<sup>56</sup> The bill

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<sup>50</sup>H.R. 5005, Sec. 404.

<sup>51</sup>H.R. 5005, Sec. 401(6).

<sup>52</sup>For further information on APHIS and the proposed transfer, see CRS Report RL31466, *Homeland Security Department: U.S. Department of Agriculture Issues*, by Jean M. Rawson.

<sup>53</sup>S. 2452, Sec. 134(c)(1).

<sup>54</sup>S. 2452, Sec. 134(b)(1).

<sup>55</sup>For further information on FEMA’s current administrative structure, see: CRS Report RL31285, *FEMA’s Mission: Policy Directives for the Federal Emergency Management Agency*, by Keith Alan Bea.

<sup>56</sup>H.R. 5005, Secs. 502 and 506.

makes no further mention of the director, the subordinate FEMA PAS positions, or comparable positions.

Both bills would create an unusual hierarchical arrangement of positions with regard to FEMA. Because they let stand current appointment and pay provisions for the officials of FEMA, the director is at the same compensation level as the proposed deputy secretary of the department and above the level of the under secretaries. The existing compensation levels for other FEMA PAS positions and the parallel departmental positions might be similarly problematic. The lines of authority between the director and the leadership of the department are also not explicitly established. This is particularly true for the Senate bill, where the term “distinct entity” is not defined.

### **Federal Protective Service, General Services Administration**

Both the House and Senate proposals would transfer the Federal Protective Service (FPS) of the General Services Administration (GSA) to the new department. The functions transferred would include those of the GSA administrator that relate to FPS.<sup>57</sup> The FPS is part of the Public Buildings Service. The head of the FPS is not a political appointee. Absent language in the proposal, it is assumed that the status would not change.

### **Immigration and Naturalization Service, Department of Justice<sup>58</sup>**

Both proposals would abolish the Immigration and Naturalization Service (INS) and transfer its functions to new entities in the proposed department and the Department of Justice. The Senate proposal stipulates that this transition would take effect one year after the provisions creating the other directorates go into effect.<sup>59</sup>

Currently, the INS commissioner is a PAS position at Level IV of the Executive Schedule.<sup>60</sup> The remaining upper management of the INS comprises a number of appointed officials in the SES, some career and some noncareer. In a significant shift of responsibilities and functions from the Justice Department, the Senate proposal would transfer all of the Immigration and Naturalization Service (INS) functions to

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<sup>57</sup>H.R. 5005, Sec. 402(4) and S. 2452, Sec. 133(c)(8).

<sup>58</sup>Further information about proposed transfers of INS functions is available under “New Units and Offices in the Department of Justice” in the “New Units Proposed” section below.

<sup>59</sup>S. 2452, Secs. 1131 and 1321.

<sup>60</sup>For further discussion of the proposed transfer, see CRS Report RL31388, *Immigration and Naturalization Service: Restructuring Proposals in the 107<sup>th</sup> Congress*, by Lisa Seghetti; and CRS Issue Brief IB10103, *Immigration Legislation and Issues in the 107<sup>th</sup> Congress*, coordinated by Andorra Bruno.



the new department, creating the Directorate of Immigration Affairs.<sup>61</sup> The functions currently carried out by the Commissioner of INS would be transferred to the Under Secretary of Immigration Affairs. The new directorate would comprise two bureaus, the Bureau of Immigration Services and the Bureau of Enforcement and Border Affairs. A number of new appointed positions, in addition to the under secretary, would be created in this new directorate:

- ! Assistant Secretary for Immigration Affairs (appointed by the Secretary, compensated at Level IV);
- ! Assistant Secretary for Enforcement and Border Affairs (appointed by the Secretary, compensated at Level IV);
- ! Chief Financial Officer (SES position, career-reserved, compensated at Level V), Deputy Chief Financial Officer (SES position, career-reserved), General Counsel (appointed by the Secretary, Level V), Chief of Policy (SES position), Chief of Congressional, Intergovernmental, and Public Affairs (SES position) for the directorate;
- ! Chief budget officers for each of the proposed bureaus (appointment authority and compensation not specified);
- ! Director of the Office of Immigration Statistics (appointed by the Secretary, compensation not specified);
- ! Ombudsman (appointed by the Secretary, compensation provided for).<sup>62</sup>

The directorate created by these provisions might have greater autonomy than the other directorates, by virtue of the positions it creates and the authorities it confers. The lines of authority and communication linking the officers of this proposed directorate and the principal officers of the department are not clear. The general counsel of the directorate does not appear to be under the authority of the departmental general counsel, for example. Nor does the CFO of the directorate appear to be under the direction of the departmental CFO.

In contrast, H.R. 5005 would transfer only the enforcement functions of the INS to the new department, creating a new Bureau of Border Security under the direction of the Under Secretary for Border and Transportation Security. Several appointed positions would be created by this provision: an assistant secretary; a Chief of Policy and Strategy; and a Citizenship and Immigration Services Liaison.<sup>63</sup> The appointment authority is not specified for any of these positions, and compensation is not specified for the latter two. The remaining functions of INS would be transferred to a new Bureau of Citizenship and Immigration Services at the

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<sup>61</sup>S. 2452, Sec. 1102.

<sup>62</sup>The Ombudsman would be compensated at the same rate as the highest rate of basic pay under the SES or at a rate set by the Secretary in accordance with 5 U.S. C. 9503.

<sup>63</sup>H.R. 5005, Secs. 412(a)(2), 412(b), and 412(c).

Department of Justice.<sup>64</sup> The new positions that would be created in the bureau are identified below in the section “New Units and Offices in the Department of Justice.”

The Senate proposal would create the Agency for Immigration Hearings and Appeals in the Department of Justice.<sup>65</sup> Within this agency would be created a director (PAS position, compensation not specified); a deputy director (appointed by the director, compensation not specified); a general counsel (appointed by the director, compensation not specified); a pro bono coordinator (appointed by the director, compensation not specified);<sup>66</sup> a Chief Immigration Judge (appointed by the director, compensation not specified);<sup>67</sup> and a Chief Administrative Hearing Officer (also appointed by the director, compensation not specified).<sup>68</sup>

## **Transportation Security Administration, Department of Transportation**

Both proposals would transfer the Transportation Security Administration (TSA) from the Department of Transportation (DOT) to the new department. H.R. 5005 provides that TSA would remain a “distinct entity within the Department under the Under Secretary for Border and Transportation Security” for the first two years after enactment.<sup>69</sup> All TSA functions, as well as the functions of the Secretary of Transportation and the Under Secretary of Transportation for Security that relate to TSA, would transfer.<sup>70</sup> There appears to be no language in either proposal specifically addressing the status of current senior positions related to the transferred TSA functions.<sup>71</sup>

The transfer of TSA into the new department as provided for by legislation might create some confusion and discord. Although the House bill maintains TSA as a “distinct entity” in the new department for two years, this term is not defined. In addition, both proposals might create an unusual hierarchy in the new department. The Under Secretary of Transportation for Security is a PAS position with a five-year term. The position is compensated at Level II of the Executive Schedule, the same level as the deputy secretary of the new department and a level above the under secretary at the head of the directorate within which TSA will reside. The TSA head also carries the same level title as would the head of the proposed directorate. In addition, in a departure from usual practice, the TSA under secretary position carries

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<sup>64</sup>H.R. 5005, Sec. 411.

<sup>65</sup>S. 2452, Sec. 1301.

<sup>66</sup>S. 2452, Sec. 1302.

<sup>67</sup>S. 2452, Sec. 1304.

<sup>68</sup>S. 2452, Sec. 1305.

<sup>69</sup>H.R. 5005, Sec. 407.

<sup>70</sup>H.R. 5005, Sec. 402(3) and S. 2452, Sec. 131(c)(4).

<sup>71</sup>For further discussion of the proposed transfer, see CRS Report RS21244, *Homeland Security: Should the Transportation Security Administration Be Included?*, by Robert S. Kirk.

with its statutory provision for an annual bonus not to exceed 30% of the annual rate of pay.<sup>72</sup> If that bonus were applied, the aggregate pay for the under secretary would be \$195,000 in 2002.<sup>73</sup>

## **United States Coast Guard, Department of Transportation**

Both proposals would move the United States Coast Guard into the department as a “distinct entity.”<sup>74</sup> The House bill also lists the Coast Guard as an entity whose functions, personnel, assets, and liabilities would be transferred to the department. H.R. 5005 would provide that to “assist the Secretary in the performance of his functions, there is a Commandant of the Coast Guard, who shall be appointed as provided in Sec. 44 of title 14, United States Code.”<sup>75</sup> That section establishes the commandant as a PAS position with a four-year term (reappointment is allowed) who will have the grade of admiral while serving. S. 2452 does not provide explicitly for the appointment of the commandant, presumably leaving 14 U.S.C. 44 as the default process. Both proposals stipulate that the commandant would report directly to the Secretary.<sup>76</sup>

Although both proposals stipulate that the Coast Guard will remain a “distinct entity” within the department, neither proposal defines what this means. The status of the Coast Guard with regard to the department is, therefore, unclear. It does not appear that the Coast Guard is part of any directorate, since the commandant would report directly to the Secretary. This might create coordination challenges between the Coast Guard and the Directorate of Border and Transportation Security.

## **United States Customs Service, Department of the Treasury**

The Senate proposal would transfer the U.S. Customs Service from the Treasury Department to the department and maintain it as a distinct entity within the department. Some functions would be retained by the Treasury Department.<sup>77</sup> The status of the current position of Commissioner of Customs, which is a PAS position compensated at Level III of the Executive Schedule, is not specified.

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<sup>72</sup>P.L. 107-71, Sec. 101(c)(1) and (2); Nov. 19, 2001; 115 Stat. 602. Currently, TSA is headed by an acting under secretary, James Loy.

<sup>73</sup>The salary for the Vice President, the Speaker of the House of Representatives, and the Chief Justice of the United States is \$192,600, effective January 2002.

<sup>74</sup>S. 2452, Sec. 131(c)(2) and H.R. 5005 402(2).

<sup>75</sup>H.R. 5005, Sec. 103(c).

<sup>76</sup>For further discussion of the proposed transfer, see CRS Report RS21125, *Homeland Security: Coast Guard Operations—Background and Issues for Congress*, by Ronald O’Rourke.

<sup>77</sup>S. 2452, Sec. 131(c)(1) and 131(d).

The Senate proposal does not define what is meant by “distinct entity,” so it is unclear what relationship the service would have to the rest of the department. Although “authorities, functions, personnel, and assets” would be transferred to the new department, it is unclear whether or not the Secretary or any under secretary would have general authority over the service.

H.R. 5005 would transfer many U.S. Customs Service functions from the Treasury Department to the new department. The bill would continue the Commissioner of the U.S. Customs Service as a PAS position compensated at Level III of the Executive Schedule. The current commissioner would be permitted to continue in office in the new department until a new commissioner is selected.<sup>78</sup>

## **United States Secret Service, Department of the Treasury**

Both proposals would transfer the United States Secret Service from the Treasury Department to the new department as a “distinct entity.” H.R. 5005 states that the “functions, personnel, assets, and obligations ... including the functions of the Secretary of the Treasury relating thereto” would be transferred. S. 2452 directs the transfer of the “authorities, personnel, functions, and assets” of the Secret Service to the new department.<sup>79</sup>

As presently organized, the Secret Service is in the Department of the Treasury within the scope of the Under Secretary for Enforcement. The Director of the Secret Service is appointed by the Secretary of the Treasury. The six most recent directors have been career members of the Senior Executive Service chosen from on-board staff.<sup>80</sup> H.R. 5005 would establish the position of Director of the Secret Service as a PA position.<sup>81</sup> There is no further discussion about the proposed status of the director. No salary level or pay system is identified as being applicable. If the position remains, as proposed, a presidential appointment, it is likely that a designation related to compensation would be made. S. 2452 appears to make no provision for appointment of the director.

The proposals’ use of the term “distinct entity” and the provisions regarding the appointment of the director might create difficulties in the new department. Both bills would establish the Secret Service as a “distinct entity” within the new department. Neither bill includes any further detail defining “distinct entity,” however, or the relationship between the Secret Service and its leadership and the department and its leadership. This may lead to some confusion about the lines of authority. Whereas the House bill establishes the director as a PA position, the Senate proposal appears to be silent on the matter. As noted in other sections above, PA positions are very unusual in departments and are more commonly seen in

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<sup>78</sup>H.R. 5005, Secs. 402(1) and 451(b).

<sup>79</sup>H.R. 5005, Sec. 711 and S. 2452, Sec. 138.

<sup>80</sup>Information received from U.S. Secret Service, Office of Government Liaison and Public Affairs, via telephone conversation, July 3, 2002.

<sup>81</sup>H.R. 5005, Sec. 103(d)(3).

advisory roles in the White House. The designation of the director as a PA position might lead to further confusion about the lines of authority within the new department.

## Other Units and Functions to Be Transferred

Several other units and functions are proposed to be transferred.<sup>82</sup> Those are listed below along with the bill number. Unless otherwise noted, the person now serving as the head or lead staffer of the operation is a career employee.

Computer Security Division of the National Institute of Standards and Technology (Commerce) — S. 2452, Sec. 133(c)(4)

Critical Infrastructure Assurance Office (Commerce) — H.R. 5005, Sec. 202(3) and S. 2452, Sec. 133(c)(1). Position filled by a Senior Executive Service limited term appointment.<sup>83</sup>

Chemical Biological Defense Program (Defense) (portions) — H.R. 5005, Sec. 302(2).

Domestic Emergency Support Teams (Justice) — H.R. 5005, Sec. 402(7).

Energy Security and Assurance Program (Energy) — H.R. 5005, Sec. 202(4) S. 2452, Sec. 133(c)(7).

Environmental Measurements Laboratory (Energy) — H.R. 5005, Sec. 302(1)(E).

Federal Computer Incident Response Center (GSA) — H.R. 5005, Sec. 202(5) and S. 2452, Sec. 133(c)(6).

Federal Law Enforcement Training Center (Treasury) — S. 2452, Sec. 131(c)(5). Transferred to the Attorney General — H.R. 5005, Sec. 774.

Lawrence Livermore National Laboratory Advanced Scientific Computing Research Program (Energy) — H.R. 5005, Sec. 302(1)(F).

National Bio-Weapons Defense Analysis Center (Defense) — S. 2452, created in the Department of Defense by Sec. 161 and moved to the new department by Sec. 135(i)(2)(B).

National Communications System (Defense) — H.R. 5005, Sec. 202(2) and S. 2452, Sec. 133(c)(3).

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<sup>82</sup>Several additional programs and activities are proposed for transfer but not identified in the bills as being associated with named units or programs.

<sup>83</sup>*Plum Book, 2000*, p. 33.

National Domestic Preparedness Office (Federal Bureau of Investigation (FBI), Justice) — H.R. 5005, Sec. 402(6) and S. 2452, Sec. 134(c)(2).

National Infrastructure Protection Center (other than the Computer Investigations and Operations Section) (FBI, Justice) — H.R. 5005, Sec. 202(4) and S. 2452 Sec. 133(c)(2).

National Infrastructure Simulation and Analysis Center (Energy) — H.R. 5005, Sec. 202(4) and S. 2452, Sec. 133(c)(5).

Office for Domestic Preparedness (Justice) — H.R. 5005, Sec. 402(5) and S. 2452, Sec. 134(c)(3).

Office of the Assistant Secretary for Public Health Emergency Preparedness (Health and Human Resources (HHS)) (portions) — H.R. 5005, Sec. 502(2) (including the Office of Emergency Preparedness, the National Disaster Medical System, and the Metropolitan Medical Response System) and S. 2452, Sec.134(c)(4) (including the Noble Training Center, the Metropolitan Medical Response System, National Disaster Medical System (HHS component), the Disaster Medical Assistance Teams, the Veterinary Medical Assistance Teams, the Disaster Mortuary Operational Response teams, the special events response, and the citizen preparedness programs). The staffing for this recently reconfigured organization within HHS is not represented in source materials.

Plum Island Animal Disease Center (Agriculture) — H.R. 5005, Sec. 308.

Select Agent Registration and Enforcement Program (Health and Human Services and Agriculture) — S. 2452, Sec. 134(c)(6).

Strategic National Stockpile (HHS) — H.R. 5005, Sec. 502(3) and S. 2452, Sec. 134(c)(5).

## **New Units Proposed**

Under both proposals, new organizational entities would be established. For some, the administrative structure is addressed in the proposals. The following paragraphs identify those units and any positions that are created.

### **Bioterrorism Preparedness and Response Division, CDC (HHS)**

A Bioterrorism Preparedness and Response Division would be established, by S. 2452, Sec. 166, within the Office of the Director of the Centers for Disease Control and Prevention (CDC) at the Department of Health and Human Services (HHS). This new unit would be headed by a director, to be appointed by the Director of CDC, in consultation with the Secretaries of Health and Human Services and Homeland Security.

## **Border Coordination Working Group**

S. 2452, Sec. 139, would direct the Secretary to establish a border security working group composed of the Secretary, the Under Secretary for Border and Transportation Protection, the Under Secretary of Immigration Affairs, and representatives of other agencies as determined by the Secretary. The provision creates no additional positions.

## **Federal Interagency Committee on First Responders**

The Federal Interagency Committee on First Responders, which would be created by S. 2452, Sec. 137(d), would comprise the proposed Chief Homeland Security Liaison Officer of the department, nine specified representatives of other related departments and agencies, and additional representatives as determined by the President. The committee would have administrative support from the agency and a chair selected by the members. The proposal would also establish, under Sec. 137(e), an advisory council for the committee with up to 13 members selected by the committee to represent both urban and rural law enforcement, fire and rescue organizations, and medical and emergency relief services. (See “National Council of First Responders,” below, for a related House provision.)

## **Homeland Security Institute**

A Homeland Security Institute would be created by H.R. 5005, Sec. 310, to be “administered as a separate entity by the Secretary.” The provision creates no additional positions.

## **Homeland Security Science and Technology Advisory Committee**

H.R. 5005, Sec. 309 would create a Homeland Security Science and Technology Advisory Committee. The proposed committee would include 20 members with three-year terms appointed by the Under Secretary for Science and Technology. Compensation for the members and staffing for the committee are not specified.

## **Homeland Security Science and Technology Coordination Council**

A Homeland Security Science and Technology Coordination Council would be created by H.R. 5005, Sec. 306. The council membership would consist of all the department’s under secretaries and any other departmental officials designated by the Secretary. No additional staffing is specified in the provision.

## **Intelligence Analysis Center**

H.R. 5005, Sec. 211 would establish an Intelligence Analysis Center headed by the Under Secretary for Information Analysis and Infrastructure Protection. The bill directs that the

Secretary and the Director of Central Intelligence, the Secretary of Defense, the Attorney General, the Secretary of State, or the head of another agency or department as the case may be, shall enter into cooperative arrangements to provide for an appropriate number of individuals to be detailed to the Under Secretary to perform analytical functions and duties with respect to the mission of the Department from the following agencies: (A) The Central Intelligence Agency. (B) The Federal Bureau of Investigation. (C) The National Security Agency. (D) The National Imagery and Mapping Agency. (E) The Department of State. (F) The Defense Intelligence Agency. (G) Any other agency or department that the President determines appropriate.

## **Joint Interagency Homeland Security Task Force**

H.R. 5005, Sec. 779, would allow the Secretary to establish and operate a Joint Interagency Homeland Security Task Force, composed of unspecified representatives from military and civilian agencies. No additional positions would be created by this provision.

## **National Bio-Weapons Defense Analysis Center, DOD**

S. 2452 would establish a National Bio-Weapons Defense Analysis Center in the Department of Defense (Sec. 161). No new positions would be created by this provision.

## **National Clearinghouse on Emergency Preparedness**

A National Clearinghouse on Emergency Preparedness would be established under S. 2452, Sec. 152. The proposal states that the “Clearinghouse will be headed by a Director.” No further statement is made with regard to type of appointment or compensation level.

## **National Combating Terrorism and Homeland Security Response Council**

A National Combating Terrorism and Homeland Security Response Council would be established under the provisions of S. 2452, Sec. 301(e)(1). Members would be the heads of federal terrorism prevention and response agencies or their designees as determined by the Secretary and director (of the National Office for Combating Terrorism). The Secretary and director would co-chair the council, which would meet at their direction.

## **National Combating Terrorism Strategy Panel**

A National Combating Terrorism Strategy Panel would be established under the provisions of S. 2452, Sec. 303. Members would be appointed by the Secretary and the director (of the National Office for Combating Terrorism), “in consultation with the chairman and ranking member of the Committee on Governmental Affairs of the Senate and the chairman and ranking member of the Committee on Government Reform of the House of Representatives, from among individuals in the private sector who are recognized experts in matters relating to combating terrorism and the



homeland security of the United States.” The chair and eight members of the panel would serve for 18-month terms and would be “compensated at a rate equal to the daily equivalent of the annual rate of basic pay prescribed for level IV of the Executive Schedule ... for each day (including travel time) during which such member is engaged in the performance of the duties of the Panel.” The chair of the panel would have the authority to appoint staff and to request detailees from federal agencies and departments.

## **National Council of First Responders**

A National Council of First Responders would be established within the proposed department by Sec. 104 of the House bill. The council would comprise at least 100 members “from among the ranks of police, firefighters, emergency medical technicians, rescue workers, and hospital personnel ....” Members would serve terms of three years on a staggered basis. A chair would be appointed by the President. The Secretary would detail a departmental employee to carry out related administrative functions. (See “Federal Interagency Committee on First Responders,” above, for a related Senate provision.)

## **National Homeland Security Council**

H.R. 5005, Sec. 1001, would establish a National Homeland Security Council in the Executive Office of the President. The council would comprise the President, Vice President, select cabinet members, and other individuals as the President directs. Sec. 1006 would provide a staff for the council, headed by an executive secretary. The executive secretary would be a PA position to be compensated at a rate not to exceed the rate for the executive secretary of the National Security Council.

## **National Office for Combating Terrorism**

A National Office for Combating Terrorism would be established within the Executive Office of the President under S. 2452, Sec. 201. The head of the office would be a new position called “Director of the National Office for Combating Terrorism.” The director would be a PAS position compensated at Level I of the Executive Schedule. The President would “assign to the office such other officers as the President, in consultation with the Director, considers appropriate to discharge the responsibilities of the Office.”

## **Office for Civil Rights and Civil Liberties**

An Office for Civil Rights and Civil Liberties would be established in the department by H.R. 5005, Sec. 604. The provision would create a director for the office, but is silent on the appointment process and compensation for the position. (S. 2452, Sec. 110(b), would create the PAS position of Civil Rights Officer, as noted above under “Other Proposed PAS Positions.”)

## Office for State and Local Government Coordination

Both proposals would create an Office for State and Local Government Coordination within the Office of the Secretary. H.R. 5005, Sec. 777 would establish the office, but has no provision for additional positions. S. 2452, Sec. 137, would establish the office and a Chief Homeland Security Liaison Officer, appointed by the Secretary. This officer would coordinate the activities of homeland security liaison officers in each state, to be designated by the Secretary.

## Office of International Affairs

Both H.R. 5005, Sec. 770, and S. 2452, Sec. 113, would establish an Office of International Affairs in the Office of the Secretary. The office would be headed by a director appointed by the Secretary. The provisions do not specify compensation.

## New Units and Offices in the Department of Justice

This section identifies new immigration-related units and offices that have been proposed for the Department of Justice. Other proposed transfers of INS functions may be found under “Immigration and Naturalization Service, Department of Justice,” in the “Agencies Proposed to Be Transferred” section, above.

**Assistant Attorney General.** H.R. 5005, Sec. 421, would establish an Assistant Attorney General in the Department of Justice, who would be the head of the newly created Bureau of Citizenship and Immigration Services.<sup>84</sup> The appointment authority and compensation level for this position are not specified. Generally, assistant attorneys general in the Department of Justice are PAS positions compensated at Level IV of the Executive Schedule.

**Agency for Immigration Hearings and Appeals.** An Agency for Immigration Hearings and Appeals would be established within the Department of Justice by S. 2452, Sec. 1301. Sec. 1302 would create an agency director as a PAS position with unspecified compensation. It would also empower the director to appoint a deputy director, general counsel, and pro bono coordinator and other officers as necessary. Sec. 1304 would create a Chief Immigration Judge, without specification of appointment process or compensation. This section would also empower the agency director to appoint immigration judges in consultation with the Chief Immigration Judge. Sec. 1305 would create a Chief Administrative Hearing Officer. Appointment process and compensation for this position are not specified.

**Board of Immigration Appeals.** S. 2452, Sec. 1303, would establish a Board of Immigration Appeals comprising a chair and not less than 14 other immigration appeals judges appointed by the Director of the Agency for Immigration Hearings and Appeals.

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<sup>84</sup>This new bureau is discussed later in this report under “New Units in the Department of Justice.”

**Bureau of Citizenship and Immigration Services.** H.R. 5005, Sec. 421, would establish a Bureau of Citizenship and Immigration Services within the Department of Justice. The bureau would be headed by a newly created assistant attorney general. The appointment authority and compensation level for this position are not specified. Generally, assistant attorneys general in the Department of Justice are PAS positions compensated at Level IV of the Executive Schedule. The provision also would create, within the bureau, the positions of General Counsel, Chief Budget Officer, Chief of Policy and Strategy, Chief of Congressional, Intergovernmental, and Public Affairs, Border Security Liaison, and Chief of the Office of Citizenship. The appointment process and compensation for these positions are not specified.

**Citizenship and Immigration Services Ombudsman.** A position of Citizenship and Immigration Services Ombudsman in the Department of Justice would be established by H.R. 5005, Sec. 422. The position would report to the Deputy Attorney General. The appointment process and compensation are not specified.

**Office of Immigration Statistics.** H.R. 5005, Sec. 425 would establish an Office of Immigration Statistics in the Bureau of Justice Statistics at the Department of Justice. Under this provision, the office would be headed by a director, who would be appointed by the Attorney General and report to the Director of the Bureau of Justice Statistics. Compensation for the director is not specified in the provision.

## **Cross-Agency Provisions**

The Senate proposal (Sec. 2102) would establish chief human capital officers, to be appointed by the head of each agency, in every agency in which there is a chief financial officer. The proposal does not provide for the compensation of these officers. Sec. 2103 would establish a Chief Human Capital Officers Council comprising the Director of the Office of Personnel Management (OPM), the Director of the Office of Management and Budget (OMB), the chief human capital officers of the executive departments, and other individuals as designated by the OPM Director.

## **Limits of Secretary's Reorganization Authority**

Both proposals would provide for limited internal reorganizations by the Secretary. The House bill would allow the Secretary to “allocate or reallocate functions among the officers of the Department, [and to] establish, consolidate, alter or discontinue organizational units within the Department” either as part of a presidential reorganization or with notification of appropriate congressional committees.<sup>85</sup> This authority could not be used to abolish any entity or function “established or required to be maintained by” the Act or other statute. The Senate proposal would also give the Secretary reorganization authority, providing that it

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<sup>85</sup>H.R. 5005, Sec. 764(a).

would not apply to “any office, bureau, unit, or other entity established by law and transferred to the Department; ... any function vested by law in [such entity]; or ... the alteration of the assignment or delegation of functions assigned by this Act to any officer of organizational entity of the Department.”<sup>86</sup> These provisions might limit the Secretary’s managerial flexibility,<sup>87</sup> particularly with regard to units that would be transferred into the department as “distinct entities.” It is unclear whether or not these provisions would limit the Secretary’s authority with regard to the appointment status of incoming managers who had been previously appointed.

## Transition of Officials Previously Confirmed

Sec. 811(d)(2) of H.R. 5005 would provide that reconfirmation by the Senate would not be required by the Act for “any officer whose agency is transferred to the Department pursuant to this Act and whose duties following such transfer are germane to those performed before such transfer.” This language is in the context of providing the authority for acting officials, and it is unclear whether or not it would apply to permanent appointments. It does, therefore, raise the question of the status of present office holders, such as the Director of FEMA. All functions of that agency would be transferred to the department,<sup>88</sup> but the status of the director is left unclear.

In contrast, the Senate proposal contains a similar provision, but the language is not in the context of providing authority for acting officials.<sup>89</sup> It indicates that reconfirmation is not required by the Act if an agency is transferred to the department, the officer is currently in a PAS position, and the new position will be in a similar office and with equivalent authority and responsibilities to the previous position. This proposal also provides that FEMA, among other entities, will remain a “distinct entit[y]” within the new department.<sup>90</sup> It appears that the FEMA director and other FEMA officials would continue to serve in their present capacities in the new department.

Under both proposals, the President would be authorized, during the transition period, to designate an officer already serving in a PAS position to serve, in an acting

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<sup>86</sup>S. 2452, Sec. 191(a).

<sup>87</sup>For a discussion of managerial flexibility in the context of the President’s management agenda, see CRS Report 31409, *The President’s Management Agenda*, by Ronald C. Moe and Henry B. Hogue.

<sup>88</sup>H.R. 5005, Sec. 502.

<sup>89</sup>S. 2452, Sec. 183(d).

<sup>90</sup>The Senate proposal transfers the following as distinct entities: Federal Emergency Management Agency, U.S. Customs Service, U.S. Coast Guard, U.S. Secret Service. Under the House proposal, the U.S. Secret Service, the Transportation Security Administration, and the U.S. Coast Guard would be maintained as distinct entities.

capacity, in a position within the department.<sup>91</sup> The House bill provides that the acting official could continue to serve until an appointee to the position is confirmed. The Senate proposal would impose limits on the service of the acting official in a PAS position according to provisions of 5 U.S.C. 3346.

## Discussion and Options

Both the House and Senate proposals would establish a number of principal officers and other positions for the new department. Congress might consider other options that might serve to strengthen the proposals administratively and address some of the uncertainties identified earlier in this report.

- Option: Vest all functions of subordinate units and employees in the Secretary.
- Option: Assure that each position created or transferred has a clearly identified appointment authority, compensation provision, and organizational context. Congress may wish to more clearly state its intentions in this area.
- Option: Clarify the establishment and appointment of any Under Secretary of Immigration Affairs in the Department of Justice.
- Option: Establish any new assistant attorney general positions as PAS positions at Level IV of the Executive Schedule in conformity with other assistant attorneys general.
- Option: Require confirmation for all assistant secretary positions with general areas of responsibility to be identified by the President at the time of each nomination. The Secretary would retain the flexibility within those areas. Compensate all assistant secretaries at Level IV of the Executive Schedule.
- Option: Consider whether as many as 12 assistant secretaries are needed. Congress may explore the responsibilities and rationale for these positions. It could create any number of assistant secretary positions, subject to confirmation and paid at Executive Schedule rates. It could allow the Secretary to name deputy assistant secretaries to be among the noncareer SES personnel in the department. This might be a means to avoid the inconsistencies of appointment status, to avoid having presidential appointees in the executive departments, and to work within the existing appointments framework.
- Option: Establish the department general counsel as a PAS position.
- Option: Establish the CIO position in conformity with 44 U.S.C. 3506 to maintain uniformity among these position across the departments and within the CIO Council.

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<sup>91</sup>H.R. 5005, Sec. 811(d) and S. 2452, Sec. 183(c).

- Option: Clarify the relationship between departmental officers and directorate officials with similar responsibilities. For example, under the Senate proposal, would the CFO and general counsel of the Directorate of Immigration Affairs be under the authority of their counterparts at the departmental level?
- Option: Clarify the status of transferred agency incumbents. Questions arise, such as: Would the position of Under Secretary for Transportation Security transfer? If so, would that position transfer as an under secretary? If so, would it bring with it the statutory bonus provision now applicable to it? Should there be a similar statutory bonus provision applicable to other under secretary positions? Would lead FEMA officials (statutory positions) continue to exist as such, or should the statute effect a change of status?<sup>92</sup>
- Option: If the intention is to leave much of the appointment and compensation status vague, it might be useful to offer relevant discussion in report language. When a statute is silent, the report language becomes important as successor secretaries strive to follow congressional intent while implementing the statute and as successor Congresses conduct oversight.

## Conclusion

The proposals are complex and far-reaching. The intent, certainly, is to effect a strong agenda and organizational mechanism for homeland security. However, attention to the details of administrative structure, such as appointment status and process and compensation designation for top managers, serves to allow departmental management to focus on the mission of the department.

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<sup>92</sup>For further discussion of possible implications, see CRS Report 98-892, *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative*, by Morton Rosenberg.