

**Congress of the United States**  
**House of Representatives**  
**Washington, D.C. 20515**

July 9, 2002

The Honorable Tom Ridge  
Director  
Office of Homeland Security  
The White House  
Washington, DC 20500

Dear Governor Ridge:

Congress is considering the President's proposal to create a new Department of Homeland Security on an accelerated schedule. But now that Congress has received the legislative language that would implement the President's plan, many issues have arisen about the details of the proposal. We are writing in the hope that you will be able to provide expeditious responses to these concerns.

The issues fall into ten main areas. First, the new Department will inherit a vast array of responsibilities that have nothing to do with homeland security. These include administering the National Flood Insurance Program, cleaning up oil spills at sea, and eradicating pests like the boll weevil. Giving the new Department dozens of responsibilities unrelated to homeland security risks bloating the size of the bureaucracy and diluting the new Department's counterterrorism mission.

Second, the legislation lacks an effective mechanism to coordinate the activities of the many federal agencies that have major homeland security functions. The President's submission to Congress listed 153 different agencies, departments, and offices involved with homeland security.<sup>1</sup> After the creation of the proposed new Department, this number actually will increase to 160 agencies, departments, or offices with security roles. But the draft bill does not include a mechanism for developing and implementing a unified homeland security strategy across the entire government.

Third, there are inefficiencies and coordination problems that will arise when parts of agencies are removed from their existing departments and moved to the new Department. The goal of the legislation is to make government more efficient, but some of the proposed changes could have exactly the opposite effect. For example, GAO has testified that programs transferred from the Department of

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<sup>1</sup>President George W. Bush, *The Department of Homeland Security* (June 2002) (hereinafter "White House Briefing Document") (on line at <http://www.whitehouse.gov/deptofhomeland/>).

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Health and Human Services include “essential public health functions that, while important for Homeland Security, are critical to basic public health core capacities.”<sup>2</sup>

Fourth, despite prior assurances that the Administration supported reforms of the Immigration and Naturalization Service (INS) that were passed by the House, the President’s proposal would import the INS into the new Department of Homeland Security wholly intact and without these needed internal reforms.

Fifth, the legislation includes broad exemptions from our nation’s most basic “good government” laws. The legislative language would allow the new Secretary, in conjunction with the Office of Personnel Management, to waive all provisions of our civil service laws. These laws have evolved over many decades to ensure that our government has a professional civil service hired on the basis of merit rather than political favoritism. Yet the proposed legislation would allow the new Department to waive all of these protections, including those that prohibit patronage, protect whistleblowers, provide for collective bargaining rights, and ensure health and retirement benefits.

A similar approach has been taken with procurement and the management of real property. Under the proposal, the Secretary does not have to comply with cornerstone procurement principles, such as open and competitive bidding. Moreover, basic government in sunshine laws, such as the Freedom of Information Act and the Federal Advisory Committee Act, have been limited in their application to the new Department.

Sixth, the President’s proposal would give the new Department extraordinary powers to avoid meaningful congressional oversight. Not only would the new Department be able to exempt itself from civil service, procurement, and property laws, it would also be able to rearrange functions, eliminate offices, and transfer large amounts of appropriated funds without having to seek prior congressional approval.

Seventh, the proposal does not address the potential for disruption in the nation’s war against terrorism. According to David Walker, the Comptroller General of GAO:

[R]eorganizations of government agencies frequently encounter start up problems and unanticipated consequences that result from the consolidations, are unlikely to fully overcome

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<sup>2</sup>U.S. General Accounting Office, *Homeland Security: New Department Could Improve Coordination but May Complicate Public Health Priority Setting*, 6 (June 25, 2002) (GAO-02-883T).

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obstacles and challenges, and may require additional modifications in the future to effectively achieve our collective goals for defending the country against terrorism.<sup>3</sup>

Although Administration officials have compared this restructuring to the formation of the Department of Defense in the 1940s, that reorganization was not attempted until after the war was over, and even then it caused confusion and inefficiencies for decades.

Eighth, there is no comprehensive national strategy for combating terrorism to guide the new Department. Logically, a major bureaucratic reorganization like this should be proposed as part of a comprehensive national strategy for providing homeland security. But in this case, the reorganization is occurring in a vacuum. There is no national strategy that identifies the major threats the nation faces and explains how the new Department will meet them. Nor is there a comprehensive threat and risk assessment that identifies and prioritizes threats in a coherent manner.

Ninth, the costs of this proposal have not been identified. Although the Administration has stated that the creation of this new Department “would not ‘grow’ government,”<sup>4</sup> this is not credible. According to the nonpartisan Congressional Budget Office, even the less ambitious reorganization proposed by Senator Lieberman will cost taxpayers over \$1 billion over the next five years.<sup>5</sup> Costs for the Administration’s plan inevitably will be higher.

Finally, the Administration’s proposal was developed in secret by a small group of White House advisors, without substantive input from the agencies that handle homeland security. It is being rushed through Congress on an accelerated schedule. This is not normally an approach that produces sound policy. The potential for making grave mistakes as a result of this truncated process should be a serious concern for all Americans.

We need to work together to address the concerns raised in this letter and to make improvements in the legislation. Your response to the issues and questions raised in the body of this letter will be an important step in this process. For this reason — and given the short time frame Congress has for consideration of the legislation — we urge you to respond by July 15, 2002.

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<sup>3</sup>U.S. General Accounting Office, *Homeland Security: Proposal for Cabinet Agency Has Merit, But Implementation Will Be Pivotal to Success*, 5 (June 25, 2002) (GAO-02-886T).

<sup>4</sup>White House Briefing Document, *supra* note 1, at 17.

<sup>5</sup>Congressional Budget Office, *Cost Estimate: S.2452, National Homeland Security and Combating Terrorism Act of 2002*, 1 (June 17, 2002).

## **I. TRANSFER OF FUNCTIONS NOT RELATED TO HOMELAND SECURITY**

According to the White House briefing document issued on June 7, 2002, the Department of Homeland Security “must be an agile, fast-paced, and responsive organization.”<sup>6</sup> Transferring functions that do not involve homeland security to the new Department, however, interferes with this goal. Giving the new Department unnecessary responsibilities inevitably will expand the size of its bureaucracy and dilute its counterterrorism mission.

At the same time, giving vital but unrelated government responsibilities to the Department creates the risk that these responsibilities will be neglected and performed poorly. As GAO has concluded, many of the unrelated functions being given to the new Department “represent extremely important functions executed by the federal government that, absent sufficient attention, could have serious implications for their effective delivery and consequences for sectors of our economy, health and safety, research programs and other significant government functions.”<sup>7</sup>

Despite these risks, many important government functions that are not related to homeland security are being transferred to the new Department. In fact, the new Department will have to carry out over three dozen completely unrelated missions under the President’s proposal.

Section 402(3) of the President’s proposal would transfer the Animal Plant Health Inspection Service (APHIS), which is now currently part of the Department of Agriculture, into the new Department. APHIS has nearly 8,000 full-time employees (FTEs), but few have responsibility for inspecting plants and animal products at the border. The other APHIS employees perform functions that are critical to various sectors of the economy, but are not related to homeland security. For example, APHIS is responsible for:

- Eradicating pests, such as the boll weevil, the citrus canker, the gypsy moth, and various noxious weeds through detection and control strategies throughout the United States;
- Approving animal drugs that are made from biological materials, such as animal vaccines;
- Approving field trials of genetically modified crops; and
- Maintaining the missing pet network at [www.missingpet.net](http://www.missingpet.net).

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<sup>6</sup>White House Briefing Document, *supra* note 1, at 16.

<sup>7</sup>GAO-02-886T, *supra* note 3, at 19.

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Section 502(1) of the President's proposal would transfer the Federal Emergency Management Agency (FEMA) into the new Department. To date, however, FEMA has had a limited role in counterterrorism. According to former FEMA director James Lee Witt, "[o]ver the last decade FEMA has responded to more than 500 emergency and major disaster events. Two of those were related to terrorism (Oklahoma City and New York City)."<sup>8</sup> In Mr. Witt's view, "[f]olding FEMA into a homeland or national security agency will seriously compromise the nation's previously effective response to natural hazards."<sup>9</sup> Major FEMA responsibilities that are unrelated to homeland security include:

- Providing flood insurance and mitigation services (including pre-disaster mitigation, the Hazard Mitigation Grant Program, and flood mapping);
- Conducting various programs to mitigate the effects of natural disasters, such as programs to assist states in preparing for hurricanes and the National Earthquake Hazards Reduction Program;
- Providing temporary housing and food for homeless people; and
- Operating the National Fire Data Center and the National Fire Incident Reporting System to reduce the loss of life from fire-related incidents.

Section 402(4) of the President's proposal would transfer the United States Coast Guard out of the Department of Transportation and into the new Department. The Coast Guard describes itself as a "multi-mission, military, maritime" agency. Although it performs some security-related functions, it also conducts many others unrelated to homeland security. For example, Coast Guard responsibilities include:

- Providing navigational tools to ensure that vessels can navigate the nation's waterways;
- Promulgating and enforcing boating regulations to ensure that oceangoing vessels are safe;
- Protecting the nation's fishery resources, as well as its endangered species, by enforcing prohibitions against illegal and excess fishing;

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<sup>8</sup>James Lee Witt and Associates, *Department of Homeland Security and FEMA* (white paper) (June 19, 2002).

<sup>9</sup>*Id.*

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- Protecting the maritime environment by preventing oil spills in the nation's waters and ensuring that spills are cleaned up expeditiously if they happen; and
- Maintaining a fleet of ships that is capable of breaking ice in order to maintain maritime mobility and monitors the movement of glaciers.

These Coast Guard functions are essential, but they could be jeopardized by the transfer to a new Department focused on homeland security. Indeed, the effects of the shift in the Administration's priorities are already being felt. According to the Administration's homeland security budget justification for fiscal year 2003, "[a]fter September 11, the Coast Guard's port security mission grew from approximately 1-2 percent of daily operations to between 50-60 percent today."<sup>10</sup> Without a sustained commitment to its core marine and fishery functions, the Coast Guard's ability to protect boaters and the marine environment will be jeopardized.

There are many other examples of unrelated functions being transferred to the new Department. The transfer of the Environmental Measurements Laboratory from the Department of Energy (DOE), for example, will make the new Department responsible for maintaining the Human Subjects Research Database, which contains descriptions of all projects involving human subjects that are funded by the DOE, as well as the program that assesses the quality of 149 private laboratories that measure radiation levels. Radiation measurement quality control undoubtedly will seem like a small item to the new Department of Homeland Security, but assuring that the laboratories make accurate measurements is important, as mistakes potentially could affect public health and cause large unnecessary public expenditures at DOE facilities.

Appendix A contains a list of 40 unrelated functions that would be transferred to the new Department by the President's proposal. While it may be impossible to create a new Department without transferring some unrelated functions, there would seem to be serious dangers inherent in the wholesale transfer of unrelated functions as contemplated in the Administration's proposal.

## **II. LACK OF EFFECTIVE COORDINATING MECHANISMS**

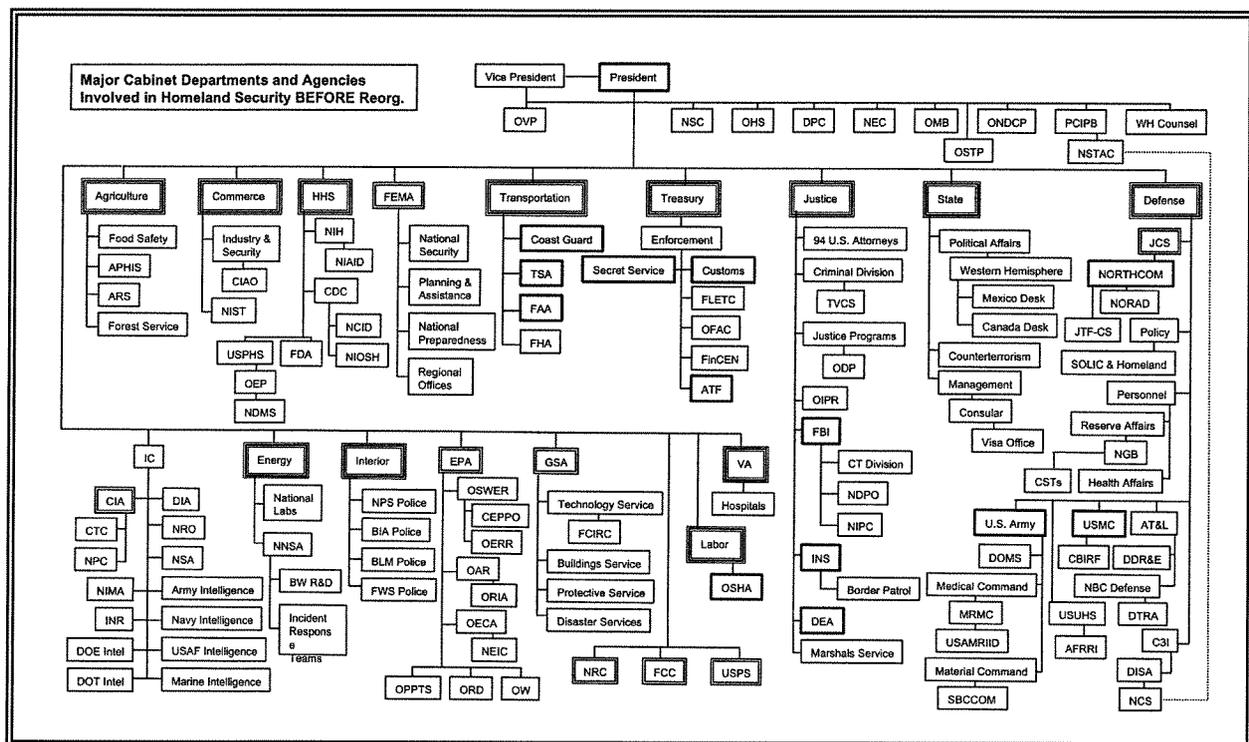
At the same time that the Administration's proposal transfers numerous unrelated functions to the new Department, the proposal also fails to include provisions that would ensure the coordination of the more than 100 federal entities that will continue to have significant homeland security functions.

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<sup>10</sup>President George W. Bush, *Securing the Homeland; Strengthening the Nation*, 18 (undated) (hereinafter "FY03 Budget Justification") (on line at [http://www.whitehouse.gov/homeland/homeland\\_security\\_book.html](http://www.whitehouse.gov/homeland/homeland_security_book.html)).

According to the Administration, “responsibilities for homeland security are dispersed among more than 100 different government organizations.”<sup>11</sup> Indeed, an organizational chart provided by the White House listed 153 different agencies, departments, and offices with a role in homeland security (see Figure 1). The White House argues that the President’s proposal would solve this problem by “transforming and realigning the current confusing patchwork of government activities into a single department.”<sup>12</sup>

**FIGURE 1: Before Reorganization —  
 153 Federal Agencies, Departments, and Offices With Homeland Security Role**



Source: The White House

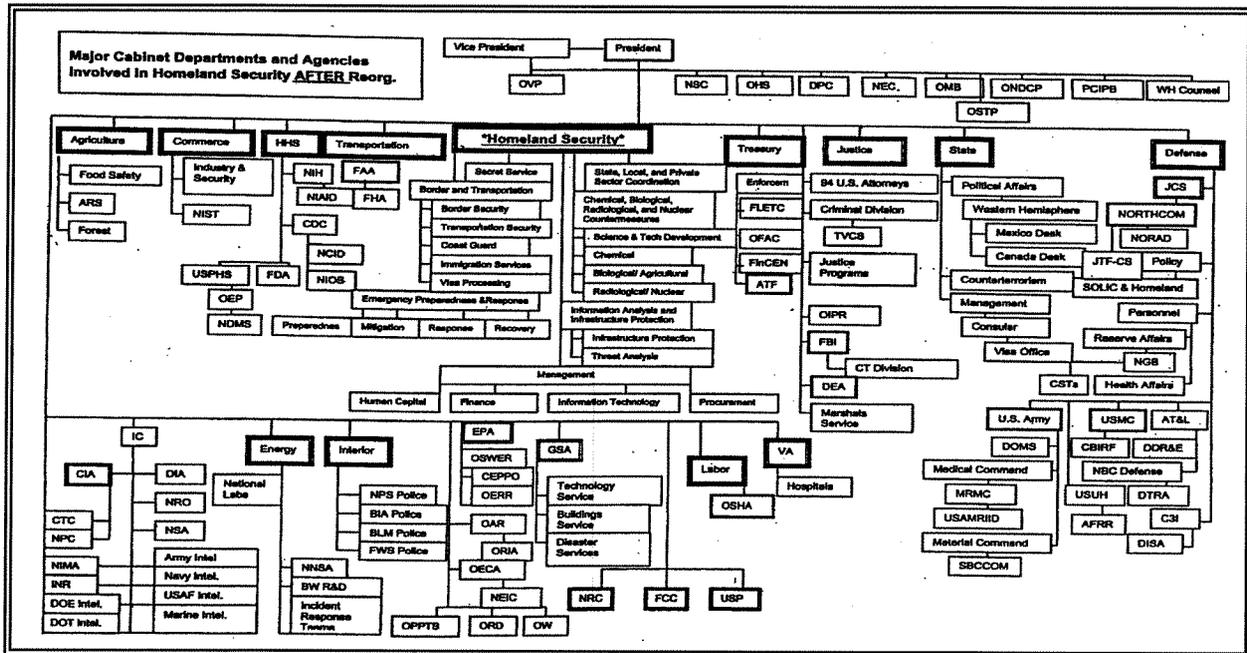
In fact, however, the President’s proposal will not simplify this patchwork and may even make it worse. Even after all of the changes proposed in the President’s legislative language, the federal government would continue to have well over 100 agencies, departments, and offices involved in homeland security. According to an analysis by the minority staff of the Appropriations Committee, the

<sup>11</sup>White House Briefing Document, *supra* note 1, at 1 (emphasis in original).

<sup>12</sup>*Id.*

total number of departments, agencies, and offices with a role in homeland security actually will grow under the President's proposal, from 153 to 160 (see Figure 2).<sup>13</sup>

**FIGURE 2: After Reorganization —  
 160 Federal Agencies, Departments, and Offices With Homeland Security Role**



Source: House Appropriations Committee (Minority Staff)

One example of the continued need for coordination across agencies involves providing emergency response. According to the Administration:

Currently, if a chemical or biological attack were to occur, Americans could receive warnings and health care information from a long list of government organizations, including HHS,

<sup>13</sup>A post-transfer organizational chart provided by the White House Office of Management and Budget shows the number of federal agencies, departments, and offices dropping to 134. The White House chart, however, lists the new Department of Homeland Security as having only six offices involved in homeland security. The White House chart omits major components of the new Department that will have homeland security functions, including the Coast Guard, the Office of Threat Analysis, and the office responsible for state, local, and private sector coordination.

FEMA, EPA, GSA, DOJ, OSHA, OPM, USPS, DOD, USAMRIID, and the Surgeon General — not to mention a cacophony of local agencies.<sup>14</sup>

But under the President's proposal, all but one of these 11 federal agencies (FEMA) would continue to exist, and this one agency would be replaced by the new Department. The potential for confusion — and the need for effective coordination — remains as great after the creation of the new Department as before.

In fact, in some cases, the reorganization will actually create confusion. Currently, three separate federal agencies are in charge of protecting the food supply: the Food and Drug Administration (FDA), which prevents adulteration of fruits, vegetables, processed foods, and seafood; the Environmental Protection Agency (EPA), which regulates environmental contaminants, such as pesticides; and the Department of Agriculture, which regulates the safety of meat and poultry for human consumption, as well as the spread of plant and animal pests through food products. Leading experts, such as the National Academy of Sciences, have called for consolidating these diffuse authorities into a single agency.<sup>15</sup>

The Administration's proposal, however, would further fragment regulation of the food supply by transferring some of Agriculture's responsibilities to the new Department, creating a fourth food safety agency. APHIS, which is charged with inspecting imports to ensure that pests and bugs that could harm crops or livestock do not enter the United States, would become part of the new Department. But the Food Safety Inspection Service of the Department of Agriculture, which inspects domestic and imported meat and poultry for threats to human health, would remain at Agriculture. The nonsensical result, as GAO has observed, is that "the focus appears to be on enhancing protection of livestock and crops from terrorist acts, rather than on protecting the food supply as a whole."<sup>16</sup>

One area in which coordination is urgently needed is among law enforcement and intelligence agencies, in particular the Federal Bureau of Investigation (FBI) and the Central Intelligence Agency (CIA). How the new Department would relate to these agencies is not clear, however. One of the

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<sup>14</sup>White House Briefing Document, *supra* note 1, at 5.

<sup>15</sup>National Research Council, *Ensuring Safe Food from Production to Consumption*, National Academy Press (1998) (recommending a major overhaul of food safety laws and appointment of a single federal official to oversee food safety). *See also* U.S. General Accounting Office, *Food Safety and Security: Fundamental Changes Needed to Ensure Safe Food* (Oct. 10, 2001) (GAO-02-47T) (recommending a single food safety agency).

<sup>16</sup>GAO-02-886T, *supra* note 3, at 18.

primary missions of the new Department is to “[p]revent terrorist attacks within the United States.”<sup>17</sup> The Administration says that a new department with this mission is needed because “[t]oday no one single government agency has homeland security as its primary mission.”<sup>18</sup> But the FBI has also just undergone a major reorganization. Now, its primary mission is also “[p]rotecting the United States from terrorist attack”<sup>19</sup> — identical to that of the new Department of Homeland Security. As a result, rather than having no single federal agency with homeland security as its mission, the Administration seems to be proposing two.

Under the Administration’s proposal for a new Department of Homeland Security, there will be a new office for intelligence and threat analysis. This office will assist in “pulling together information and intelligence from a variety of sources.”<sup>20</sup> Similarly, under FBI Director Mueller’s reorganization proposal, there will be a new office in the FBI called the Office of Intelligence that will also assist in “pulling together bits and pieces of information that often come from separate sources.”<sup>21</sup> The Department of Homeland Security’s intelligence office would “have the ability to view the dangers facing the homeland comprehensively, ensure that the President is briefed on relevant information, and take necessary protective action.”<sup>22</sup> Similarly, the FBI’s intelligence office will be charged with “providing analytic products to policy makers and investigators that will allow us to prevent terrorist acts.”<sup>23</sup> This does not appear to be a recipe for a unified approach.

The investigation of the September 11 attacks has already revealed serious lapses in the analysis and sharing of intelligence information. In July 2001, an FBI special agent in Phoenix reported to his supervisors that followers of Osama bin Laden might be training at U.S. aviation schools and suggested a nationwide canvass of the schools.<sup>24</sup> But this warning was apparently ignored. As early as

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<sup>17</sup>White House Briefing Document, *supra* note 1, at 8.

<sup>18</sup>*Id.* at 1.

<sup>19</sup>Statement of Robert S. Mueller, III, before the Senate Committee on the Judiciary (June 6, 2002) (on line at [http://judiciary.senate.gov/testimony.cfm?id=279&wit\\_id=608](http://judiciary.senate.gov/testimony.cfm?id=279&wit_id=608)).

<sup>20</sup>White House Briefing Document, *supra* note 1, at 14.

<sup>21</sup>Mueller Statement, *supra* note 19.

<sup>22</sup>White House Briefing Document, *supra* note 1, at 14.

<sup>23</sup>Mueller Statement, *supra* note 19.

<sup>24</sup>*FBI Whistle-Blower Assails Bloated Bureaucracy*, Washington Post (June 7, 2002).

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January 2001, the CIA obtained information that two of the September 11 assailants — Nawaz al-Hazmi and Khalid al-Midhar — met with al-Qaeda agents in Malaysia. But this information was not provided to the INS until August 2001, by which time al-Hamzi and al-Midhar had already entered the United States.<sup>25</sup>

The Administration's proposed bill, however, does not adequately address these problems. Although the bill gives the Secretary of Homeland Security rights of access to reports, assessments, and analytical information from other agencies that relate to threats and vulnerabilities, the Department remains primarily a "consumer" of intelligence information collected by agencies outside its control after that information is already processed by those agencies. This passive role will not ensure that the new Department obtains access to information that the collecting agencies deem insignificant, such as the warning from the FBI agent about flight schools. Although the Administration's bill allows for the transmittal of "raw" intelligence from outside agencies to the Department of Homeland Security, the Department is not given the resources to cope with the volume and complexity of this information.<sup>26</sup> Moreover, the new Department has no "tasking" authority to direct what intelligence is collected, making it difficult for the new Department to ensure that possible threats it identifies are properly pursued.

Another concern is the potential for confusion and interference in the actual response to bioterrorist incidents. The FBI will bring a law enforcement focus to the scene of a bioterrorist event, while the new Department will be concerned with the emergency response. Under the President's proposal, it is unclear which will prevail. Under Presidential Decision Directive 62, which was signed during the previous Administration, the FBI was designated as the lead agency for "crisis management," which included efforts to anticipate, prevent, and resolve terrorist attacks. FEMA was designated the

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<sup>25</sup>*Terrorism "Watch List" Was No Match for Hijackers*, Washington Post (Sept. 23, 2001); *Can We Stop the Next Attack?*, Time.com (March 3, 2002). The CIA has claimed that it provided information on al-Midhar as early as January 2001, but the FBI has asserted that the information provided contained little detail. Sources: *CIA Warned FBI About Hijacker*, CNN.com (June 4, 2001); *FBI and CIA Fight It Out Over Who Was to Blame for September 11 Blunders*, The Guardian (June 5, 2002).

<sup>26</sup>Of the 1,000 people slated to staff the new Information Analysis and Infrastructure Protection Division, 800 reportedly will come from the FBI's National Infrastructure Protection Center (NIPC). These individuals, however, are already fully occupied with their current responsibilities, which involve protecting critical infrastructure, particularly with respect to computer and information technology. If given the new role of processing all raw intelligence information from the FBI, CIA, and other intelligence agencies, the existing NIPC staff would be both overwhelmed and diverted from its current tasks.

lead agency for “consequence management,” which included broader measures to protect public health and safety. The President’s proposal seeks to “clarify” these responsibilities by “eliminating the artificial distinction between ‘crisis management’ and ‘consequence management.’”<sup>27</sup> But it does not describe how the new Department and the FBI will handle the scene of a bioterrorist attack if they both arrive at the same time with fundamentally conflicting interests and goals.

There are many other instances of coordination problems that the President’s proposal does not address. It is unclear in the President’s proposal, for instance, how the Department of Homeland Security would organize and coordinate the various different police forces that exist among federal agencies. The Administration’s proposal would transfer some of those forces (the Federal Protective Service, which protects buildings belonging to the General Services Administration (GSA)), but not others (the security forces protecting Department of Energy, Veterans, and judicial buildings). Moreover, removing the Federal Protective Service from GSA creates its own problems because, as GAO has observed, “security needs to be integrated into the decisions about location, design and operation of federal facilities.”<sup>28</sup>

What is urgently needed is an effective entity at the White House level that can unify the disparate federal agencies with homeland security functions behind a comprehensive national strategy. This is supposed to be the mission of the White House Office of Homeland Security, which President Bush created in October 2001, and which you head. But the proposal does nothing to give the head of the office the kinds of authority needed to succeed.

### **III. PROBLEMS WITH EXTRACTING CERTAIN AGENCIES**

The sections above have raised concerns with transferring functions unrelated to homeland security and the lack of coordinating mechanisms regardless of whether agencies are inside or outside the structure of the new Department. Also of concern are the potential effects of removing certain functions from their home agencies.

This is a particular problem for the functions being transferred from the Department of Health and Human Services (HHS). Section 502(5) of the President’s proposal would move the Office of the Assistant Secretary for Public Health Emergency Preparedness and “the functions of the Secretary of Health and Human Services related thereto” to the new Department of Homeland Security. This provision makes little sense. In the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Congress created the Office of the Assistant Secretary for Public Health

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<sup>27</sup>White House Briefing Document, *supra* note 1, at 12.

<sup>28</sup>GAO-02-886T, *supra* note 3, at 18.

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Emergency Preparedness in recognition of the need to have a central office in HHS to coordinate how the various agencies within the Department respond to public health emergencies.<sup>29</sup> Moving this office to another department will not eliminate the need for a coordinating office within HHS. It will simply recreate the same problems within HHS that Congress was attempting to fix.

Richard Falkenrath, director of policy at the White House Office of Homeland Security, was asked about this problem during a briefing for staff on July 1, 2002. He answered that the challenge of coordinating emergency preparedness and response activities within HHS could be handled by “a couple of people” in the Secretary’s office. Obviously, this cavalier attitude is seriously misinformed.

Section 505 is also problematic. It transfers control over HHS programs to provide assistance for state and local preparedness from HHS to the new Department. These funds, which total over \$1 billion, allow states and localities to enhance their surveillance, communication, and laboratory abilities, all of which are essential for responding to numerous public health threats, including threats that are not related to terrorism. As GAO has stated, these programs “include essential public health functions that, while important for homeland security, are critical to basic public health core capacities.”<sup>30</sup> As a result, GAO made the following conclusions:

We are concerned that this approach may disrupt the synergy that exists in these dual-purpose programs. We are also concerned that the separation of control over the programs from their operations could lead to difficulty in balancing priorities. Although the HHS programs are important for homeland security, they are just as important to the day-to-day needs of public health agencies and hospitals, such as reporting on disease outbreaks and providing alerts to the medical community. The current proposal does not clearly provide a structure that ensures that both the goals of homeland security and public health will be met.<sup>31</sup>

Section 403 also creates uncertainties by transferring to the new Department vague authorities

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<sup>29</sup>According to the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Pub. Law 107-588), the Assistant Secretary coordinates all agency interfaces on emergency preparedness between HHS and “other departments, agencies and offices of the United States.” This person also “[i]nterfaces between the Department and State and local entities with responsibility for emergency preparedness.” As part of this person’s duties, he or she also “coordinate[s] the efforts of the Department to bolster State and local emergency preparedness for a bioterrorist attack or other public health emergency.”

<sup>30</sup>GAO-02-883T, *supra* note 2, at 6.

<sup>31</sup>*Id.* at 8.

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over visa processing. Currently, approving and denying visas is an important activity of the State Department, which processes about 400,000 immigrant visas and over six million non-immigrant visas annually. To perform this function, the State Department employs thousands of foreign service officers skilled in hundreds of languages. Section 403(1) transfers to the Secretary of Homeland Security “exclusive authority” over this function, but this authority would be exercised “through” the Secretary of State. As a result, it is unclear whether the State Department must concur in policy decisions, or whether this is merely an administrative function. Additional statements by the Administration have not clarified this provision. The Administration has stated that consular officers will remain employed by the State Department, but that the new Secretary of Homeland Security will delegate back to the Secretary of State some visa functions unrelated to security.

Similar problems affect the provisions transferring portions of the Department of Energy. The provisions in the bill are ambiguous and potentially very broad. For example, section 302(2)(G) of the President’s proposal would transfer “the advanced scientific computing research program and activities” at Lawrence Livermore Laboratory to the new Department. Although the exact scope of this provision is unclear, it appears to encompass parts of the Lawrence Livermore Laboratory’s Computation Directorate, which supports other programs at the laboratory by providing computing capacity and capability, as well as research, advanced development, and operations and support related to computing, computer science, and information technologies. Such a transfer could harm the laboratory’s ability to support its key mission — safeguarding the stockpile of nuclear weapons — as well as other core laboratory activities.

Section 302(2)(E) gives the President authority to transfer from DOE to the new Department any life science activity within the biological and environmental research program that is related to microbial pathogens. The result would be that ongoing DNA sequencing of harmful microbes could be transferred to the new Department, while virtually identical work on microbes with beneficial uses (such as microbes that break down pollution) would stay at DOE. Splitting this highly specialized work risks weakening the effectiveness of both.

#### **IV. LACK OF RECOGNITION OF DISPARATE IMMIGRATION FUNCTIONS**

In April, the House passed legislation (H.R. 3231) recognizing the two distinct functions of the INS: an immigration services function and an enforcement function. As part of this reform effort, the bill would split the INS into a Bureau of Citizenship and Immigration Services and a Bureau of Immigration Enforcement, both under the supervision of an Associate Attorney General for Immigration Affairs within the Department of Justice. The legislation aimed to correct longstanding and widely-recognized systemic problems within the INS by separating out its distinct and often conflicting service and enforcement functions.

When the House immigration bill was being considered, the Administration expressed its support. In addition, when the White House issued its briefing document regarding the new Department of Homeland Security, that support was reiterated. The briefing document stated the following:

The new Department of Homeland Security would include the INS and would, consistent with the President's long-standing position, separate immigration services from immigration law enforcement.<sup>32</sup>

Despite these assurances, however, the legislative language proposed by the President would import the INS into the new Department of Homeland Security intact and unreformed. There are no details whatsoever regarding the structure of the INS after it is transferred to the new Department. As a result, the Administration's proposal fails to address internal structural and coordination problems that hamper the effectiveness of the INS.

## **V. EXEMPTIONS FROM "GOOD GOVERNMENT" LAWS**

The Administration's proposal would create broad exemptions to the nation's "good government" laws. It would make the civil service, procurement, and property acquisition and disposal laws essentially optional for the new Department. In addition, the President's proposal would weaken valuable sunshine laws, such as the Freedom of Information Act and the Federal Advisory Committee Act. The bill would also create a weak management and oversight structure by not fully applying the Chief Financial Officers Act, the law governing Chief Information Officers, and the Inspector General Act.

### **A. Exemption from Civil Service Protections**

The nation's civil service laws have evolved over many decades to ensure that the government has a professional civil service hired on the basis of merit rather than political favoritism. Section 730 of the President's proposal, however, would give the Secretary the authority to create an alternative personnel system. The only limitation in the statute is that the system should be "flexible, contemporary, and grounded in the public employment principles of merit and fitness."

Under the President's proposal, employees of the new Department could be exempted from essential provisions of title 5 of the United States Code. No rationale has been offered to explain why

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<sup>32</sup>White House Briefing Document, *supra* note 1, at 10.

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affording these basic protections for federal workers and their families would undermine the mission of the new Department. The civil service provisions that become optional include the following:

- The prohibition on discrimination against employees on the basis of political affiliation and on coercing political activity (anti-patronage protection);
- The prohibition on hiring or promoting a relative (anti-nepotism protection);
- The prohibition on reprisal against employees for the lawful disclosure of information about illegal and wasteful government activity (whistleblower protection);
- The preferences for veterans in hiring and in reductions-in-force;
- The protection from arbitrary dismissal or demotion through due process appeal rights to the Merit Systems Protection Board;
- The right to organize, join unions, and bargain collectively with management over working conditions;
- Sick and annual leave for federal employees and family and medical leave;
- Retirement benefits, such as the Civil Service Retirement System and the Federal Employees' Retirement System; and
- Health insurance through the Federal Employees' Health Benefits Program.

Moreover, important programs for ensuring diversity in the federal workforce, such as the requirement to recruit minorities, would also become optional under the proposed legislation.

Another potential threat to the civil service laws is section 732(b), which allows the Secretary to hire an unlimited number of employees through "personal service" contracts rather than through the civil service system. Although the rationale for this provision seems to be to allow the new Department to obtain certain specialized services in an emergency, there do not appear to be any limits on its use. For example, current law requires these types of contracts to be temporary (no longer than one year) and subject to salary caps (no higher than the GS-15 level). The President's proposal would allow these contracts to go on indefinitely and at any rate. In effect, the section provides an alternative vehicle for bypassing the protections and requirements of the civil service system.

**B. Exemption from Procurement Rules**

Under section 732(c) of the President's proposal, the new Secretary could waive any and all procurement statutes and regulations, and the Secretary would not be required to comply with the cornerstone procurement principles of open and competitive bidding. In a section-by-section analysis provided by the White House, the Administration asserts that "normal procurement operations would be subject to current government-wide procurement statutes and regulations."<sup>33</sup> To the contrary, however, the legislative language would add the new Department to the list of entities listed in 40 U.S.C. §474, such as the Postal Service, which would exempt entirely the Department from the federal government's normal acquisition laws.

As a result, there is no guarantee that the new Department would be getting the lowest prices, the best quality, or the best deals. Fundamental principles of federal procurement such as the following would not apply:

- The requirement that acquisitions be publicly advertised;
- The requirement that sufficient notice be given to allow companies to respond;
- The requirement that all responsible bidders be given the chance to compete for a given acquisition; and
- The requirement that all contractors be rated on the same criteria when competing for a given contract.

These bedrock principles have helped to maintain competition in federal contracting, which history has proven to be the best way to ensure the best quality at the lowest prices while maintaining a system free of favoritism or abuse. In addition, long-standing preferences for small- and minority-owned businesses designed to encourage their development and access to federal contracts would no longer be guaranteed.

Section 732(a) of the President's proposal would explicitly grant the new Department so-called "other transactions authority" for research and development contracts. This authority was given to the Defense Department to eliminate the open and competitive bidding process in order to attract nontraditional contractors. In fact, however, it has been used mainly by traditional contractors to negotiate contracts that waive the federal government's rights to review financial management and cost

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<sup>33</sup>The White House, *Analysis for the Homeland Security Act of 2002*, 11 (undated).

information, as well as its rights to use new inventions discovered through research funded by the federal taxpayer.<sup>34</sup> In reviewing the use of this authority by the Defense Department, the Inspector General found that these that types of contracts “do not provide the government a number of significant protections, ensure the prudent expenditure of taxpayer dollars, or prevent fraud.”<sup>35</sup>

### **C. Exemption from Property Rules**

The new Department will acquire a considerable inventory of federal property, particularly through the Coast Guard, which owns valuable real estate across the country. Sections 732(d) and (f) of the President’s proposal, however, would give the new Department broad authority to acquire and dispose of both real and personal property. Specifically, the Department could acquire replacement real property through exchange or transfer with other agencies or through the sale or long-term lease to the private sector. In addition, the Department would be authorized to retain the proceeds of such transactions.

Currently, under the 1949 Property Act, federal agencies must determine whether they own “excess” property they no longer need. GSA then screens this excess property for other federal uses. If there are no federal uses for the property, GSA declares the property “surplus” and screens it for “homeless” or “public benefit” uses, such as for schools, correctional institutions, airports, and other entities. If no beneficial public use is found for the property, GSA may sell the property through negotiated sales at fair market value without restrictions on use. The property may also be sold to the public through a bidding process if a negotiated sale does not occur. Under the Administration’s proposal, however, none of these procedures will apply.

The Government Reform Committee reported a comprehensive reform of federal property laws earlier this year (H.R. 3947). This reform gave agencies more flexibility to manage their property, but it also included safeguards to ensure that agencies respond to community input, consider local zoning laws, and receive fair market value. None of these safeguards are incorporated into the Administration’s proposal.

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<sup>34</sup>In general, for intellectual property developed with federal funding, the government normally retains a nonexclusive, nontransferable, irrevocable, and paid-up (royalty-free) license to use the intellectual property.

<sup>35</sup>Inspector General, Department of Defense, *Comments on the Service Acquisition Reform Act (H.R. 3832)*, 11 (Mar. 12, 2002) (concluding that “other transactions have not attracted a significant number of nontraditional Defense contractors” and that “traditional protections for the public trust do not exist, for the most part, for other transactions”).

**D. Exemption from Freedom of Information Act**

Section 204 of the President's proposal would exempt the new Department from complying fully with the Freedom of Information Act (FOIA). If nonfederal entities or individuals provide information voluntarily to the new Department that relates to infrastructure vulnerabilities or other vulnerabilities to terrorism, that information would not be subject to FOIA. This exemption would apply to information that "is or has been in the possession of the Department."

FOIA was designed to preserve openness and accountability in government. In order to protect sensitive information, FOIA already contains sufficient exemptions from disclosure. These exemptions cover critical infrastructure information. FOIA does not require the disclosure of national security information (exemption 1), sensitive law enforcement information (exemption 7), or confidential business information (exemption 4). Therefore, new exemptions to its provisions do not appear necessary.

The danger in creating new exemptions to FOIA is that important information about health and safety issues could be withheld from the public. In fact, the provision is drafted so broadly that it could be used to "launder" embarrassing information through the new Department and thereby prevent public disclosure.

One particular target of the new FOIA exemption appears to be the "Risk Management Plans" that chemical plants are required to file under the Clean Air Act. These plans inform communities about the dangers they would face in the event of an explosion or chemical accident in a nearby plant. Chemical industry officials argued that Congress should restrict public access to this information because the information could be used by terrorists to target facilities.

Congress addressed this issue by carefully balancing the goal of informing emergency responders and the public about potential risks of chemical accidents with the goal of keeping sensitive information away from terrorists. In the Chemical Safety Information Site Security Act of 1999, Congress concluded that information about potential "worst case" scenarios should remain available to the public, but with certain restrictions to prevent a searchable database from being readily posted on the internet. Congress ensured public access to basic information about the risk management plans, preserving the right of Americans to know about chemical accidents that could impact their families and communities. Under the President's proposal, however, chemical companies could now prevent the disclosure of all Risk Management Plans under FOIA simply by sending them to the new Department.

**E. Exemption from Federal Advisory Committee Act**

Section 731 of the President's proposal would exempt advisory committees established by the Secretary of the new Department from the Federal Advisory Committee Act (FACA). FACA requires that any committee formed to provide advice to the federal government, and which consists of members who are not federal employees, must follow certain rules in order to promote good-government values such as openness, accountability, and a balance of viewpoints. Generally, FACA requires that such committees announce their meetings, hold their meetings in public, take minutes of the meetings, and provide the opportunity for divergent viewpoints to be represented.

To protect sensitive information, FACA includes exemptions for information that relates to national security issues or information that is classified. As a result, many agencies with homeland security missions, such as the Department of Justice, the Federal Bureau of Investigation, and the Department of Defense, currently operate under FACA without difficulty. The President's proposal contains no explanation why the new Department could not also comply with FACA. In fact, the only two agencies that are exempt from FACA are the Central Intelligence Agency and the Federal Reserve.

At least 27 advisory committees that currently exist would be transferred to the new Department under the President's proposal. These existing advisory committees, which are currently subject to FACA, include the Navigational Safety Advisory Committee at the Coast Guard, the Advisory Committee of the National Urban Search and Rescue System at FEMA, the Advisory Committee on International Child Labor Enforcement at the Customs Service, and the Advisory Committee on Foreign Animal and Poultry Diseases at APHIS. When rechartered under the Homeland Security Department, none of these advisory committees will be subject to the FACA requirement on balance and openness.

In addition, the President's proposal waives important conflict of interest laws that apply to individuals serving on advisory committees. Under section 731, if an individual serves on an advisory committee, the individual will be exempt from the provisions of sections 203, 205, or 207 of Title 18, United States Code. These sections contain important protections. Section 207, for example, provides that a person who serves on a committee that is advising an agency on a specific matter cannot lobby the agency about the same matter after leaving the advisory committee. No rationale is provided for exempting members of advisory committees from these protections against conflicts of interest.

**F. Exemption from Chief Financial Officer Act**

Section 103(d)(4) of the President's proposal would authorize the President to appoint the Department's Chief Financial Officer (CFO) without Senate confirmation. Current law requires that a

CFO of a cabinet department either be: (1) appointed by the President with Senate confirmation; or (2) designated by the President from among agency officials who are Senate-confirmed.<sup>36</sup> In either case, current law requires that CFOs be Senate-confirmed.

In addition, the President's proposal contains no language making the CFO Act applicable to the new Department. The CFO Act contains core financial management, accountability, and reporting requirements that are at least as important for the new Department as they are for other covered agencies, which include all existing cabinet departments. Moreover, section 602 of the President's proposal provides that the CFO shall report to the Secretary or to another official of the Department as the Secretary may direct. This section is inconsistent with the CFO Act, which requires that the CFO report directly to the agency head regarding financial management matters.<sup>37</sup>

These exemptions from financial management requirements make little sense. According to GAO, "[i]t is important to re-emphasize that the department should be brought under the Chief Financial Officers (CFO) Act and related financial management statutes."<sup>38</sup>

#### **G. Exemption from Chief Information Officer Legislation**

The proposal does not appear to give the Chief Information Officer (CIO) of the new Department the same status and responsibilities as CIOs at other agencies. Section 603 of the President's proposal provides that the CIO shall report to the Secretary or to another official of the Department as the Secretary may direct. The Clinger-Cohen Act, however, requires that the CIO report directly to the agency head.<sup>39</sup>

In addition, the Clinger-Cohen Act specifies numerous responsibilities for CIOs. These include developing an accounting, financial, and asset management system that is reliable, consistent, and timely; developing and maintaining information systems; and assessing and reporting on progress made in developing information technology systems. The President's legislative language, however, does not specify any responsibilities for the CIO. In fact, the bill would assign responsibility for information technology systems to an Under Secretary for Management at the new Department, a responsibility assigned to the CIO under the Clinger-Cohen Act.

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<sup>36</sup>31 U.S.C. §901(a)(1).

<sup>37</sup>31 U.S.C. §902(a)(1).

<sup>38</sup>GAO-02-886T, *supra* note 3, at 33.

<sup>39</sup>44 U.S.C. §3506(a)(2)(A).

#### **H. Limits on Access to Information by Inspector General**

Section 710 of the President's proposal would subject the Inspector General (IG) of the new Department to the Secretary's control and would authorize the Secretary to prevent the IG from doing work in areas involving certain information. These areas are quite broad and extend to information concerning any "matters the disclosure of which would, in the Secretary's judgment, constitute a serious threat to national security." Under the President's proposal, the Secretary could prohibit the IG from doing work "if the Secretary determines that such prohibition is necessary . . . to preserve the national security or to prevent a significant impairment to the interests of the United States."

IGs at certain other agencies (such as the Defense Department and the Justice Department) have similar limitations on access. But in those cases, the IGs are directed to report to Congress if the relevant Secretary impedes their access to necessary information. In the case of the IG for the new Department, this important check on Secretarial interference has been eliminated. Instead, the proposal would give the responsibility of reporting interference with an IG investigation to the Secretary, who would have an obvious conflict of interest in full reporting.

#### **VI. EXEMPTION FROM CONGRESSIONAL OVERSIGHT**

In addition to creating exemptions to many of the nation's good government laws, the President's proposal would substantially undercut Congress' ability to conduct oversight of the new Department. Through several broad and sweeping provisions in the President's proposal, the Secretary of the new Department would have new powers to rewrite enacted legislation and override budgetary decisions made by Congress.

The President's proposal would give the Secretary of the new Department the equivalent of a lump-sum appropriation of more than \$30 billion. In transferring the various existing agencies to the new Department, several provisions of the President's proposal allow the Secretary to transfer agency balances to the new Department. Section 803(e) of the President's proposal allows the new Secretary to allocate those funds as the Secretary sees fit, and it expressly overrides the provision of permanent law that requires funds transferred to be used only for the purposes for which they were originally appropriated. Taken together, these provisions allow the new Secretary to rewrite appropriations relating to both homeland security and all other functions conducted by the new Department.

Section 733(b) creates for the new Secretary a permanent blanket grant of authority to transfer between appropriations accounts up to 5% of the appropriations made each year for agencies within the new Department, so long as the Appropriations Committees are given 15 days notice. This provision could allow the Secretary to transfer \$2 billion or more per year rather than addressing potential funding misallocations through the annual congressional appropriations process.

In addition, section 733(a) allows the Secretary to “establish, consolidate, alter, or discontinue” any organizational unit in the new Department, including those established by statute, upon 90 days notice to Congress. Although the Coast Guard and the Secret Service are exempt from this provision, all other agencies transferred to the new Department could be abolished entirely with no input from Congress.

## VII. POTENTIAL FOR SERIOUS DISRUPTION IN THE WAR ON TERROR

The Administration asserts that the “current components of our homeland security structure will continue to function as normal and there will be no gaps in protection as planning for the new Department moves forward.”<sup>40</sup> Unfortunately, this is a difficult goal to achieve, and the proposal submitted to Congress contains no implementation plan that shows how disruptions will be avoided.

In fact, the history of corporate and government reorganizations is not encouraging. As a management professor from Columbia University recently remarked, “[t]o think that a structural solution can bring about a major improvement in performance is a major mistake.”<sup>41</sup> In the corporate world, more mergers fail than succeed.<sup>42</sup> According to one expert, “[p]rivate-sector data show that productivity usually drops by 50 percent in the first four to eight months following the initial announcement of a merger, largely because employees are preoccupied with their now uncertain future.”<sup>43</sup>

The model most often cited by the Administration is the creation of the Department of Defense in 1947. But that reorganization was not undertaken until after World War II was over. Moreover, the newly created Defense Department was riven with strife for decades after its creation. As recently as 1983, when President Reagan ordered the invasion of Grenada, the Army and the Marines had to split

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<sup>40</sup>White House Briefing Document, *supra* note 1, at 4.

<sup>41</sup>*The Experiment Begins*, National Journal (June 15, 2002).

<sup>42</sup>*See, e.g., Breaking Up Is Hard, Merging Is Harder*, New York Times Week in Review (June 23, 2002) (“Indeed, business history is littered with failed attempts to unite far-flung enterprises that would prosper through sheer scale”); and *Stressed Out: Can Workplace Stress Get Worse?*, Wall Street Journal (Jan. 16, 2001) (“75% of those deals, by several experts’ estimates, will fail to achieve expected results”).

<sup>43</sup>Max Stier, *Homeland Security: Mega Merger*, Washington Post (June 25, 2002).

the island in half because they could not figure out how to cooperate.<sup>44</sup> The original 1947 reorganization required four different amendments, the last being the Goldwater-Nichols Act of 1986, before the problems created by the 1947 reorganization were finally addressed.

GAO has closely tracked the history of government reorganizations. According to David Walker, the Comptroller General of GAO:

Often it has taken years for the consolidated functions in new departments to effectively build on their combined strengths, and it is not uncommon for these structures to remain as management challenges for decades . . . . [R]eorganizations of government agencies frequently encounter start up problems and unanticipated consequences that result from the consolidations, are unlikely to fully overcome obstacles and challenges, and may require additional modifications in the future to effectively achieve our collective goals for defending the country against terrorism.<sup>45</sup>

Given this history, the burden should be on the Administration to show how this bureaucratic reorganization can be accomplished successfully. But virtually no detail has been provided to Congress that addresses these serious implementation issues.

## VIII. LACK OF NATIONAL STRATEGY

Most experts recommend three concrete steps for developing an approach to homeland security: First, evaluate the threats posed to the country; second, develop a plan for dealing with those threats; and third, implement that plan through whatever reorganization and realignment of resources is necessary. It appears, however, that the Administration has taken exactly the opposite approach: White House officials proposed the reorganization first; they will come out with a strategy second; and they may eventually do a comprehensive assessment of the threats facing the country.

Experts have consistently criticized the United States for failing to have a comprehensive national strategy for fighting terrorism. GAO has made this finding repeatedly.<sup>46</sup> The U.S. Commission

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<sup>44</sup>*Repeating the Past*, National Journal (June 15, 2002).

<sup>45</sup>GAO-02-886T, *supra* note 3, at 5.

<sup>46</sup>See U.S. General Accounting Office, *Combating Terrorism: Selected Challenges and Related Recommendations* (September 2001) (GAO-01-822); U.S. General Accounting Office, *Combating Terrorism: Need for Comprehensive Threat and Risk Assessments of Chemical and Biological Attacks* (September 1999) (GAO/NSIAD-99-163); and U.S. General Accounting Office,

on National Security, the bipartisan group headed by former Senators Warren Rudman and Gary Hart, found that “no overarching strategic framework guides U.S. national security policymaking or resource allocations.”<sup>47</sup> Likewise, the independent panel headed by Governor James Gilmore concluded that “the United States has no coherent, functional national strategy for combating terrorism.”<sup>48</sup>

Nine months ago, in October 2001, the White House agreed with this assessment. In the executive order creating the White House Office of Homeland Security, President Bush recognized that developing a national strategy was essential in the fight against terrorism. The executive order establishing the Office provided that:

The mission of the Office shall be to develop and implement the coordination of a comprehensive national strategy to secure the United States from terrorist threats or attacks.<sup>49</sup>

When you assumed your position, you also recognized that developing this strategy was your top assignment, calling it your “main mission”<sup>50</sup> and your “very first mission.”<sup>51</sup> In a speech in April, you said, “I take every word of that executive order seriously,” and you promised that the strategy would be “guided by an overarching philosophy: risk management — focusing our resources where they will do the most good, and achieve the maximum protection of lives and property.”<sup>52</sup>

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*Combating Terrorism: Threat and Risk Assessments Can Help Prioritize and Target Program Investments* (April 1998) (GAO/NSIAD-98-74).

<sup>47</sup>The United States Commission for National Security/21st Century, *Road Map for National Security: Imperative for Change* (Mar. 15, 2001).

<sup>48</sup>Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction, *Toward a National Strategy for Combating Terrorism (Second Annual Report)* (Dec. 15, 2000).

<sup>49</sup>Executive Order 13228.

<sup>50</sup>*Ridge Says Focus is on Expanding Homeland Security Resources*, Speech at Homeland Security Conference, U.S. Department of State (Washington, DC) (on line at <http://usinfo.state.gov>).

<sup>51</sup>*Tom Ridge Speaks to the Associated Press Annual Luncheon*, Office of the White House Press Secretary (Apr. 29, 2002) (on line at <http://www.whitehouse.gov/news/releases/2002/04/20020429-3.html>).

<sup>52</sup>*Id.*

Since that time, the national strategy has been promised repeatedly. In the budget justification for fiscal year 2003, the Administration made this statement:

The United States has never had a national blueprint for securing itself from the threat of terrorism. This year, with the publication of the National Strategy for Homeland Security, it will.<sup>53</sup>

Unfortunately, this strategy has not been developed.<sup>54</sup> As a result, Congress still does not have a list of priorities set forth in a clear way and cannot gauge whether your reorganization proposal best serves the nation's security goals. Moreover, the new Department will have no clear strategy to implement after it is created. As John R. Brinkerhoff, civil defense director at FEMA under President Reagan, has stated: "The Bush Administration is doing the wrong thing for the wrong reasons . . . . What worries me the most is that we've put the cart before the horse: We're organizing, and then we're going to figure out what to do."<sup>55</sup>

## IX. COST

The Administration has stated that the creation of this new Department "would not 'grow' government."<sup>56</sup> According to the Administration: "The cost of the new elements (such as the threat analysis unit and the state, local, and private sector coordination functions), as well as the department-

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<sup>53</sup>FY03 Budget Justification, *supra* note 10, at 6. The Administration continued: "The Budget for 2003 is a down payment on a larger set of homeland security initiatives that will be described in the national strategy and reflected in the 2004 and later budgets." *Id.* at 7.

<sup>54</sup>In testimony before the Government Reform Committee on June 20, 2002, you stated that the principles of the national strategy have been evident "ever since the President sent up his 2003 budget initiative." House Committee on Government Reform, *Hearing on The Department of Homeland Security: An Overview of the President's Proposal* (June 20, 2002) (stenographic record). This statement is misleading at best. The budget justification for fiscal year 2003 included absolutely no information about the newly proposed Department of Homeland Security, which the Administration now says is the cornerstone of the national strategy. Moreover, the Administration's budget justification for fiscal year 2003 makes clear that no national strategy existed when the budget justification was submitted to Congress. FY03 Budget Justification, *supra* note 10, at 6.

<sup>55</sup>*Bush's Homeland Gambit*, National Journal (June 15, 2002).

<sup>56</sup>White House Briefing Document, *supra* note 1, at 17.

wide management and administration units, can be funded from savings achieved by eliminating redundancies inherent in the current structure.”<sup>57</sup>

This is not a credible statement. CBO has examined the costs of the reorganization proposal put forth by Senator Lieberman (S. 2452). According to CBO, the Lieberman bill “would cost about \$1.1 billion over the 2003-2007 period.”<sup>58</sup> CBO writes: “[A] new cabinet-level department would require additional resources to perform certain administrative functions, including new positions to staff the offices of the Inspector General, general counsel, budget, and Congressional affairs for the new department.”<sup>59</sup> In addition, CBO states that the new Department would require additional funding for “centralized leadership, coordination, and support services,” and that “new departmental staff would be hired over the first two years following enactment of the legislation.”<sup>60</sup>

The Administration’s proposal is significantly more ambitious and costly than Senator Lieberman’s. It includes more agencies, such as the Transportation Security Administration with over 40,000 employees. Moreover, it requires the new Department to take on a host of new functions, including:

- A new office for “Intelligence and Threat Analysis” to “fuse and analyze intelligence and other information pertaining to threats to the homeland from multiple sources,”<sup>61</sup> including a new “system for conveying actionable intelligence and other information”<sup>62</sup> and a new system to “consolidate the federal government’s lines of communication with state and local public safety agencies and with the private sector”,<sup>63</sup>

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<sup>57</sup>*Id.*

<sup>58</sup>CBO Cost Estimate, *supra* note 5 (specifically excluding the costs of obtaining a new or leased building and centralizing staff and resources there).

<sup>59</sup>*Id.*

<sup>60</sup>*Id.*

<sup>61</sup>White House Briefing Document, *supra* note 1, at 3.

<sup>62</sup>*Id.* at 14-15.

<sup>63</sup>*Id.* at 14.

- A new “state-of-the-art visa system, one in which visitors are identified by biometric information”;<sup>64</sup>
- A new “automated entry-exit system that would verify compliance with entry conditions, student status such as work limitations and duration of stay, for all categories of visas”;<sup>65</sup>
- New “interoperable communications,” including “equipment and systems” for the “hundreds of offices from across the government and the country” that make up the “emergency response community” (this would be a “top priority” of the new Department);<sup>66</sup> and
- A new “national system for detecting the use of biological agents within the United States,” including a new “national public health data surveillance system,” and a new “sensor network to detect and report the release of bioterrorist pathogens in densely populated areas.”<sup>67</sup>

In addition to these new functions, the President’s proposal would establish an entirely new bureaucracy, complete with a management hierarchy and accompanying staff. According to the President’s legislative language, the new Department would have up to 22 Deputy, Under, and Assistant Secretaries. This is more than the number of Deputy, Under, and Assistant Secretaries at the Department of Health and Human Services, which administers a budget about ten times the proposed budget of the new Department of Homeland Security.

Like CBO, GAO has also concluded that the new Department will impose costs on the taxpayer. According to GAO, “[n]umerous complicated issues will need to be resolved in the short term, including a harmonization of information technology systems, human capital systems, the physical location of people and other assets, and many other factors.”<sup>68</sup> As a result, GAO concludes that the President’s reorganization proposal “will take additional resources to make it fully effective.”<sup>69</sup>

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<sup>64</sup>*Id.* at 10.

<sup>65</sup>*Id.*

<sup>66</sup>*Id.* at 12.

<sup>67</sup>*Id.* at 13.

<sup>68</sup>GAO-02-886T, *supra* note 3, at 2.

<sup>69</sup>*Id.*

Mark Everson, Controller at the Office of Federal Financial Management within the White House Office of Management and Budget, was asked about these costs at a staff briefing on July 1, 2002. He said that the Administration had no estimate of the transition costs of creating the new Department and no estimate of the level of savings to be achieved by combining agencies. The only thing he said he knew was that these unknown costs would exactly equal these unknown savings.

Obviously, Congress needs more concrete information about budget costs before it can legislate intelligently.

## **X. PROCESS**

When the President made his nationally televised address on June 6, 2002, announcing his proposal for a new Department of Homeland Security, it came as a surprise not only to Congress and the American people, but also to the agencies, departments, and offices affected by the proposal. The plan was put together with so much secrecy that “[n]o Cabinet secretary was directly consulted about a plan that would strip 170,000 employees and \$37 billion in funding from existing departments.”<sup>70</sup> In fact, there was so little communication between the White House and the agencies that at least one major agency had to call the minority staff of the Committee on Government Reform to learn whether it was affected by the reorganization plan.

This closed process utilized by the Administration is ill-suited to ensuring that all potential problems are identified and addressed beforehand. Moreover, the risk of making policy mistakes is compounded by the rushed process being used in Congress to consider the legislation. It is not clear how in this process the time and opportunity will be found to make sure the legislation is done correctly.

## **XI. CONCLUSION**

The issues raised in this letter exemplify the serious questions that should be resolved before Congress completes work on this legislation. For this reason, we urge you to respond in detail and in

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<sup>70</sup>*Bush Plan's Underground Architects; In Silence and Stealth, Group Drafted Huge Security Overhaul*, Washington Post (June 9, 2002).

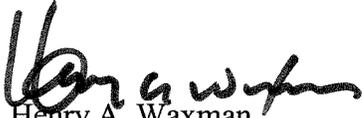
The Honorable Tom Ridge

July 9, 2002

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writing to the concerns raised in this letter by July 15, before the House select committee starts its consideration of this bill.

Sincerely,



Henry A. Waxman  
Ranking Minority Member  
Committee on Government Reform



David R. Obey  
Ranking Minority Member  
Committee on Appropriations

**APPENDIX A**  
**Transferred Functions Not Related to Homeland Security**

**Animal Plant Health Inspection Service**

Animal Welfare Act: APHIS enforces the Animal Welfare Act, the act that regulates the exhibition of animals in zoos and circuses and the transportation of animals on commercial airlines.

Biotechnology Regulatory Policy: APHIS regulates the movement, importation, and field testing of genetically engineered plants and microorganisms.

Canadian Geese: APHIS works with state wildlife agencies and local governments to address problems with non-migratory, resident Canadian geese.

Disease and Pest Detection and Eradication: APHIS is responsible for the detection and eradication of pests and diseases that affect crops and livestock. For example, on September 20, 2001, APHIS implemented the accelerated National Scrapie Eradication Program. A few of the other pests and diseases APHIS monitors for and eradicates include: the boll weevil; the fruit fly; rabies; the Asian Longhorned Beetle; the citrus canker program; and the plum pox virus.

Horse Protection Act: APHIS enforces the Horse Protection Act, the act which prohibits horses subjected to a process called soring from participating in exhibitions, sales, shows, or auctions.

Missing Pets: APHIS maintains the missing pets network at [www.missingpet.net](http://www.missingpet.net).

National Poultry Improvement Plan: This is an industry/state/federal program that establishes standards for evaluating poultry breeding stock and hatchery products to ensure they are free from hatchery-disseminated and egg-transmitted diseases.

Noxious weeds: APHIS cooperates with federal, state, and private organizations to detect and respond to infestations of invasive plants, such as branched broomrape and small broomrape.

Screwworm: APHIS is working to ensure that screwworm is not reintroduced into the United States. This eradication program is close to its goal of establishing a permanent sterile screwworm barrier in the eastern third of Panama.

Trade Issue Resolution and Management: APHIS monitors emerging foreign pest and disease threats at their origin before they have an opportunity to reach U.S. ports. APHIS also participates in trade agreements.

Veterinary Biologics: APHIS regulates veterinary biologics including vaccines and diagnostic kits.

## **Coast Guard**

International Ice Patrol: The Coast Guard has a fleet of ships designed to break ice in cold regions to ensure that boats are able to navigate the waterways.

Marine Safety: The Coast Guard enforces regulations to ensure that boats and other marine equipment meet safety standards.

Maritime Drug Interdiction: The Coast Guard interdicts drugs illegally brought into this country on the waterways.

Maritime Law Enforcement: The Coast Guard enforces the laws of the waterways.

Maritime Mobility Missions: The Coast Guard provides aids to navigation and bridge administration to ensure that vessels are able to navigate our waterways.

Oil Spill Cleanup: The Coast Guard helps to prevent oil spills in the nation's waters and assists in their cleanup when they occur.

Protection of Natural Resources: The Coast Guard protects our domestic fishery resources and marine environment.

Search and Rescue: The Coast Guard, as one of its primary missions, rescues troubled vessels and people on the nation's waterways.

## **Customs**

Border Drug Interdiction: The Customs Service fights against drug smuggling at the United States border.

Copyright Protection: The Customs Service helps to enforce the Copyright Acts.

Enforcement of Health and Safety Laws: The Customs Service checks imports to ensure that they comply with health and safety laws.

Fostering of Trade: The Customs Service works with the trade community and identifies and confronts trade issues facing the country.

Child Pornography Prevention: The Customs Service enforces laws protecting against child pornography.

Fair Trade Protection: The Customs Service enforces a variety of fair trade laws such as the Lanham Trade-Mark Act and the Trade Act of 1974.

Protection of Species at Risk: The Customs Service enforces laws protecting threatened species such as the Bald Eagle Protection Act and the African Elephant Conservation Act as well as the Endangered Species Act of 1973.

Revenue Collection: The Customs Service provides the nation with its second largest source of revenue.

Stolen Antiquities and Art: The Art Recovery Team works to recover stolen pieces of art and antiquities.

Tariff Enforcement: The Customs Service ensures that U.S. tariff laws are enforced.

## **Department of Energy**

Energy Emergency Support: The DOE Office of Energy Assurance assesses the potential effects of natural disasters such as earthquakes, hurricanes, tornados, and floods on energy infrastructure and provides energy emergency support in the case of such disasters.

Human Subjects Research Database: The DOE Environmental Measurements Laboratory (EML) maintains the Human Subjects Research Database, which contains descriptions of all projects involving human subjects that are funded by the DOE, performed by DOE staff, or conducted at DOE facilities. EML also provides direct assistance to the manager of the DOE Protecting Human Subjects Program, such as assisting with production of educational and guidance materials.

Quality Assessment Program for Contractor Labs: EML also runs a quality assessment program for DOE contractor laboratories that measure radiation. The program tests the quality of 149 private laboratories' environmental radiological measurements.

## **Federal Emergency Management Agency**

Emergency Food and Shelter: FEMA gives grants to providers of emergency food and shelter for hungry and homeless people.

Hazards Mitigation Program: FEMA provides grants to states and local governments to implement hazard mitigation measures to reduce the loss of life and property resulting from major natural disasters, such as hurricanes.

National Earthquake Hazards Reduction Program: FEMA is the lead agency on programs to improve the understanding, characterization and predictions of earthquake hazards; to improve model building codes and land use practices; to reduce risk through post-earthquake investigations and education; to develop and improve design and construction techniques; to improve mitigation capacity; and to accelerate the application of research results.

National Flood Insurance Program: FEMA administers the National Flood Insurance Program, which provides insurance coverage for events that are not covered by traditional homeowners' policies.

Reduce Loss from Fire: FEMA runs a number of programs to reduce the loss of life from fire-related incidents, including the National Fire Data Center and the National Fire Incident Reporting Systems.

## **Secret Service**

Prevention of Counterfeiting: The Counterfeit Division of the Secret Service has exclusive jurisdiction to investigate counterfeiting of United States securities and obligations including items such as food stamps and postage stamps.

Safe School Initiative: The Secret Service has partnered with the Department of Education to help prevent violence in schools.

Telecommunications Fraud: The Secret Service has become a recognized expert in helping to prevent telecommunications fraud such as the cloning of cellular telephones.