

CRS Report for Congress

Received through the CRS Web

Homeland Security: Scope of the Secretary's Reorganization Authority

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Summary

In July of 2005, the Secretary of Homeland Security announced a major reorganization of the Department. While many of the proposed changes may be effectuated administratively, some might require legislative action due to limits on reorganization authority under the Homeland Security Act of 2002 (P.L. 107-296). Section 872 of the Homeland Security Act gives the Secretary of Homeland Security the authority to reorganize *functions* and *organizational units* within the Department either: (1) independently, 60 days after the Secretary provides notice of such an action to the appropriate congressional committees, or (2) through the President's submission of a reorganization plan. The Secretary, however, may not abolish agencies, entities, organizational units, or functions established or required to be maintained by statute. This report examines the scope of the reorganization authority provided in §872 with a focus on (1) the Secretary's independent authority to reorganize the Department and (2) what is meant by the term *organizational units*, the basic administrative structures that the Secretary is empowered to "establish, consolidate, alter, or discontinue." This report will be updated as warranted.

The Scope of Section 872

Section 872 of the Homeland Security Act of 2002 (HSA; 6 U.S.C. §§ 101 *et seq.*) gives the Secretary of the Department of Homeland Security (DHS) the authority to reorganize *functions* and *organizational units* within DHS, subject to specified limits. Specifically, §872 authorizes the Secretary of Homeland Security to (1) allocate or reallocate *functions* among the officers of DHS and (2) establish, consolidate, alter, or discontinue *organizational units* within DHS. The reorganization authority provided by §872 may be exercised in one of two ways: (1) pursuant to the reorganization plan initiated by the President (§1502(b)) or (2) independently by the Secretary, 60 days after the Secretary provides notice of such an action to the appropriate congressional committees with an explanation of the rationale for the action. Congress does not appear to have any type of expedited veto authority (constitutionality aside) that could prevent

a proposed reorganization from going into effect and would likely have to pass a law to prevent such a reorganization from occurring.¹

In carrying out the reorganization authority, the Secretary, pursuant to §872(b) may not abolish any agency, entity, organizational unit, program, or function expressly established either by the HSA or another statute in the process.² Section 872(b) is the only strict limitation on the Secretary's administrative reorganization authority. However, other provisions of the HSA appear to qualify the Secretary's reorganization authority, including §821, which requires the Secret Service to be maintained as a distinct entity in DHS and §888, which requires the Coast Guard to be maintained as distinct entity in DHS.³ While the Secretary's reorganization authority appears broad, legislation would seem to be required for any action that would (1) abolish an agency, entity, organizational unit, program, or function expressly created by Congress or (2) do more than move a *function* or establish, consolidate, alter, or discontinue an *organizational unit*.

Organizational Units. Section 872(a) gives the Secretary the authority to establish, consolidate, alter, or discontinue *organizational units* within the Department; however, the term is not defined in the HSA. Consequently, there is some question as to how the term *organizational units* limits the Secretary's authority, although a court may apply a considerable degree of deference to the Secretary's organizational decisions.⁴ Because no dispositive legislative history has been found discussing the scope of an *organizational unit*, case law may be helpful.

In *Adams v. United States*, 350 Border Patrol agents claimed that they were entitled to, rather than exempt from, overtime pay under the Fair Labor Standards Act because they were not executive employees within the meaning of the act (i.e., supervisors,

¹ In *INS v. Chadha*, 462 U.S. 919 (1983), the Supreme Court struck down Congress's use of the *legislative veto*, a device by which Congress could approve or disapprove executive decisions through legislative actions that were short of a public law: one-house vetoes, two-house vetoes, and committee vetoes. Congress no longer relies on one-house or two-house vetoes, but committee and subcommittee vetoes continue to be a part of executive-legislative accommodations. For more information see CRS Report RS22132, *Legislative Vetoes after Chada*, by Louis Fisher.

² See P.L. 107-296, §§ 872, 1502. This report will refer to public law citations, since the Secretary of Homeland Security has also used these citations in its correspondence with Congress.

³ See e.g., §424 (requiring the Transportation Security Administration to be maintained as a distinct entity — expired Nov. 24, 2004); §471 (prohibiting the President's Reorganization plan (§1502) from combining the Bureau of Customs and Border Protection and the Bureau of Citizenship and Immigration Services — expired on March 1, 2003 (see discussion in text under §871(a)(1)).

⁴ *Chevron Inc., v. Natural Resources Def. Council*, 467 U.S. 837, 844 (1984). In *Chevron*, the Supreme Court found a regulation promulgated by the Environmental Protection Agency to be a reasonable interpretation of the Clean Air Act Amendments of 1977. Where the statute is ambiguous, *Chevron* dictates that a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. See also P.L. 107-296, §1103 (stating that nothing in the Homeland Security Act (HSA) should be construed to limit judicial deference to actions made by the Secretary of Homeland Security).

foremen, or managers who managed a Federal agency or any subdivision thereof, including the lowest recognized *organizational unit* with a continuing function).⁵ The *Adams* court relied on a 1975 OPM advisory letter that defined *organizational units* to mean “an established and defined organizational entity with regularly assigned employees. This requirement distinguishes supervisors who are responsible for planning and accomplishing a continuing workload from ‘leaders’ who head temporary groups formed to perform a special assignment of limited duration, or who direct the work of other employees assigned to a project but do not exercise full supervision over such employees.”⁶ The *Adams* case appears to suggest that an *organizational unit* may be a relatively small administrative structure.

Furthermore, in applying canons of statutory construction to the HSA, it appears Congress intended an *organizational unit* to be something smaller than an agency or other statutorily created entity. In the limitation provision of §872(b)(1), for example, Congress placed the term *organizational units* after the terms *agency* and *entity*, but before the terms *program* and *function*. This placement suggests Congress may have intended an *organizational unit* to be smaller than an *agency* and *entity* on the general assumption that things of a higher order are named at the beginning of an enumeration and that Congress does not intend to be superfluous.⁷ In §471(b) of the HSA, Congress again suggests that an *organizational unit* may be a small administratively created structure. Section 471(b) authorizes the Secretary (through the President’s Reorganization Plan) to reorganize the functions or organizational units *within* the Bureau of Citizenship and Immigration Services. Because the provision places an organizational unit *within* the Bureau, it appears Congress also intended the term to be something smaller than a bureau.

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

Section 872(a)(1). Section 872(a)(1) indicates that the Secretary may, pursuant to §1502(b) (i.e., the President’s Reorganization Plan), allocate or reallocate *functions* among the officers of DHS and establish, consolidate, alter, or discontinue *organizational units* within DHS, provided the Secretary does not abolish any agency, entity, *organizational unit*, program, or function expressly established by the HSA. This implies

⁵ 46 Fed. Cl. 616 (Fed. Cl. 2000).

⁶ FPM Letter No. 551-7. The Federal Claims Court recognized the “checkered history” of the letter, but still felt it captured the relevant standard.

⁷ See 2A Norman J. Singer, Statutes and Statutory Construction, §§ 47.17 at 284, 47.19 at 292 (6th ed. 2000).

that in order to reorganize the infrastructure of DHS under §872(a)(1), the Secretary must act through the President's Reorganization Plan.⁸ The reorganization plan, including modifications, was to become effective upon the earlier of (1) the dates specified in the plan or (2) the end of the transition period (transition period means the 12-month period beginning on the effective date of the HSA — i.e., November 25, 2002 to November 24, 2003).⁹ Since the President is not authorized to modify or submit another reorganization plan under the HSA, the Secretary's reorganization authority under §872(a)(1) seems to also be similarly limited by these dates. Accordingly, the Secretary's authority under §872(a)(1) likely terminated on March 1, 2003 — the effective transfer date for many agencies under President Bush's Reorganization Plan and earlier of the two selections.

Section 872(a)(2). The authority under §872(a)(2) allows the Secretary to allocate or reallocate *functions* among the officers of DHS and to establish, consolidate, alter, or discontinue *organizational units* within DHS after providing 60 days, notice to the appropriate congressional committees of such action with an explanation of the rationale for the action. This authority is permanent, but it is limited by §872(b)(2), which prohibits the Secretary from abolishing any agencies, entities, organizational units, programs, or functions established or required to be maintained by statute. In essence, this limitation requires the Secretary to maintain any of the aforementioned categories that are created by law including those categories created by the HSA. Section 872(a)(2) allows the Secretary to act independently of the President's Reorganization Plan (section §1502(b)), provided proper notification is supplied to the appropriate congressional committees by the Secretary. Administrative reorganizations conducted pursuant to §872(a)(2) become effective 60 days after providing notice to the appropriate congressional committees unless legislation would prevent such an occurrence.

The Secretary's Reorganization Plan of July 2005

Organizational Initiatives. On July 10, 2005, Secretary Chertoff announced a six-point agenda for DHS designed to ensure that the Department's policies, operations, and structures are optimally aligned to address present and future potential threats to the United States. Among the agenda's six-points is a change that would "realign the DHS organization to maximize mission performance."¹⁰ The Secretary stated that details would be announced in the coming weeks. The following describe some of the major structural adjustments being proposed by the Secretary from available information.

Create a New Directorate of Policy. This new Directorate will serve as the primary Department-wide coordinator for policies, regulations, and other initiatives and

⁸ However, the HSA states that the Secretary may act "pursuant to §1502(b)," rather than through the *reorganization plan*, and it could be argued that the Secretary may, like the President, effect a reorganization through a transmission of *plan elements*. The legislative history of the HSA in conjunction with President Bush's thinly detailed Reorganization Plan, however, more appropriately supports the position that the Secretary must act through the President's §1502(b) Reorganization Plan as restricted by §1502(a), rather than independently.

⁹ See P.L. 107-296, §1502(d).

¹⁰ Press Release, Department of Homeland Security, *Homeland Security Secretary Michael Chertoff Announces Six-Point Agenda for Department of Homeland Security* (July 13, 2005) available at [<http://www.dhs.gov/dhspublic/display?theme=43&content=4598&print=true>].

will assume the policy coordination functions previously performed by the Border and Transportation Security Directorate. It will include the: (1) Office of International Affairs; (2) Office of Private Sector Liaison; (3) Homeland Security Advisory Council; (4) Office of Immigration Statistics; and (5) Senior Asylum Officer.

Create a New Office of Intelligence and Analysis. This new office will gather information from all relevant field operations and other parts of the intelligence community for dissemination to the appropriate personnel. It will be led by a Chief Intelligence Officer who will report directly to the Secretary and will be comprised of analysts within the former Information Analysis Directorate.

Create a New Director of Operations Coordination. This new office will allow DHS to conduct joint operations across all organizational elements of the Department and coordinate incident management activities, among other things. The Homeland Security Operations Center, which serves as the nation's nerve center for information sharing and domestic incident management, will be housed here.

Rename the Information Analysis and Infrastructure Protection Directorate, the Directorate for Preparedness. The Directorate for Preparedness will facilitate grants and oversee nationwide preparedness efforts supporting first responder training, citizen awareness, public health, and infrastructure. The renamed Directorate will be managed by an Under Secretary and include (1) a new Assistant Secretary for Cyber Security and Telecommunications; (2) a new Chief Medical Officer; (3) an Assistant Secretary for Infrastructure Protection; (4) assets of the Office of State and Local Government Coordination and Preparedness; (5) the U.S. Fire Administration; and (6) the Office of National Capitol Region Coordination.

Other Proposed Changes. Other changes reportedly include (1) having the Federal Emergency Management Agency (FEMA) report directly to the Secretary of Homeland Security rather than to an Under Secretary; (2) moving the Federal Air Marshal Service from the Bureau of Immigration and Customs Enforcement to the Transportation Security Administration; (3) merging the Office of Legislative Affairs and the Office of State and Local Government Coordination into the newly established Office of Legislative and Intergovernmental Affairs; and (4) having the Office of Security report to the Under Secretary for Management, rather than the Deputy Secretary for DHS.

Legislative Action. As previously mentioned, the Secretary of DHS has broad and permanent authority to reorganize the Department, provided he gives appropriate notice to Congress. The only explicit prohibition is that he not abolish any agency, entity, organizational unit, program, or function established or required to be maintained by statute. From the information that is available, it appears the Secretary is primarily reallocating *functions* among the officers of DHS, consolidating certain responsibilities, and establishing new *organizational units*. There are some proposed changes, nonetheless, that might need legislative action. According to a July 13, 2005, letter from DHS to Congress, the Secretary plans on seeking congressional action for the following organizational changes:

- Elevating the Assistant Secretary for the newly created Office of Policy to an Under Secretary;

- Eliminating the position of Under Secretary for Border and Transportation Security; and
- Requiring the Director of FEMA to report directly to the Secretary of DHS, rather than the Under Secretary for Emergency Preparedness and Response.

In DHS, all the current directorates were established by statute. Accordingly, it would appear consistent with the presumed intent of Congress that completely new directorates also be established by statute. Moreover, because the directorates currently in place at DHS all contain agencies, bureaus, and other large entities, it would seem that establishing a new directorate is something beyond establishing an *organizational unit*. Establishing a new directorate, therefore, would seem to need authorizing legislation, and presumably, that is what the Secretary might be doing in his attempt to seek legislation for the elevation of the Assistant Secretary position to an Under Secretary.

Relatedly, the abolition of an existing directorate might also require legislative action, since each was established by statute. Indeed, this seems to be the course of action being taken by DHS with respect to the elimination of the Under Secretary for the Directorate of Border and Transportation Security. On the other hand, from the information available, it appears DHS is not taking any legislative action to *rename* the Directorate of Information Analysis and Infrastructure Policy, the Directorate of Preparedness. Whether the renaming of a directorate is tantamount to an abolition of the entity, however, may be unlikely. Some might argue, for instance, that the mere renaming of a directorate that keeps some of its original components and gains others, is not an abolition. Still, others might suggest that a renamed directorate, which contains components fundamentally different than originally conceived, is not appropriate for change through administrative fiat. Also unclear from the Secretary's proposed plans is the status of the Directorate of Emergency Preparedness and Response, which will have many of its *functions* or *organizational units* consolidated or reallocated to FEMA or elsewhere in the Department. This Directorate, nonetheless, is still a statutorily created entity that may require further legislative action to dissolve it.

Legislation might also be needed, if not already provided elsewhere, for some of the new personnel in the reorganization if they are an "Officer of the United States," under the Appointments Clause of the Constitution.¹¹ An appointee (1) to a position of employment (2) within the federal government (3) that carries significant authority pursuant to the laws of the United States is required to be an "Officer of the United States."¹² Until more information is made available regarding the Secretary's proposed administrative and legislative organizational initiatives, many uncertainties will continue to exist.

¹¹ U.S. Const. art. II, §2, cl. 2.

¹² U.S. Dept. of Justice, Office of Legal Counsel, *The Constitutional Separation of Powers between the President and Congress*, at 27 (1996).