

Report for Congress

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Homeland Security: Human Resources Management

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Homeland Security: Human Resources Management

Summary

Responding to the September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon, and the discovery of anthrax in Washington, DC, and other cities, the Administration and Members of Congress proposed legislation to establish a Department of Homeland Security. President George W. Bush's proposal was submitted to Congress on June 18, 2002 by Homeland Security Director Tom Ridge. It was subsequently introduced as H.R. 5005 by Representative Dick Armey on June 24, 2002, and was passed on July 26, 2002. In the Senate, on May 2, 2002, Senator Joseph Lieberman introduced S. 2452 to create a Department of National Homeland Security. Senate amendments to H.R. 5005 have been debated in the Senate since late July.

H.R. 5005, as passed, includes a provision at Section 761, which would provide flexibility to the Secretary of Homeland Security and the Director of the Office of Personnel Management to establish, and from time to time adjust, a human resources management (HRM) system for some or all of the organizational units of the new department. The provision has generated considerable discussion, which has centered on the need for personnel flexibility at the department and concerns about preserving the civil service standards of merit-based hiring and preference in hiring for veterans, among other issues. If Section 761 (or a similar provision) were enacted, issues of staffing requirements and the hiring and pay systems at the new department would likely be debated. If the provision were not included in the legislation enacted, Congress could designate specific funds for the new department for personnel flexibilities and direct the department to use fully the current Title 5 *United States Code* personnel flexibility authorities available to executive branch agencies in lieu of granting authority for a new HRM system.

H.R. 5710, Homeland Security Act of 2002, was introduced in the House of Representatives by Representative Armey on November 12, 2002. On November 13, 2002, the House passed H.R. 5710 on a 299-121 vote (Roll No. 477). Identical language is before the Senate as an amendment (S.Amdt. 4901) offered by Senator Fred Thompson. As passed by the House, H.R. 5710 includes provisions on human resources management at Section 841. These are the same provisions that are at Section 761 of H.R. 5005, as passed by the House, except for three differences. The House-passed H.R. 5710 also includes new provisions on federal workforce management at Title XIII. The provisions on chief human capital officers, human capital strategic planning, competitive service hiring process, alternative ranking and selection procedures, student volunteer transit subsidy, and academic training are the same provisions that were at Titles XXI and XXII of the Lieberman substitute amendment (S.Amdt. 4471). A cloture vote on the Thompson Amendment is scheduled for November 15, 2002.

This report discusses the proposals as they relate to human resources management. Please see CRS Report RL31520 for discussion of provisions related to federal labor management relations.

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Homeland Security: Human Resources Management

Latest Developments

H.R. 5710, Homeland Security Act of 2002, was introduced in the House of Representatives by Representative Dick Armey on November 12, 2002. On November 13, 2002, the House passed H.R. 5710 on a 299-121 vote (Roll No. 477).

Please note that this report does not address provisions on federal labor management relations. For discussions of these issues see CRS Report RL31520. As passed by the House, H.R. 5710 includes provisions on human resources management at Section 841. These are the same provisions that are at Section 761 of H.R. 5005, as passed by the House, except for three differences. For a discussion of the provisions, see section "Homeland Security Department Proposals" below. The differences, one under "Requirements for the HRM System," one under "Provisions Relating to Appellate Procedures," and one under "Sunset Provision" are noted in italics at the appropriate places in the text.

The House-passed H.R. 5710 also includes new provisions on federal workforce management at Title XIII. The provisions on chief human capital officers, human capital strategic planning, competitive service hiring process, alternative ranking and selection procedures, student volunteer transit subsidy, and academic training are the same provisions that are at Titles XXI and XXII of the Lieberman substitute amendment (S.Amdt. 4471). A provision on compensatory time off for travel at Section 2403 of the Lieberman substitute amendment is not included in H.R. 5710. For a discussion of the provisions see section "Lieberman Amendment, as a Substitute to S. 2452" below.

The Senate, on November 13, 2002, on an 89-8 vote (No. 240) agreed to the motion to invoke cloture, thereby closing debate, on the Gramm-Miller Amendment No. 4738 and on a 50-47 vote (No. 241) agreed to table the Lieberman Amendment No. 4471. (These amendments are discussed under the headings "Lieberman Amendment, as a Substitute to S. 2452" and "Gramm-Miller Amendment to the Lieberman Substitute" below.) Pending in the Senate is a Thompson (for Gramm) Amendment No. 4901, in the nature of a substitute, Homeland Security Act of 2002. The H.R. 5710 provisions on human resources management are at Section 841 and on federal workforce improvement are at Title XIII of the Thompson Amendment. A cloture vote on the Thompson Amendment is scheduled for November 15, 2002.

Introduction

The September 11, 2001 terrorist attacks on the World Trade Center and the Pentagon, and the discovery of anthrax in Washington, DC, and other cities, prompted Members of Congress and the Administration to ponder how the government might better be organized to anticipate, respond to, and counter future terrorist activities. The initial response from President George W. Bush was to create an Office of Homeland Security in the White House Office on October 8, 2001.¹ Several Members of Congress responded by introducing legislation to create a homeland security department. Senator Joseph Lieberman introduced S. 2452, the National Homeland Security and Combating Terrorism Act of 2002, on May 2, 2002. On June 6, 2002, during an address to the nation, the President announced his intention to create a new cabinet-level department for homeland security.² Homeland Security Director Tom Ridge submitted the President's proposal for the department, entitled the Homeland Security Act of 2002, to Congress on June 18, 2002.³ Representative Dick Armey introduced the proposal in the House of Representatives as H.R. 5005, to establish the Department of Homeland Security, and for other purposes, on June 24, 2002.⁴ This report discusses the proposals as they relate to human resources management.⁵

¹U.S. President (Bush), "Establishing the Office of Homeland Security and the Homeland Security Council," Executive Order 13228, *Federal Register*, vol. 66, Oct. 10, 2001, p. 51812.

²Available on the Internet at [<http://www.whitehouse.gov/news/releases/2002/06/20020606-8.html>], visited July 17, 2002.

³Available on the Internet at [<http://www.whitehouse.gov/deptofhomeland/bill/index.html>], visited July 17, 2002.

⁴For discussions of the homeland security department proposals see CRS Report RL31493, *Homeland Security: Department Organization and Management*, by Harold C. Relyea (hereafter referred to as CRS Report RL31493); CRS Electronic Briefing Book, *Terrorism*, page on "Department of Homeland Security," by Harold C. Relyea, available at [<http://www.congress.gov/brbk/html/ebter220.html>]; and CRS Report RL31148, *Homeland Security: The Presidential Coordination Office*, by Harold C. Relyea.

⁵See also CRS Report RL31513, *Homeland Security: Side-by-Side Comparison of H.R. 5005 and S. 2452, 107th Congress*, by the CRS Homeland Security Team; CRS Report RL31492, *Homeland Security: Management Positions for the Proposed Department*, by Sharon S. Gressle; CRS Report RL31472, *Departmental Organization, 1947-2001*, by Sharon S. Gressle; CRS Report RL31516, *Civil Service Reform Proposals: A Side-by-Side Comparison of S. 2651 and H.R. 4580 With Current Law*, by Barbara L. Schwemle, L. Elaine Halchin, Richard A. Best, Jr., and Patrick J. Purcell; and CRS Report RL 31518, *Federal Workforce Improvement Act of 2002: S. 2651*, by Barbara L. Schwemle, L. Elaine Halchin, Richard A. Best, Jr., and Patrick J. Purcell.

Homeland Security Department Proposals

H.R. 5005

Representative Dick Armev introduced the President's proposal as H.R. 5005 on June 24, 2002, and it was referred to the House Select Committee on Homeland Security and to the House Committees on Agriculture, Appropriations, Armed Services, Energy and Commerce, Financial Services, Government Reform, Select Committee on Intelligence, International Relations, Judiciary, Science, Transportation and Infrastructure, and Ways and Means. The various committees marked up the legislation during the week of July 8, 2002 and offered their recommendations to the select committee, which crafted the bill to be considered by the House of Representatives.⁶

The select committee, on July 9, 2002, released a version of H.R. 5005 that was circulated as a discussion draft. This version included the provision on a human resources management system for the new department at Section 731. The select committee conducted a meeting on July 11, 2002, and hearings on the homeland security department legislation during the week of July 15, 2002. It marked up the bill on July 19, 2002 and reported it (H.Rept. 107-609, Part 1) on July 24, 2002. The House of Representatives passed H.R. 5005, amended, on a 295-132 vote (Roll No. 367) on July 26, 2002.

Under H.R. 5005, as passed by the House, several functions involving some 170,000 employees would be transferred to a homeland security department. Agencies transferred to the new department would include:

- ! the United States Secret Service, Department of the Treasury, including the functions of the Secretary of the Treasury relating thereto, with 6,111 full-time equivalent employees (FTEs).⁷
- ! the Coast Guard, Department of Transportation, including the functions of the Secretary of Transportation relating thereto, with 43,639 FTEs;

⁶The Committee on Government Reform, which has primary jurisdiction over civil service issues in the House of Representatives, marked up H.R. 5005 on July 11, 2002. The committee adopted an amendment to Section 730 that would have, among other provisions, authorized pay schedules to be adjusted in the department to address inequitable pay disparities, the suspension and removal of employees for national security reasons, a demonstration project that would ensure veterans' preference, whistleblower protection rights, and existing collective bargaining agreements; and that would have provided for one or more performance appraisal systems. (House Committee on Government Reform, Amendment in the Nature of a Substitute to H.R. 5005, July 10, 2002 (1:08 p.m.). Provided to CRS by the committee.)

⁷Full-time equivalents (FTEs) are an estimate of the total number of work years required by an agency over a fiscal year. They are calculated by adding the total number of hours worked by all employees (not including overtime or holiday hours) and then dividing that total by 2,080, the number of hours in a work year. One FTE equals 2,080 hours.

- ! the United States Customs Service, Department of the Treasury, including the functions of the Secretary of the Treasury relating thereto, with 21,743 FTEs;
- ! a newly constructed INS, Department of Justice;
- ! the Animal and Plant Health Inspection Service (APHIS), Department of Agriculture, including the functions of the Secretary of Agriculture relating thereto, with 8,620 FTEs;
- ! the Transportation Security Administration (TSA), Department of Transportation, including the functions of the Secretary of Transportation, and of the Under Secretary of Transportation for Security, relating thereto, with 41,300 FTEs;
- ! the Federal Protective Service (FPS), General Services Administration (GSA), including the functions of the GSA Administrator relating thereto, with 1,408 FTEs; and
- ! the Federal Emergency Management Agency (FEMA), including the functions of the Director of FEMA relating thereto, with 5,135 FTEs.⁸

Provision on Human Resources Management System. Section 730 of H.R. 5005, *as introduced*, included a provision on a human resources management system which would have provided that:

Notwithstanding any other provision of this title, the Secretary of Homeland Security may, in regulations prescribed jointly with the Director of the Office of Personnel Management, establish, and from time to time adjust, a human resources management system for some or all of the organizational units of the Department of Homeland Security, which shall be flexible, contemporary, and grounded in the public employment principles of merit and fitness.⁹

During hearings on the President's proposal conducted by the Senate Committee on Governmental Affairs and the House Committee on Government Reform on June 20, 2002, Governor Ridge explained the intent of Section 730 when he responded to a question from Representative Danny Davis, who was seeking information on why a new personnel system or one different from the traditional civil service system

⁸The Department of Homeland Security, President George W. Bush, June 2002, table just before p. 8. The proposal would place the agencies within four divisions. The Office of Management and Budget projects that the number of FTEs associated with these divisions would be as follows: Chemical, Biological, Radiological, and Nuclear Countermeasures — 598 FTEs; Information Analysis and Infrastructure Protection — 976 FTEs; Border and Transportation Security — 156,169 FTEs; and Emergency Preparedness and Response — 5,300 FTEs. See U.S. Executive Office of the President, Office of Management and Budget, *The Shape of the New Department of Homeland Security*. Available on the Internet at [<http://www.whitehouse.gov/omb/homeland.html>], visited July 17, 2002.

⁹A Bill to establish a Department of Homeland Security, and for other purposes, p. 25. Available on the Internet at [<http://www.whitehouse.gov>], visited June 26, 2002.

would be needed at the new department. According to Governor Ridge, the way the legislation is presently drafted:

it is not prescriptive. It does not dictate that a new system should be developed, that as ... the [P]resident tries to empower the new secretary of Homeland Security, to assist that secretary in the creation of an agency that can move people and resources around as quickly as possible to respond to unprecedented threats, even unknown threats ... the notion that somewhere down the road they may need that flexibility drives the [P]resident to include it in this plan. We need a system ... a flexible human resource plan can hold people accountable. People talk about rewarding performance; a new flexible system can help reward performance. There's a concern about keeping people in the agencies instead of retiring; personnel flexibility and pay flexibility would give them the possibility to do that.¹⁰

President Bush, in his remarks on July 10, 2002 to an audience of some 3,000 federal workers, many of whom would be affected by the homeland security department proposal, asked Congress for the "freedom to manage," saying:

The new department must be able to get the right people in the right place at the right time with the right pay. We need to be able to reward excellence and ensure accountability for individual performance. A lot will be expected of us, and I expect Congress to give the executive branch ... give us the flexibility necessary to achieve our objectives.¹¹

The Administration did not provide any details on the implementation of Section 730. An indication of how the provision might be implemented, however, was provided by Governor Ridge and Administration officials.

During the Senate and House committee hearings on June 20, 2002, Governor Ridge testified that "the President will request for the Department significant flexibility in hiring processes, compensation systems and practices, and performance management to recruit, retain, and develop a motivated, high-performance and accountable workforce."¹² As to how the provision might be carried out initially, *Government Executive* reported that a background briefing on the President's proposal conducted by Administration officials revealed that the legislation

would allow employees to carry over their union affiliations and current pay rates to the new federal agency. Once the department is up and running, the secretary would work with the Office of Personnel Management to develop personnel

¹⁰Testimony of Governor Tom Ridge, Homeland Security Director, before the House Committee on Government Reform, June 20, 2002. Excerpted from the hearing transcript posted on the Web site of *The New York Times* at [<http://www.nytimes.com>].

¹¹The White House, Office of the Press Secretary, "President Bush Thanks Homeland Security Workers," July 10, 2002. Available on the Internet at [<http://www.whitehouse.gov/news/releases/2002/07/print/20020710.html>], visited July 17, 2002.

¹²Written statement of Governor Tom Ridge, June 20, 2002. Available on the Internet at [http://www.senate.gov/~gov_affairs/hearings.htm], visited June 26, 2002.

rules. The secretary would also eventually decide whether to continue providing employees with union rights.¹³

A fact sheet released by the White House in conjunction with President Bush's remarks on a homeland security department on July 10, 2002 stated that "[t]he President's bill creates a broad framework that allows the new Department to retain the best aspects of the government's existing personnel systems and builds on them." According to the fact sheet:

Federal workers transferring to the new Department will bring their current pay and benefits with them. They will enjoy the same benefits (health, retirement, life insurance, and the new long-term care insurance plan) that are available to employees today.

When the new Department is established, employees represented by unions will continue to be represented; their bargaining units will move with them.

Veterans will continue to be eligible to receive employment preference in the new Department.

The new Department will be bound by merit system principles: fair treatment without regard to political affiliation; equal pay for equal work; and protection for whistleblowers.¹⁴

Administration officials, according to *The Washington Post*, said that "they did not expect the proposal to cause layoffs, although some employees could be retained, reassigned, or given the option to leave through early retirement or buyout packages."¹⁵

The Congressional Budget Office (CBO), on July 9, 2002, issued a cost estimate on H.R. 5005 that it indicates "does not include any budgetary impact that might result from implementing section 730." According to CBO, it "cannot predict whether (or to what extent) the new pay and retirement systems would supplant — or improve upon — those currently governing the federal entities to be transferred to the new department."¹⁶

Members of Congress commented on Section 730. Senator Joseph Lieberman, Chairman of the Senate Committee on Governmental Affairs, reportedly stated that he thinks "it's unfortunate that the administration has included in their legislation the

¹³Brian Friel, "New Agency Could Bring New Pay System," *Government Executive*, June 18, 2002. Available on the Internet at [<http://www.govexec.com>], visited June 26, 2002.

¹⁴The White House, Office of the Press Secretary, fact sheet, July 10, 2002. Available on the Internet at [<http://www.whitehouse.gov/news/releases/2002/07/print/20020710-1.html>], visited July 17, 2002.

¹⁵Stephen Barr, "Separate Personnel System Envisioned for Homeland Security," *Washington Post*, June 19, 2002, p. B2.

¹⁶U.S. Congressional Budget Office, Cost Estimate, *H.R. 5005, Homeland Security Act of 2002*, as introduced on June 24, 2002, July 9, 2002, p. 5.

power to install a new civil service system that could represent a major departure from current law.”¹⁷ During a meeting with reporters on June 20, 2002, Senate Majority Leader, Tom Daschle commented: “I think it is safe to say that there is unanimous opposition to the administration’s proposal to circumvent the Civil Service laws of the country, as they are contemplating. We can’t do that.”¹⁸ Senator Fred Thompson, the ranking member of the Senate Committee on Governmental Affairs, however, “asserted that additional flexibility was essential to developing the department.”¹⁹ Senator Daniel Akaka, Chairman of the Senate Subcommittee on International Security, Proliferation, and Federal Services, noted at the June 20, 2002 Senate Governmental Affairs Committee hearing on the Administration’s proposal that “the Comptroller General convincingly argues that agencies already have 90 percent of the tools needed to manage more effectively,” and “[r]ather than doing away with what has worked, we should ask why agencies are not using the flexibilities they have now.”²⁰

Several Members of the House of Representatives also have voiced concerns about the HRM provision. For example, Representative Constance Morella, in her statement at the House Committee on Government Reform hearing on June 20, 2002, said that she didn’t “know or understand . . . why the administration’s plan seeks to grant the new secretary so much unprecedented managerial flexibility, which would include the power to remove existing federal personnel rules and regulations, including the current pay structure, labor management rules and performance appraisal system.” She added that: “Sweeping aside 25 years of civil service law will not enhance the performance of the new agency. It will only exacerbate it.”²¹ Representative Tom Davis, speaking at the same hearing, emphasized the need for balance:

The federal employees who currently enjoy the protective status of the civil service shouldn’t lose that status in a mix-up where they could lose their job.... For new hires, ... I think a different issue arises, but this is clearly an issue that’s been expressed by the other side, and I think from a political perspective has to

¹⁷Charlie Mitchell, “Senators Question Bush Effort to Loosen Civil Service Rules,” June 20, 2002. Available on the Internet at [<http://www.govexec.com>], visited June 26, 2002.

¹⁸The Federal Document Clearing House transcript of Senator Daschle’s meeting with reporters, June 20, 2002.

¹⁹Mitchell, “Senators Question Bush Effort to Loosen Civil Service Rules,” June 24, 2002.

²⁰Statement of Senator Daniel Akaka. Provided to CRS by facsimile by the Subcommittee on International Security, Proliferation, and Federal Services. See also U.S. Office of Personnel Management, Office of Merit Systems Effectiveness, Center for HR Innovation, *Human Resources Flexibilities and Authorities in the Federal Government* (Washington: OPM, July 25, 2001). Available on the Internet at [<http://www.opm.gov/demos/index.htm>], visited June 26, 2002. (Hereafter referred to as OPM Report on Human Resources Flexibilities and Authorities in the Federal Government.)

²¹Statement of Representative Constance Morella. Excerpted from the hearing transcript posted on the Web site of *The New York Times* at [<http://www.nytimes.com>].

be addressed if this issue is going to clear the Congress.... I don't think we can hamstring your flexibility to govern, so we have to find that right balance.²²

Expressing another view, a member of the new House Select Committee on Homeland Security, Representative Rob Portman, reportedly said, "It is critical that the new secretary have the flexibility he needs to be able to respond to the threat" because "[t]he task is too important."²³

H.R. 5005, *as reported and as passed by the House*, includes a provision at Section 761 that would establish a human resources management system for the Department of Homeland Security.²⁴ Title 5 *United States Code* would be amended by adding a new Chapter 97 to Part III, Subpart I. The new §9701(a) would provide that notwithstanding any other provision of the title, the Secretary of Homeland Security could, in regulations prescribed jointly with the OPM Director, establish, and from time to time adjust, a human resources management (HRM) system for some or all of the organizational units of the Department of Homeland Security.

Requirements for the HRM System. The HRM system would be flexible and contemporary. It could not waive, modify, or otherwise affect:

- ! the public employment principles of merit and fitness at 5 U.S.C. 2301, including the principles of hiring based on merit, fair treatment without regard to political affiliation or other non-merit considerations, equal pay for equal work, and protection of employees against reprisal for whistleblowing;
- ! any provision of 5 U.S.C. 2302 relating to prohibited personnel practices;
- ! any provision of law referred to in 5 U.S.C. 2302(b)(1); or any provision of law implementing any provision of law referred to in 5 U.S.C. 2302(b)(1) by providing for equal employment opportunity through affirmative action; or providing any right or remedy available to any employee or applicant for employment in the civil service [*H.R. 5710, as passed by the House, changes this provision to refer to 5 U.S.C. 2302(b)(1)(8)(9)*];
- ! Subparts A (General Provisions), B (Employment and Retention), E (Attendance and Leave), G (Insurance and Annuities), and H (Access to Criminal History Record Information) of Part III of Title 5 *United States Code*; and Chapters 41 (Training), 45 (Incentive Awards), 47 (Personnel Research Programs and Demonstration Projects), 55 (Pay Administration), 57 (Travel, Transportation, and Subsistence), 59 (Allowances), 72

²²Statement of Representative Tom Davis. Excerpted from the hearing transcript posted on the Web site of *The New York Times* at [<http://www.nytimes.com>].

²³Dave Boyer, "Democrats Call Terror Bill 'Ruse' to Fire Civil Workers," *Washington Times*, June 20, 2002. Available on the Internet at [<http://www.washingtontimes.com>], visited June 26, 2002.

²⁴For a legal analysis, see CRS Report RL31548, *Homeland Security Department Proposals: Scope of Personnel Flexibilities*, by Thomas J. Nicola. (Hereafter referred to as CRS Report RL31548.)

(Antidiscrimination, Right to Petition Congress), 73 (Suitability, Security, and Conduct), and 79 (Services to Employees) of Title 5.

- ! any rule or regulation prescribed under any provision of law referred to in any of the statements in bullets immediately above.

The use of a category rating system for evaluating applicants for positions in the competitive service would be permitted under the new system.

Limitations Relating to Pay. Nothing in §9701 would constitute authority to:

- ! modify the pay of any employee who serves in an Executive Schedule position or a position for which the rate of basic pay is fixed in statute by reference to the Executive Schedule;
- ! fix pay for any employee or position at an annual rate greater than the maximum amount of cash compensation allowable under 5 U.S.C. 5307 in a year; or
- ! exempt any employee from the application of 5 U.S.C. 5307.

Provisions Relating to Appellate Procedures. It is the sense of the Congress that employees of the Department of Homeland Security are entitled to fair treatment in any appeals that they bring in decisions relating to their employment. In prescribing regulations for any such appeals procedures, the Secretary of Homeland Security and the OPM Director would ensure that employees of the department are afforded the protections of due process and, toward that end, would be required to consult with the Merit Systems Protection Board before issuing any such regulations.

Any regulations which relate to any matters within the purview of chapter 77 (on appeals) would be issued only after consultation with the Merit Systems Protection Board and would ensure the availability of procedures which would be consistent with requirements of due process and provide, to the maximum extent practicable, for the expeditious handling of any matters involving the Department of Homeland Security. *H.R. 5710, as passed by the House, adds language providing that any regulations would modify procedures under chapter 77 only insofar as such modifications are designed to further the fair, efficient, and expeditious resolution of matters involving the employees of the Department of Homeland Security.*

Sunset Provision. Effective five years after the enactment date of Section 761, all authority to issue regulations under the section (including regulations that would modify, supersede, or terminate any regulations previously issued under the section) would cease to be available. *H.R. 5710, as passed by the House, changes this provision to read that it would become effective five years after the conclusion of the transition period defined under Section 1501 of the bill. This transition period is the 12-month period beginning on the act's effective date.*

Effect on Personnel. Except as otherwise provided in the Homeland Security Act of 2002, the transfer, pursuant to this act, of full-time personnel (except special government employees) and part-time personnel holding permanent positions would not cause any such employee to be separated or reduced in grade or compensation for one year after the date of transfer to the Department of Homeland Security. Any person who, on the day preceding their date of transfer to the new department, held a position compensated on the Executive Schedule, and who, without a break in service, is appointed in the Department of Homeland Security to a position having duties comparable to the duties performed immediately preceding such appointment would continue to be compensated in the new position at not less than the rate provided for the previous position, for the duration of the person's service in the new position.

H.R. 5005, as passed, also includes several provisions related to labor management relations and collective bargaining.²⁵

A summary that accompanied H.R. 5005, as reported, explained Section 761 as follows.

The Secretary will have the flexibility to develop a strategic performance management program that effectively links employee performance and accountability to the goals, objectives and mission of the Department.... The Secretary will have the flexibility to use a broader approach to job classification that more effectively recognizes the strategic value of each employee.... The Department will have the flexibility it needs to attract skilled and dedicated workers with a modern pay system not necessarily restricted to the rigid 15 "GS" [General Schedule] pay grades.... The Secretary of Homeland Security must have the flexibility to establish a labor-management system that respects the right of workers to organize and engage in collective bargaining without threatening the important mission of the Department.... The Secretary must have the flexibility to establish a system that allows employees to challenge and appeal agency personnel actions without threatening the mission of the Department.²⁶

The report of the House Select Committee on Homeland Security (H.Rept. 107-609, Part 1) states: "The following chapters of title 5 are eligible for adjustment during the Department's process of developing a human resource system...: chapter 43, Performance Appraisal; chapter 51, Classification; chapter 53, Pay Rates and Systems; chapter 71, Labor Management Relations (except as to employee rights to organize, collectively bargain and participate in union organizations as set out [in the bill]); chapter 75, Adverse Actions; and chapter 77, Appeals."²⁷

²⁵For discussion of these issues, see CRS Report RL31520, *Collective Bargaining and Homeland Security*, by Jon O. Shimabukuro; and CRS Report RS21268, *Homeland Security: Data on Employees and Unions Potentially Affected*, by Gail McCallion.

²⁶U.S. House of Representatives, Select Committee on Homeland Security, *Transforming Government for the 21st Century*. Available on the Internet at [<http://hsc.house.gov/legislation/final.asp>], visited July 25, 2002.

²⁷U.S. Congress, House Select Committee on Homeland Security, *Homeland Security Act of 2002*, report to accompany H.R. 5005, 107th Cong., 2nd sess. H.Rept. 107-609, Part 1 (continued...)

Discussions of the Senate amendments in this report, which follow, relate only to the human resources management system for the new department. For discussions of labor management relations or collective bargaining provisions in the Senate amendments, see CRS Report RL31520, *Collective Bargaining and Homeland Security*.

Lieberman Amendment, as a Substitute to S. 2452

S. 2452, as reported by the Senate Committee on Governmental Affairs on June 24, 2002, did not include the provision on a human resources management system that is in H.R. 5005.

During business meetings of the Senate Committee on Governmental Affairs on July 24 and 25, 2002, the committee agreed to a Lieberman amendment in the nature of a substitute to S. 2452.²⁸ It includes several provisions on employment and personnel at Section 187(f) as follows.

Terms and Conditions of Employment. The transfer of an employee to the Department of Homeland Security would not alter the terms and conditions of employment, including compensation, of any employee so transferred.

Conditions and Criteria for Appointment. Any qualifications, conditions, or criteria required by law for appointments to a position in an agency, or subdivision thereof, transferred to the Department of Homeland Security under Title I of the legislation, including a requirement that an appointment be made by the President, by and with the advice and consent of the Senate, would continue to apply with respect to any appointment to the position made after such transfer to the Department has occurred.

The Lieberman amendment also includes several provisions related to labor management relations and collective bargaining.²⁹

During the business meeting on the Lieberman amendment on July 24, 2002, the Senate Committee on Governmental Affairs agreed by voice vote to an amendment

²⁷(...continued)
(Washington: GPO, 2002), p. 122.

²⁸The Lieberman amendment, as a substitute to S. 2452, also included provisions for immigration personnel which were deleted during mark up. Section 1201 would have provided immigration personnel with personnel flexibilities; pay authority for critical positions; streamlined critical pay authority; and recruitment, retention, relocation incentives, and relocation expenses. Section 1204 would have provided that the INS, and upon the effective date of title XI of the Immigration Reform, Accountability, and Security Enhancement Act of 2002, the Directorate of Immigration Affairs, would have used the fair and equitable treatment of aliens by employees as one of the standards for evaluating employee performance.

²⁹For discussion of these issues, see CRS Report RL31520, *Collective Bargaining and Homeland Security*, by Jon O. Shimabukuro; and CRS Report RS21268, *Homeland Security: Data on Employees and Unions Potentially Affected*, by Gail McCallion.

offered by Senator George Voinovich, which adds the following provisions on **federal workforce improvements** to the legislation.³⁰

Agency Chief Human Capital Officers. Title XXI would amend Part II of Title 5 *United States Code* by adding a new Chapter 14 — Agency Chief Human Capital Officers. The new Section 1401 would provide that the agency head would appoint or designate a CHCO who would advise and assist the agency head and other agency officials in carrying out the agency’s responsibilities for selecting, developing, and managing a high-quality, productive workforce in accordance with merit system principles; implement the rules and regulations of the President and the Office of Personnel Management (OPM) and the laws governing the civil service within the agency; and carry out such functions as his or her primary duty.

The agencies covered by the CHCO provision would be the Departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, the Interior, Justice, Labor, State, Transportation, the Treasury, Veterans Affairs, the Environmental Protection Agency, and the National Aeronautics and Space Administration. Other agencies covered would be the Agency for International Development, the Federal Emergency Management Agency, the General Services Administration, the National Science Foundation, the Nuclear Regulatory Commission, the Office of Personnel Management, the Small Business Administration, and the Social Security Administration.³¹

Under the new Section 1402, CHCOs would have six functions, including (1) setting the workforce development strategy of the agency; (2) assessing workforce characteristics and future needs based on the agency’s mission and strategic plan; (3) aligning the agency’s human resources policies and programs with organization mission, strategic goals, and performance outcomes; (4) developing and advocating a culture of continuous learning to attract and retain employees with superior abilities; (5) identifying best practices and benchmarking studies; and (6) applying methods for measuring intellectual capital and identifying links of that capital to organizational performance and growth. CHCOs would have access to all records, reports, audits, reviews, documents, papers, recommendations, or other materials that are the property of the agency or are available to the agency; and relate to programs and operations with respect to which the CHCO has responsibilities. The CHCO could request such information or assistance as may be necessary for carrying out the duties and responsibilities provided by Chapter 14 from any federal, state, or local governmental entity.

A new Section 2103 would establish a CHCO Council consisting of the OPM director who would be chairperson; the OMB deputy director of management who

³⁰Several of the amendment’s provisions had been introduced by Senator Voinovich in S. 2651. See also CRS Report RL31516, *Civil Service Reform Proposals: A Side-by-Side Comparison of S. 2651 and H.R. 4580 With Current Law*, by Barbara L. Schwemle, L. Elaine Halchin, Richard A. Best, Jr., and Patrick J. Purcell; and CRS Report RL 31518, *Federal Workforce Improvement Act of 2002: S. 2651*, by Barbara L. Schwemle, L. Elaine Halchin, Richard A. Best, Jr., and Patrick J. Purcell.

³¹S. 2452 specifies that agency refers to those listed under 31 U.S.C. 901(b)(1)(2).

would be vice chairperson; and CHCOs of executive departments and any other members designated by the OPM director. The council would meet periodically to advise and coordinate the activities of the member agencies on such matters as modernization of human resources systems, improved quality of human resources information, and legislation affecting human resources operations and organizations. The CHCO Council would ensure that representatives of federal employee labor organizations are present at a minimum of one meeting of the council each year. The representatives would not be members of the council. Each year the CHCO Council would submit a report to Congress on its activities.

The new Section 2104 would amend 5 U.S.C. 1103 by adding a subsection (c) which would provide that OPM would design a set of systems, including appropriate metrics, for assessing the management of human capital by federal agencies. The systems would be defined in OPM regulations and include standards for (A) aligning agency human capital strategies with their missions, goals, and organizational objectives and integrating those strategies into agency budget and strategic plans; (B) closing skill gaps in mission critical occupations; (C) ensuring continuity of effective leadership through implementation of recruitment, development, and succession plans; (D) sustaining a culture that cultivates and develops a high performing workforce; (E) developing and implementing a knowledge management strategy supported by appropriate investment in training and technology; and (F) holding managers and human resources officers accountable for efficient and effective human resources management in support of agency missions in accordance with merit system principles.

The above provisions would become effective 180 days after the enactment of Division C of the legislation.

Title XXII would provide for reforms relating to federal human capital management.

Inclusion of Agency Human Capital Strategic Planning in Performance Plans and Program Performance Reports. The new Section 2201 would amend 31 U.S.C. 1115(a)(3) to read: “provide a description of how the performance goals and objectives are to be achieved, including the operational processes, training, skills and technology, and the human, capital, information, and other resources and strategies required to meet those performance goals and objectives.” With respect to each agency with a Chief Human Capital Officer (CHCO), the CHCO would prepare that portion of the annual performance plan described under 31 U.S.C. 1115(a)(3).³² The section also would amend 31 U.S.C. 1116(d) by adding a new paragraph (5) (old (5) redesignated) to require agencies to include a review of the performance goals and evaluation of the performance plan relative to the agency’s strategic human capital management in program performance reports.

³²S. 2452 would redesignate 31 U.S.C. 1115(f) and insert this provision as a new subsection (f).

Reform of the Competitive Service Hiring Process. The new Section 2202 would amend 5 U.S.C. 3304(a) by adding a new paragraph (3) providing authority for agencies to appoint, without regard to 5 U.S.C. 3309 through 3318, candidates directly to positions for which public notice has been given and OPM has determined that there exists a severe shortage of candidates or there is a critical hiring need. OPM regulations would prescribe criteria for identifying such positions and may delegate authority to make determinations under such criteria.

Alternative Ranking and Selection Procedures. Section 2202 also would add a new Section 3319 to Title 5 *United States Code*. Section 3319(a) would provide that OPM or an agency which has been delegated examining authority may establish category rating systems for evaluating applicants for positions in the competitive service. Applicants would be evaluated under two or more quality categories based on merit, consistent with OPM regulations, rather than be assigned individual numerical ratings. Under Section 3319(b), within each quality category, applicants who are eligible for veterans' preference would be listed ahead of applicants who are not eligible for preference. Except for applicants for scientific and professional positions at GS-9 (equivalent or higher), each applicant who is a disabled veteran with a compensable service-connected disability of 10% or more would be listed in the highest quality category.

Section 3319(c)(1) would provide that an appointing official could select any applicant in the highest quality category, or, if fewer than three candidates have been assigned to the highest quality category, in a merged category consisting of the highest and the second highest quality categories. An appointing official could not pass over a preference eligible in the same category from which selection is made, unless the requirements of 5 U.S.C. 3317(b) or 3318(b), as applicable, are satisfied under Section 3319(c)(2).

Section 3319(d) would provide that each agency that establishes a category rating system would submit in each of the three years following that establishment, a report to Congress on the system that would include information on the number of employees hired under the system; the system's impact on the hiring of veterans and minorities, including those who are American Indian or Alaska Natives, Asian, Black or African American, and native Hawaiian or other Pacific Islander; and the way in which managers were trained in the administration of the system. OPM could prescribe regulations to carry out the provisions under Section 3319(e).

Student Volunteer Transit Subsidy. Section 2204(a) would amend 5 U.S.C. 7905(a)(1) to provide that a student who provides voluntary services would be eligible for a transit subsidy.

Title XXIV would amend current law provisions on academic training.

Academic Training. Section 2401 would amend 5 U.S.C. 4107. Section 4107(a) renames the section as "Academic degree training" and provides that an agency could select and assign an employee to academic degree training and could pay or reimburse the costs of the training from appropriated or other available funds. The training would have to contribute significantly to meeting an identified agency training need, to resolving an identified agency staffing problem, or to accomplishing

goals in the agency's strategic plan; be part of a planned, systematic, and coordinated agency employee development program linked to accomplishing the agency's strategic goals; and be accredited and provided by a college or university that is accredited by a nationally recognized body.

Under Section 4107(b), in exercising the authority, an agency would, consistent with the merit system principles at 5 U.S.C. 2301(b)(2) and (7), consider the need to maintain a balanced workforce in which women, members of racial and ethnic minority groups, and persons with disabilities are appropriately represented in government service and provide employees effective education and training to improve organizational and individual performance. The agency also would assure that the training is not for the sole purpose of providing an employee with an opportunity to obtain an academic degree or to qualify for appointment to a particular position for which the degree is a basic requirement; and assure that no authority is exercised on behalf of any employee occupying or seeking to qualify for a noncareer appointment in the Senior Executive Service; or appointment to any position that is excepted from the competitive service because of its confidential policy-determining, policy-making, or policy-advocating character. The agency would, to the greatest extent practicable, facilitate the use of online degree training.

Compensatory Time Off for Travel. Section 2403 would amend 5 U.S.C. Subchapter V, Chapter 55 by adding a new section 5550b providing that an employee would receive one hour of compensatory time off for each hour spent by the employee in travel status away from his or her official duty station, to the extent that the time spent in travel status is not otherwise compensable. OPM would prescribe regulations not later than 30 days after this section's enactment. *H.R. 5710, as passed by the House, does not include this provision.*

Senate Debate on the Motion to Proceed

On September 3, 2002, the Senate debated the motion to proceed to debate on the homeland security bill. Several Senators specifically addressed the issue of a new human resources management system for the Department of Homeland Security. Among the views expressed were the following.

Senator Joseph Lieberman: The dispute that is going on now and the question of civil service rights is not relevant. I hate to see it stand as an obstacle in the path to adopting legislation creating a Department of Homeland Security which ... will give the President at least 90 percent of what he wants in this new Department. In fact, far from limiting the authority of the new Secretary of Homeland Security with regard to the management flexibility that that Secretary has, our legislation protects the existing flexibility in law. The new Secretary would be able to remove employees for poor performance, transfer employees as needed, reward and give bonuses to those who perform ably. In fact, we add by this legislation to the existing management flexibility that the new Secretary would have.... So far from limiting the management flexibility of the new Secretary, we are increasing it beyond what any other Secretary has today, and we give the administration an open invitation, specifically in the letter in regard

to the legislation we are proposing, by requiring the Secretary to come back every 6 months and to offer legislative recommendations.³³

Senator Fred Thompson: It is important ... that we give the new Department the management tools it needs.... We can't expect to keep doing things the same old way and get different results. We don't want those inefficiencies, those overlaps, duplications, and waste, lost items, and things such as that, to follow us into the Department of Homeland Security.... The answer is to give the new Department sufficient management flexibility in order to address these issues.³⁴

Senator Robert Byrd: Before I vote to approve a homeland security measure, I want to know about the pay system. How will the payroll systems and personnel systems be merged into the new Department? How would the special pay rates, already in existence at the separate agencies, coordinate or be replaced by a pay system if one were to be implemented? What will be the hiring procedures? What will be the firing procedures in this vast new order?... A report by the nonpartisan Partnership for Public Service³⁵ recently stated: [W]hat is missing from the current debate ... is the institutional experience government has accumulated with Title 5 modifications that have already successfully allowed government agencies to emulate high-performing workplaces — without compromising merit principles, including protections against politicized personnel decisions.³⁶

On a 94-0 vote (No. 209), the Senate agreed to begin debate on the bill on September 4, 2002. On that day, Senator Lieberman offered the amendment agreed to by the Senate Committee on Governmental Affairs as S.Amdt. 4471 and as substitute for H.R. 5005.

Gramm-Miller Amendment to the Lieberman Substitute

Senator Phil Gramm, for himself and Senator Zell Miller, offered an amendment (S.Amdt. 4738) to the Lieberman amendment (S.Amdt. 4471) on September 25, 2002. This amendment, at Subtitle D — General Provision, Section 730, Establishment of Human Resources Management System, would insert the language from Subtitle G, Section 761, of H.R. 5005, as passed by the House of Representatives (discussed above), with two modifications as follows. Under the section on provisions relating to appellate procedures, the Gramm-Miller amendment would add an additional requirement providing that any regulations relating to any matters within the purview of Chapter 77 (on appeals) would modify procedures under Chapter 77 only insofar as such modifications are designed to further the fair, efficient, and expeditious resolution of matters involving the employees of the department. Under the sunset provision, the Gramm-Miller amendment would provide that the provision would take effect five years after the conclusion of the

³³*Congressional Record*, daily edition, vol. 148, Sept. 3, 2002, p. S8070.

³⁴*Congressional Record*, daily edition, vol. 148, Sept. 3, 2002, p. S8041.

³⁵Partnership for Public Service, *Homeland Security: Winning the War for Talent to Win the War on Terror* (Washington: The Partnership), July 31, 2002, pp. 24-25.

³⁶*Congressional Record*, daily edition, vol. 148, Sept. 3, 2002, pp. S8067-S8068.

transition period, defined under Section 801 of the act as the 12-month period beginning on the act's effective date.

The Gramm-Miller amendment also incorporates, at Division C, the same provisions on federal workforce improvements that are in the Lieberman amendment (discussed above).

Breaux-Chafee-Nelson Amendment to the Gramm-Miller Amendment

On September 25, 2002, Senator Benjamin Nelson, for himself and Senators John Breaux and Lincoln Chafee, offered an amendment (S.Amdt. 4740) to the amendment offered by Senators Gramm and Miller (S.Amdt. 4738). This amendment, at Section 730, Establishment of Human Resources Management System, would insert the language from Subtitle G, Section 761, of H.R. 5005, as passed by the House of Representatives (discussed above), with the same two modifications that are in the Gramm-Miller amendment. The Breaux-Chafee-Nelson amendment also would further modify H.R. 5005, as passed by the House, to provide that Chapters 71 (on labor-management relations) and 77 (on appeals) of Title 5 United States Code could not be waived, modified, or otherwise affected by a human resources management system for the new department.

The Breaux-Chafee-Nelson amendment does not include the provisions on federal workforce improvements that are in the Lieberman amendment.

Human Resources Management at Selected Agencies Proposed for Transfer

Human resources management (HRM) offices are currently providing a full range of services at six of the eight large agencies proposed to be transferred to a homeland security department. The Transportation Administration Service Center (TASC) of the Department of Transportation provides human resource services to the TSA on a fee-for-service basis. FPS has a personnel representative in the central office in Washington, DC, and in each of its 11 regional offices. Human Resources Management offices and the number of their employees include:

- ! APHIS — 180 employees located in Washington, DC; Riverdale, MD; and Minneapolis, MN;
- ! FEMA — 93 employees;
- ! TSA — 15 employees, but anticipate having 45 to 50 employees;
- ! Coast Guard — 400 employees at headquarters and 2,600 to 2,700 employees working in the field at seven training centers, a pay center, and the personnel and recruiting commands;
- ! Customs Service — 268 full-time permanent employees;

- ! INS — approximately 552 full-time permanent and temporary employees in Washington, DC; and approximately 200 employees located in Burlington, VT; Dallas, TX; and Laguna Niguel, CA; and
- ! Secret Service — 407 employees (the office is allocated 471 positions).

All the HRM offices, except TSA, reported that they provide various personnel services that would generally include staffing, position classification, payroll preparation, employee relations, labor relations, processing of personnel actions, benefits (retirement, health insurance, life insurance) counseling, and development of policies on various personnel issues.³⁷

Issues for Consideration

Authorizing a new human resources management system for the new department would raise several issues, including questions about equity among the various departments and agencies in the executive branch. Discussions about a new system may include staffing requirements, hiring, and pay among the issues considered.³⁸

With regard to *staffing* requirements, the Administration has stated that an increased number of employees is not anticipated. According to Press Secretary Ari Fleischer, the proposal is: “not a massive addition to the bureaucracy [I]f you take 100 workers from Department X and put those 100 workers in Department Y, you still have 100 workers. They’ve been reorganized. But it is not an addition to the government, because you’re working with the same, essentially, group of people.”³⁹ Others, however, hold a different view. For example, the National Treasury Employees Union has asserted that the Customs Service “by its own account needed an additional 14,000 employees to successfully accomplish its mission before September 11” and “is now stretched beyond the limit.”⁴⁰ In his statement at the Senate Committee on Governmental Affairs hearing, Senator George Voinovich noted, “The Partnership for Public Service says that one-third of all of the employees

³⁷Information provided to CRS by human resources management offices by telephone, June 12-13 and 17-19, 2002.

³⁸For discussion of Title 5 *United States Code* provisions on government management, see CRS Report RL30795, *General Management Laws: A Selective Compendium — 107th Congress*, Ronald C. Moe, project coordinator. See especially Chapter IV.

³⁹“Press Secretary’s Morning Conversation with Reporters,” June 6, 2002. Available on the Internet at [<http://www.whitehouse.gov/news/releases/2002/06/print/20020606-1.html>], visited June 26, 2002.

⁴⁰National Treasury Employees Union, “Proposed Homeland Security Cabinet-Level Agency No Substitute for Adequate Funding, Union Leader Questions Timing of President’s Announcement,” June 6, 2002. Available on the Internet at [<http://www.nteu.org>], choose “Press Releases,” visited June 26, 2002.

from five of the major agencies being folded into the new department are going to have their people eligible for retirement ... in five years.”⁴¹

As stated above, under H.R. 5005, the Secret Service, Coast Guard, Customs, INS, APHIS, TSA, FPS, and FEMA would be transferred to a new department. Governor Ridge, in his testimony before the Senate Committee on Governmental Affairs and the House Committee on Government Reform on June 20, 2002, stated: “In order to respond to rapidly changing conditions, the Secretary [of homeland security] would need to have great latitude in re-deploying resources, both human and financial. The Secretary should have broad reorganizational authority in order to enhance operational effectiveness, as needed.”⁴² A consolidated human resources management office to serve some of the agencies transferred to a new department would, perhaps, be an example of such a redeployment. If so, there would be the potential that not all current HRM employees would be needed to perform personnel services. Details about possible retraining or reassignments of personnel have not been provided.

As for a *hiring* system for a new department, the use of the term “personnel flexibilities” as it relates to hiring sometimes means direct hiring authority⁴³ or exceptions (such as category ranking) to the Rule of Three,⁴⁴ for selection of candidates. These could help speed the selection and hiring of new staff. Concerns about these flexibilities may center on preserving two civil service standards — merit-based hiring free of political influence or favoritism, and preference in hiring for veterans. The American Federation of Government Employees (AFGE), in commenting on the proposal, stated, “This bill has the potential to allow the new Department to engage in personnel actions that are today illegal, such as picking out individual employees for transfer or removal from their jobs”; and “[i]n opening the door to hiring and firing on the basis of politics and favoritism, ... would impose a modern day spoils system.”⁴⁵ The Transportation Security Agency (TSA), one of the agencies proposed for transfer to the new department, is in the excepted service and, therefore, not covered by the Title 5 *United States Code* provisions, except for those on veterans preference.⁴⁶ TSA is using a contractor to recruit and hire its airport screener employees. This raises the question of whether, and how, such contractors might be used in the future, as well as the relative costs and benefits of doing so.

⁴¹The Federal Document Clearing House transcript of the Senate Committee on Governmental Affairs hearing, June 20, 2002.

⁴²Written statement of Governor Tom Ridge, June 20, 2002. Available on the Internet at [http://www.senate.gov/~gov_affairs/hearings.htm], visited June 26, 2002.

⁴³Direct hiring authority would allow agencies to appoint candidates directly to positions.

⁴⁴This term refers to providing the appointing authority with a certificate that includes the names of three eligibles and requiring appointment from those three names.

⁴⁵“AFGE Responds to President’s Homeland Security Bill,” June 18, 2002. Available on the Internet at [<http://www.afge.org>], choose “News Releases,” visited June 26, 2002.

⁴⁶P.L. 107-71, Nov. 19, 2001, 115 Stat. 601.

As it relates to *pay*, the term “personnel flexibilities” sometimes means the establishment of pay bands as the compensation system. Under such a system, General Schedule pay grades are consolidated into broader pay bands.⁴⁷ Currently, the General Schedule, which provides for 15 pay grades and 10 steps within each grade, is the compensation system for employees in most of the agencies proposed for transfer. The TSA, however, is using the pay banding system to compensate transportation security screeners, criminal investigators, and civil aviation security specialists (which include federal air marshals).⁴⁸ The existence of two distinct pay systems in one department could raise questions of pay parity between employees who are performing similar jobs. There are anecdotal reports from the Customs Service and the Secret Service, among others, that the TSA is hiring away their law enforcement officers by offering higher salaries. Further, *The Washington Post* reported that “[a]s of early June, the TSA had hired 39 general attorneys at an average salary of \$111,000, compared with an average of about \$80,000 at the Department of Transportation, of which the TSA is part.”⁴⁹ Differences in other types of compensation systems could also raise questions of parity in a new department. The U.S. Customs Service’s inspectors and the INS’s border patrol officers would be incorporated into the new department, but Customs employees, for example, have their own unique and more remunerative system of overtime and premium pay.⁵⁰

On July 31, 2002, the Partnership for Public Service issued a preliminary report which recommended that the Department of Homeland Security adopt pay banding and critical pay authorities, category ranking systems for hiring, and voluntary separation incentive payments.⁵¹

If Congress decides to keep the new department under the existing system, there would remain a number of issues to be addressed. This option would likely satisfy those who have major concerns about the maintenance of the civil service system and protection of the employees to be transferred. Critics might argue that critical aspects of the current system have become ossified and mandating its use would be detrimental to efforts to establish an effective department.

If Congress wanted to address the Administration’s request for personnel flexibility without creating a new system, it might:

⁴⁷Pay bands provide greater discretion to federal managers in setting salary levels for employees.

⁴⁸The federal air marshals currently are under the Federal Aviation Administration, but eventually will be part of TSA.

⁴⁹Dan Morgan and Greg Schneider, “Lawmakers Fear Costly Price Tag to Create Homeland Dept.,” *Washington Post*, June 20, 2002, p. A 21.

⁵⁰19 U.S.C. 267.

⁵¹Partnership for Public Service, *Homeland Security: Winning the War for Talent to Win the War on Terror* (Washington: The Partnership), July 31, 2002, pp. 24-25.

- ! direct the new department to use fully the existing personnel flexibilities⁵² (such as recruitment and relocation bonuses, retention allowances, superior qualifications and special qualifications appointments, and performance-based cash awards) available to executive branch agencies under Title 5 of the *United States Code* for a specific period of time, and document the use and effect of these flexibilities;
- ! earmark a specified amount of funds to be used exclusively for these personnel flexibilities at the new department; and
- ! agree to consider additional personnel flexibilities or new authority for the department at some time in the future. It could mandate that, in requesting additional flexibilities or new authority, the department would have to state specifically what flexibilities were needed, why they were needed, and plans for their use.

Other issues likely to be considered during discussions about any HRM system would include to whom the head/heads of the HRM function would report in a new department⁵³ and what kind of automated human resources and payroll systems the various agencies currently have and how they might be merged if a consolidation of HRM services were to occur. Among other considerations are that APHIS and INS currently have staff in field offices performing personnel services; what role would they have in a new department? Also, APHIS provides personnel support to the Agricultural Marketing Service and the Grain Inspection, Packers and Stockyards Administration of the Department of Agriculture and the Merit Systems Protection Board; would these responsibilities continue in a new department?

Congress also could establish or direct the Administration to establish a committee including top HRM staff (two or three staff from each agency) from the agencies transferred to the new department. The committee would examine any differences between various agency systems, such as those for overtime pay and automated human resources and payroll systems, and consider whether they should be made uniform. (For example, if the Customs Service and the Immigration and Naturalization Service, agencies with different overtime pay systems, were placed in the new department, the committee could examine whether these different systems should be continued.) The committee could be directed to report its findings and recommendations to Congress at a time certain after enactment of homeland security legislation.

⁵²OPM Report on Human Resources Flexibilities and Authorities in the Federal Government.

⁵³Since enactment of the Government Performance and Results Act, P.L. 103-62, on August 3, 1993, Congress and the Administration have been encouraging agencies to elevate the role of human resources management in strategic planning.

Next Steps

President George W. Bush, in his address to the nation and in transmitting his proposal to the Hill, requested that Congress act on his proposal before the end of the 107th Congress.

The House of Representatives passed H.R. 5005, on July 26, 2002, and the bill would include authority for a new human resources management (HRM) system at the homeland security department. In the Senate, during business meetings of the Senate Committee on Governmental Affairs on July 24 and 25, 2002, the committee agreed to a Lieberman amendment in the nature of a substitute to S. 2452. It does not include the provisions on a new HRM system. On September 3, 2002, the Senate debated the motion to proceed to debate on the homeland security bill and on a 94-0 vote agreed to begin debate on September 4, 2002. On that day, Senator Lieberman offered the amendment agreed to by the committee as S.Amdt. 4471 and as substitute for H.R. 5005. Debate on the legislation continues in the Senate.

On July 26, 2002, President Bush reportedly “vowed not to sign any legislation that doesn’t include the management flexibility that the Senate version would deny him.”⁵⁴ In an August 1, 2002 letter to Senator Tom Daschle, the Majority Leader, Homeland Security Director Tom Ridge stated that he had reviewed the Lieberman substitute amendment and that “[i]f the legislation were to come to the President in its current form, I would recommend a veto to the President.”⁵⁵ Senator Lieberman, chairman of the Senate Committee on Governmental Affairs, has consistently responded that his substitute amendment agreed to by the committee would provide the President with all the flexibility that he needs. An editorial opinion in *The Washington Post* written by Senator Lieberman observed that:

Under our legislation, the president and the secretary of homeland security would, in fact, have more flexibility to run an efficient, effective and performance-driven department than the law now provides. Our legislation includes bipartisan reforms to the civil service that give the secretary new management tools to attract, retain and reward excellence. With the powers in existing law and new ones added in our bill, the administration would be able to promptly hire new talent, swiftly move employees around, discipline and fire poor performers and even remove employees from collective bargaining units when national security is at stake.... If granted, the president’s pleas for additional “flexibility” would give his administration unprecedented power to undercut the civil service system, rewrite laws by fiat and spend taxpayers’ money without congressional checks and balances.⁵⁶

⁵⁴Bill Miller and Juliet Eilperin, “House Approves Homeland Security Bill; Bush Gets Flexibility to Shape, Manage New Department,” *The Washington Post*, July 27, 2002, p. A6.

⁵⁵Letter from the Honorable Tom Ridge, Homeland Security Advisor to the President, to the Honorable Thomas Daschle, Majority Leader of the Senate, Aug. 1, 2002. For a detailed discussion of the letter see CRS Report RL31548.

⁵⁶Joe Lieberman, “Security Blueprint,” *The Washington Post*, Sept. 3, 2002, p. A17.

Conclusion

Section 761 of H.R. 5005 (the President's proposal) would authorize the Secretary of Homeland Security and the Director of the Office of Personnel Management to establish a flexible human resources management (HRM) system for some or all of the organizational units of a new Department of Homeland Security. The provision is currently being debated in Congress. If Section 761 (or a similar provision) is included in the legislation enacted, key issues to be considered in discussing an HRM system for the new department might include staffing requirements and hiring and pay systems. Other issues likely to be considered would include the kind of automated human resources and payroll systems the various agencies proposed for transfer to a new department currently have and how those systems might be merged if a consolidation of HRM services were to occur.

Alternatively, if Section 761 (or a similar provision) is not included in the legislation enacted, Congress could direct the department to use fully the current Title 5 *United States Code* personnel flexibility authorities available to executive branch agencies or take other actions to increase the department's flexibility in the human resources area.